

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

Case No: HC-MD-CIV-ACT-CON-2018/04966

In the matter between:

SUZANNE HOFF

PLAINTIFF

and

EGBERT OTTO EUGEN HOFF

DEFENDANT

Neutral citation: *Hoff vs Hoff* (HC-MD-CIV-ACT-CON-2018/04966) [2021] NAHCMD
555 (30 November 2021)

Coram: UEITELE J

Heard: 29 September 2021

Delivered: 30 November 2021

Flynote: *Contract — Compromise —* What constitutes — Purpose of agreement to put end to existing litigation or avoid pending litigation which might arise because of uncertainty between parties — Compromise may follow upon disputed contractual claim — May also follow upon any form of disputed right — Effect of such agreement was that it barred the bringing of proceedings on original cause of action.

Summary: On 22 June 2017 and in Windhoek, both parties acting personally, entered into a “settlement agreement” in respect to the patrimonial consequences of their

erstwhile marriage. The plaintiff claims that the defendant breached the agreement in that he expressly assured her that the necessary vaccinations were administered to the horses during 2011 to 2016 .She alleges that the defendant's representation was false and that no vaccinations were administered to the horses during 2011 to 2017.

The plaintiff as a result of the alleged breach claims damages from the defendant for the time periods during which the defendant allegedly did not vaccinate or sufficiently vaccinate the horses and for the maintenance of these horses which the plaintiff alleges have no commercial value and have no commercial benefit to her.

The defendant entered an appearance to defend the action and pursuant thereto filed a special plea as well as a plea on the merits of the action. The basis of the special plea raised by the defendant is specifically in respect to clauses 2, 5, 10, 23 and 26 of the settlement agreement and that the plaintiffs' claims are part and parcel of those claims already settled in the settlement agreement.

Held that clause 26 of the settlement agreement entered into by the parties stipulate that the parties record the terms of this settlement to be in full and final settlement of all present, past and future claims that the parties may have against each other. Which means both parties at the time were well aware of the implications of concluding and signing such an agreement of which they sought the agreement to be made an order of court.

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

Held further that it is plain, from the exposition of the law that the settlement entered into by the parties brought the original dispute or cause of action to an end. The plaintiff is accordingly not entitled, in the circumstances, to approach the court on the very cause of action that was settled and eternally put to bed by the parties.

Held further that there is an allegation by the plaintiff in the papers, that her reality of consent was influenced by misrepresentation. However, it is a matter of note that the plaintiff has not approached the court seeking an order setting the agreement aside for the reason that it is vitiated by misrepresentation as mentioned above. It is also plain, from reading the plaintiff's papers that she admits the fact agreement and its binding nature on the parties.

ORDER

1. The defendants' special plea is upheld.
2. The plaintiff must pay the defendants costs of suit, such costs to include the costs of one instructing and one instructed counsel.
3. The matter is removed from the roll and regarded as finalised.

JUDGMENT

UEITELE J:

Introduction

[1] The plaintiff (Susanne Hoff) and the defendant (Egbert Otto Eugen Hoff) were previously husband and wife. During the year 2012 the defendant instituted divorce proceedings against his former wife. I will, in this judgement, when I refer jointly to the plaintiff and defendant refer to them as the parties.

[2] In line with the trend in divorce proceedings, the plaintiff and the defendant, after a protracted and contested divorce action, elected to resolve their dispute in a non-adjudicatory manner, through the use of dispute resolution mechanisms designed to

foster the amicable settlement of disputes, such as conciliation or mediation. The path chosen by the parties led them to arrive at a negotiated settlement of the ancillary issues raised in the action for the dissolution of their marriage relationship. The parties recorded the terms of the settlement in a written document dated 22 June 2017 which was, made an order of the court. The record of the settlement terms or contract is commonly referred to as a settlement agreement.

[3] The settlement agreement between the plaintiff and the defendant dealt with proprietary claims emanating from their accrued estate as consequence of their marriage.

[4] The action in the present matter in broad terms is concerned with the settlement agreement. During December 2018 the plaintiff, alleging that the defendant breached the terms of the settlement agreement, instituted proceedings out of this Court claiming damages in a global amount of N\$ 1 054 962-40, she allegedly suffered as a result of the breach of the settlement agreement. I now proceed to briefly deal with the pleadings between the parties.

The pleadings.

[5] In her particulars of claim the plaintiff alleges that on 22 June 2017 and in Windhoek, both parties acting personally, entered into a "settlement agreement" in respect to the patrimonial consequences of their erstwhile marriage. She further pleaded that the material express, alternatively tacit, in the further alternative implied terms of the settlement agreement were as follows:

- '5.1 The plaintiff would retain as her sole and exclusive property all horses and genetic bloodlines connected and/or (*sic*) associated with the Neu-Heusis horse stud that was kept on Farm Neu-Heusis (registered with the Namibian Horse Breeders Association under No F10025) as at 20 June 2017, or wherever else the stud or portions of the stud may have been (the horses).
- 5.2. The parties agreed that the horse stud as at 20 June 2017 comprised of 27 horses as set out in clause 2.3(a) to (y) of "A".

- 5.3. The parties agreed that the risk of profit and loss in respect to the horses would pass to the plaintiff on 8 July 2017. This included all risks associated with the horses including, but not limited to, the risk of injury, sickness and/or death by natural causes.
- 5.4 The defendant would in the circumstances of clause 5 of the agreement be exempted from any liability concerning the horses.
- 5.5 The defendant confirmed and warranted that, each of the horses returned in terms of the agreement, were as identified and referred to during the inspection conducted by the plaintiff on Farm Neu-Heusis on 20 June 2017.
- 5.6 The defendant further agreed to immediately arrange for a veterinarian to administer the full range of necessary vaccinations on the horses by 29 June 2017 and to perform a follow-up vaccination within two weeks after 29 June 2017 (but prior to 8 July 2017).
- 5.7 The costs of the vaccination would be borne by the plaintiff.
- 5.8 The defendant agreed to, by not later than 29 June 2017 provide the plaintiff with all records and/or (*sic*) invoices of vaccinations and other relevant Veterinary records, if any, pertaining to and/or (*sic*) connected with the horses.
- 5.9 It was further recorded by the parties that the defendant would do his utmost to obtain proof of such records and invoices but if these were not available, the plaintiff would accept the plaintiff's (*sic*) assurance that such vaccinations were administered to the Neu-Heusis stud from 2011 to 2016.
- 5.10 The parties recorded the terms of the settlement agreement were to be in full and final settlement of all present, past and future claims that the parties may have against each other.
- 5.11 It was an implied term that the provisions of clause 26 would not relate to any claims pursuant to the agreement itself and/or (*sic*) the enforcement thereof.'

[6] The plaintiff further claimed that she complied with her obligations under the settlement agreement but the defendant breached the agreement in that, despite

having expressly assured her that the relevant and necessary vaccinations were administered to the horses during the period 2011 to 2016 this was not the case. The plaintiff continued and claimed that the representation by the defendant was false in that insufficient vaccination or no vaccination at all against Rabies or African Horse Sickness or Tetanus or all three Rabies, African Horse Sickness or Tetanus were administered to the horses, by the defendant during the period 2011 – 2017.

[7] The plaintiff further claimed that it was on the strength of the defendant's misrepresentation that she assumed the risk of injury, sickness or death by natural causes to the horses and as such exempted the defendant from any liability concerning the horses and their continuous stay on Farm Neu-Heusis and thereafter. Plaintiff proceeded to claim that as a result of the breach the defendant is not entitled to the rights contained in clause 5 of the settlement agreement.

[8] The plaintiff furthermore claimed that as a consequence of the fact that the horses were either insufficiently vaccinated or not vaccinated at all and had not received booster vaccination;

- (a) the horses needed to be vaccinated (three 3 vaccination courses over a period of three years) at a cost of N\$23,778.30 per "vaccination run" amounting at a total costs of N\$71 334-90, which costs the plaintiff will incur;
- (b) the horses and particularly "no Fathers Girl", "All Inclusive", and "Kalkutta" were insufficiently protected or immunised against African Horse Sickness, contracted the sickness and succumbed to the sickness.

[9] The plaintiff further claimed that as a direct result of the defendant's failure to vaccinate or sufficiently vaccinate "no Fathers Girl", "All Inclusive", and "Kalkutta" against African Horse Sickness she suffered damages in the amount of N\$110 000 being their reasonable value at the time of their death.

[10] The plaintiff furthermore claimed that as a direct result of the defendant's failure to sufficiently vaccinate or vaccinate the horses at all during the 2011 – 2017 period, the

horses are all at an elevated risk of contracting African Horse Sickness, and as a result succumbing to the disease. She continues and contends that the elevated risk has a direct impact on the horses' marketability and ultimately their value for at least the following three year period ending 2020. Because the horses will have no commercial value she stand to suffer damages in the amount of N\$515 000.

[11] The plaintiff furthermore claimed that despite the fact that the horses will have no commercial value and thus no commercial benefit for her she is obliged to maintain and care for the horses. The reasonable costs of maintaining and caring for the horses is N\$10,867.50 per annum per horse which includes grazing and farrier services but does not include incidental veterinary services or other sundries, which amounts to N\$358 627-50 per year for the 11 horses identified by the plaintiff in her particulars claim.

[12] It is on the basis of the contentions that I have set out in the preceding paragraphs that the plaintiff claims damages in a global amount of N\$ 1 054 962-40, which she allegedly suffered as a result of the breach of the settlement agreement by the defendant.

[13] The defendant entered a notice to defendant the plaintiff's claim and pleaded to the plaintiff's particulars of claim. In his plea the defendant raised a special plea in the following terms:

1. The plaintiff's whole causes of action involving the claims so prosecuted by her as depicted in her particulars of claim are derived from a written settlement agreement so concluded between the parties on the 22nd of June 2017 and which settlement agreement was then made an order of this honourable court.
2. The defendant further avers that all the claims currently set out in the plaintiff's particulars of claim filed of record herein were part and parcel of the disputes and subject matters of disputes which were so settled in terms of the settlement agreement referred to hereinbefore.
3. The defendant avers that in addition to the terms and conditions contained in the settlement agreement so concluded between the parties, the following clauses contained therein have a direct and express bearing upon the claims currently being prosecuted by the plaintiff herein, to wit:

3.1 The introduction to clause to clause 2 thereof which states as follows —

“In settlement of all proprietary claims between the parties pursuant to this divorce action and emanating from the parties’ accrued estate from their marital relationship, ...”

3.2 Clause 23 thereof which states as follows.

“It is recorded that the plaintiff has no pending criminal and/or civil action against the defendant ...”

3.3 Clause 26 thereof which states as follows.

“The parties record the terms of this settlement to be in full and final settlement of all present, past and future claims that the parties may have against each other.”

4. A proper reading of all of the plaintiff's claims set out in her particulars of claim reveals that these claims are directly relevant to the Neu-Heusis horse stud which horse stud formed the subject matter of clauses 2.2 — 2.4 as well as clauses 4 — 16 of the settlement agreement and in respect of which the provisions set out in clauses 23 and 26 thereof directly relate and apply.
5. In the premises the defendant avers that the plaintiff has no claim whatsoever on the bases currently set out in her particulars of claim as depicted in the claims set out therein.’

[14] The plaintiff replicated to the defendant's special plea. In her replication the plaintiff admitted that she and the defendant entered into a settlement agreement in respect of the matrimonial consequences of their marriage, but in essence denied that she is not, by virtue of the provisions of the settlement agreement, entitled to institute action against the defendant. She contended that the dispute in the present matter relate to the settlement agreement and that the cause of action in this matter stems directly from the operation of the settlement agreement itself, and clauses 2, 5, 10, 23, and 26 of the settlement agreement are unhelpful to the defendant in as far as the plaintiff is suing in terms of (and seeking enforcement of the settlement agreement

itself) or seeking contractual damages pursuant to defendant having breached the settlement agreement.

[15] The plaintiff furthermore contends that a reference in clause 26 (of the settlement agreement) to the “*full and final settlement of all present, past and future claims that the parties may have against each other*” is a reference to the present, past and future claims which stemmed from the issues prior to the compromise having been reached and can therefore not be relied on by the defendant to prohibit the plaintiff from seeking to enforce her rights in terms of the settlement agreement (the compromise).

[16] At a Pre Trial Conference held on 23 September 2021 the parties agreed to have the special plea raised by the defendant determined first before the merits of the plaintiff’s claim could be considered. It is the special plea that I now consider.

The defendant’s contention

[17] Mr Strydom who appeared for the defendant argued that, although a settlement agreement constitutes a contract in the conventional legal sense of the word, it may be construed as a compromise between parties in order to settle and regulate their differences in a compromised manner, thereby avoiding or terminating litigation. He continued and said a compromise (or *transactio*) is the settlement by agreement of disputed obligations whether contractual or otherwise. A compromise is a form of novation differing from ordinary novation in that the obligations novated by the compromise must previously have been disputed or uncertain, the essence of compromise being the final settlement of the dispute or uncertainty.

[18] Counsel further argued that the effect of a compromise is the same as *res judicata* or a judgment given by consent. He argued that, that is what happened in this matter because after the plaintiff and the defendant concluded the settlement agreement, that settlement agreement was made an order of court thereby bringing an end to the disputes between the parties and rendering the disputes so embodied in the settlement agreement final. He thus proceeded and argued that a compromise (settlement agreement) is an absolute bar to action compromised but not of course on any claim not included in the compromise. He cited as authority for that proposition the

comments of O'Regan AJA in the case of *Metals Australia Ltd and Another v Amakutuwa and Others*¹ where the learned Judge said:

'A compromise is a form of agreement the purpose of which is to put an end to existing litigation or to avoid litigation that is pending or might arise because of a state of uncertainty between the parties ... An agreement of compromise may follow upon a disputed contractual claim but it may also follow upon any form of disputed right and 'may be entered into to avoid even clearly a spurious claim'. The effect of an agreement is that it bars the bringing of proceedings on the original cause of action.'

[19] Mr Strydom continued and submitted that in circumstances where particular disputes have been settled by means of a compromise, the parties in essence abandoned their rights to pursue further claim in respect of the subject matter of the compromise/settlement agreement. Mr Strydom argued that that intention is made clear in clause 26 of the settlement agreement which states that:

'The parties record the terms of this settlement to be in full and final settlement of all present, past and future claims that the parties may have against each other.'

[20] Mr Strydom furthermore argued that clause 5 of the settlement agreement states that the plaintiff shall bear all risk of injury or sickness or death by natural causes or injury, sickness and death by natural causes from 8 July 2017 and the defendant will be exempted from any liability concerning the horse from that date. He concluded that the plaintiff cannot institute action against the defendant in respect of a matter regulated by the settlement agreement.

The plaintiff's contentions

[21] Mr Jones who appeared on behalf of the plaintiff on the other hand argued that our courts have not dismissed the notion that a compromise is voidable at the instance of the aggrieved party in instances of misrepresentation or some other ground for rescission and seems more likely to support this approach. It then follows that a claim based on misrepresentation and damages (despite it being in regard to a compromise) is actionable.

¹ *Metals Australia Ltd and Another v Amakutuwa and Others* 2011 (1) NR 262 (SC) at 268F-269 A.

[22] Mr Jones further argued that the plaintiff concedes that she and the defendant settled the patrimonial issues arising out of the marriage relationship. She, however, pleaded that during the negotiations leading up to the settlement agreement the defendant made several material misrepresentations. He continued and argued that if it were not for those misrepresentations the agreement would not have been concluded in its current terms and plaintiff would have not agreed that the risk of profit and loss passed in the manner and at the time in which it did.

[23] Mr Jones further argued that simply put, the defendant cannot be heard to say that, despite the assurances made in clause 10 of the settlement agreement being false, the plaintiff must, nevertheless accept that the vaccinations were administered even if they were not, because this would lead to a very strange outcome indeed and must be rejected. He argued that the plaintiff is not prohibited from instituting action pursuant the defendant's alleged misrepresentation surrounding the assurances in clause 10 and the truth underlying these.

[24] He further argued that when an agreement was induced by a misrepresentation, it is voidable at the innocent party's instance who can choose to rescind or keep the contract alive seeking specific performance or damages, whatever the case may be. He thus argued that because the plaintiff's claim is based on the defendant's misrepresentation, which the defendant made during the negotiations leading to the conclusion of the settlement agreement and the inclusion of clause 10, the plaintiff is entitled to avoid the consequences of the agreement, which is voidable in the circumstances and elect not to rescind but to instead seek damages brought about by the defendant's misrepresentation. Clause 10 cannot assist the defendant if he knew (as alleged by the plaintiff) that he was unable to give the assurance because it was not the true position, argued Mr Jones.

[25] Mr Jones furthermore argued that courts interpret exemption clauses restrictively with a view to mitigating their effects. He implored the Court to consider with great care the meaning of an exemption clause, especially if it is very general in its application. The reason for this is that an exemption clause limits or ousts common law rights. The exemption clause must thus be interpreted as narrowly as possible.

[26] Mr Jones argued that when considering whether clause 26 of the settlement agreement has the effect of ousting the plaintiff's rights to claim against the defendant in the circumstances of this matter, consideration must be had to the context and circumstances under which the settlement agreement came into existence and also the pleadings. He argued that the context and circumstances under which the settlement agreement came into existence is as follows:

- (a) the purpose of the settlement agreement was to settle the matrimonial consequences arising from the marriage out of community of property but incorporating the accrual;
- (b) the defendant expressly agreed and undertook to arrange for a veterinarian to administer the full range of necessary vaccinations to the horses by no later than 29 June 2017 and thereafter to cause the follow up vaccinations;
- (c) the defendant specifically represented to the plaintiff that the horses were properly vaccinated between 2011 and 2016. In so doing the defendant misrepresented the truth of the matter, as allegedly the horses were never vaccinated;
- (d) the plaintiff relied upon the representation and accepted that they were true, in circumstances where the defendant (it is alleged) knew that they were not vaccinated as per his assurances.

(27) Mr Jones thus argued that because the plaintiff suffered damages as a result of the misrepresentations made by the defendant, the defendant is not entitled to rely on clause 26, as an embargo against the plaintiff's action for damages brought about by the misrepresentation.

Discussion

[28] Mr Jones formulates the issues which this Court is required to determine as follows:

‘Therefore, the crisp legal issue then becomes; firstly, is the plaintiff prohibited by law from suing the defendant for his alleged misrepresentations leading up to the conclusion of settlement agreement itself (and seeking damages) and secondly, does the inclusion of clause 26 prohibit the plaintiff from suing the defendant on the strength of his alleged misrepresentations (a new cause of action) which it is alleged, led to the plaintiff’s damages.’

[29] I do not agree with Mr Jones’ formulation of the issue which this Court is required to determine because the formulation leads to a very loose and simplification of the real dispute between the plaintiff and the defendant. The question in my view is not whether the plaintiff is prohibited from instituting action claiming damages from the defendant for the defendant’s alleged misrepresentations leading up to the conclusion of settlement agreement. In my view the question is simply what effect the settlement agreement has on the parties’ rights and obligations. I will accordingly start of by considering the legal principles governing settlement agreements.

Settlement Agreements

[30] What is not in dispute in this matter is that the parties on 22 June 2007 concluded a written settlement agreement, which was made an order of Court.

[31] What constitute a settlement agreement and the legal principles governing settlement agreements have been considered in a few cases in our courts². In the case of *Government of the Republic of Namibia and Others v Katjizeu and Other*³ the Supreme Court set out the law relating to settlement agreements in the following terms:

[15] ... In *Cachalia v Herbere & Co.*, 1905 T.S. 457 at p.462, SOLOMON, J., accepted the definition of *transactio* given by Grotius, Introduction, 3.4.2., as

“An agreement between litigants for the settlement of a matter in dispute”

² *Mbambus v Motor Vehicle Accident Fund* 2011 (1) NR 238 (HC), *Metals Australia Ltd and Another v Amakutuwa and Others* 2011 (1) NR 262 (SC), *Government of the Republic of Namibia and Others v Katjizeu and Other* 2015 (1) NR 45 (SC)

³ *Government of the Republic of Namibia and Others v Katjizeu and Other* 2015 (1) NR 45 (SC).

Voet, 2.15.1., gives a somewhat wider definition which includes settlement of matters in dispute between parties who are not litigants and later, 2.15.10., he includes within the scope of *transactio*, agreements on doubtful matters arising from the uncertainty of pending conditions “even though no suit is then in being or apprehended”. (Gane’s trans., vol 1,p. 452.). The purpose of a *transactio* is not only to put an end to existing litigation but also to prevent or avoid litigation.

This is very clearly stated by Domat, *Civil Law*, vol.1, para 1078, in a passage quoted in *Estate Erasmus v Church*, 1927 T.P.D. 20 at p 24, but which bears repetition:

“A transaction is an agreement between two or more persons, who, for preventing or ending a law suit, adjust their differences by mutual consent, in the matter which they agree on; and which every one of them prefers to the hopes of gaining, joined with the danger of losing.”

A *transactio* whether extra-judicial or embodied in an order of Court, has the effect of *res judicata*.’

[16] In *PL v YL* 2013 (6) SA 28 (ECG) at 48D-H the court held that:

“The suggestion that besides legislative support the encouragement of a negotiated settlement also requires judicial support is in my view not something which is inconsistent with the policies underlying our law. The settlement of matters in dispute in litigation without recourse to adjudication is generally favoured by our law and our courts. The substantive law gives encouragement to parties to settle their disputes by allowing them to enter into a contract of compromise. A compromise is placed on an equal footing with a judgement. It puts an end to a lawsuit and renders the dispute between the parties *res judicata*. It encourages the parties to resolve their disputes rather than to litigate. As Huber puts it:

“A compromise once lawfully struck is very powerfully supported by the law, since nothing is more salutary than the settlement of lawsuits.” ’

This was confirmed by the appeal court in *Schierhout v Minister of Justice* [1925 AD 417 at 423] it said:

“The law ... rather favours a compromise . . . or other agreement of this kind; for interest *reipublicae ut sit finis litium*.

'As a natural progression of the notion that the resolution of disputes by agreement, as opposed to litigation, is favoured and is in accordance with the policy of our law, any action by the court which has the effect of expressing a willingness to encourage the settlement of disputes must equally be favoured.'

Karson v Minister of Public Works 1996 (1) SA 887 (E) at 893F – H adds the following:

'It is well settled that the agreement of compromise, also known as *transactio*, is an agreement between the parties to an obligation, the terms of which are in dispute, or between the parties to a lawsuit, the issue of which is uncertain, settling the matter in dispute, each party receding from his previous position and conceding something, either by diminishing his claim or by increasing his liability ... It is thus the very essence of a compromise that the parties thereto, by mutual assent, agree to the settlement of previously disputed or uncertain obligations ...

[17] A Canadian court has considered the effect of a settlement agreement and the following was stated in *George v 1008810 Ontario Ltd* 2004 CanLII 33763 (ON LRB) in para 23:

'At common-law, the effect of a settlement was to put an end to the underlying cause of action: Halsbury's Laws of England, 4th ed., vol. 37, para 391:

Effect of settlement or compromise. Where the parties settle or compromise pending proceedings, whether before, at or during the trial, the settlement or compromise constitutes a new and independent agreement between them made for good consideration. Its effects are (1) to put an end to the proceedings, for they are thereby spent and exhausted, (2) to preclude the parties from taking any further steps in the action except where they are provided for liberty to apply to enforce the agreed terms, and (3) to supersede the original cause of action altogether. *A judgment or order made by consent is binding unless and until it has been set aside in proceedings instituted for that purpose and it acts, moreover, as an estoppel by record.* (Underlined and italicised for emphasis).

[31] In the case of *Mbambus v Motor Vehicle Accident Fund*⁴ this Court per Van Niekerk J⁵, said:

‘The purpose of compromise is to end doubt and to avoid the inconvenience and risk inherent in resorting to the methods of resolving disputes. Its effect is the same as *res judicata* on a judgment given by consent. It extinguishes *ipso jure* any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved. ... But a compromise induced by fraud, misrepresentation, or some other ground for rescission, is voidable at the instance of the aggrieved party, even if made an order of court.’

[32] From the exposition of the legal principles in the preceding paragraph it is clear that a settlement agreement, in an instance where parties sued each other with regard to disputed obligations, is an agreement whereby the parties end the law suit, and by mutual consent adjust their difference putting an end to the underlying cause of action. The effect of the settlement agreement is first, to, amongst other matters, preclude the parties from taking any further steps in the action except where they provided for liberty to apply to enforce the agreed terms, and secondly to extinguish *ipso jure* any cause of action that previously may have existed between the parties, unless the right to rely thereon was reserved.

[33] The question that must be answered in this matter is whether the plaintiff’s claim has any relation to the dispute that previously existed between the parties and which dispute the parties compromised.

[34] Whether the settlement agreement is indeed an agreement of compromise is a matter of contractual interpretation. In this matter the plaintiff claims damages from the defendant which she alleges she suffered as a result of the defendant having breached the settlement agreement. It is plain from the clauses of the agreement that the settlement agreement was entered into because the parties wanted to put an end to existing litigation and to avoid litigation that might arise because of a state of uncertainty between the parties.

[35] The core provisions of the settlement agreement are:

⁴ *Mbambus v Motor Vehicle Accident Fund* 2013 (2) NR 458 (HC).

⁵ Quoting from the judgement of *Georgias v Standard Chartered Finance Zimbabwe Limited* 2000 (1) SA 126 (ZSC), p 138I-140D.

- (a) clause 2 which clearly states that the parties conclude the agreement in settlement of the proprietary claims arising from the divorce action between them;
- (b) clause 5 provides that if the plaintiff did not collect and remove all the horses from Farm Neu – Heusis by 8 July 2017, she will bear all risks (this includes risks associated with injury, sickness or death by natural causes) and the defendant will be exempted from any liability concerning the horses and their continuous stay on Farm Neu-Heusis;
- (c) clause 10 which provides that the plaintiff [that is Mr Egbert Hoff] must provide the defendant [that is Ms Susanne Hoff] with all records or invoices or both of vaccinations and other relevant veterinary records if any pertaining to the Neu –Heusis Stud. The clause proceeds and state that, 'it is recorded herewith that the plaintiff shall do his outmost to obtain proof of such records and invoices but if not available the defendant shall accept the plaintiff's assurance that such vaccinations were administered to the Neu Heusis Stud from 2011 to 2016'; and
- (d) clause 26 which provides that the terms of the settlement agreement are in full and final settlement of 'all present, past and future claims that the parties may have against each other.'

[36] It is clear from the second (that is clause 5) of these provisions that the parties foresaw the possibility of litigation between them arising out of the proprietary rights of their marital relationship and that they expressly abandoned any claims they may have had or will have against each other. It is furthermore clear from the agreement as a whole that the purpose of the settlement agreement was to put an end to the possibility of litigation between the parties by redefining their respective rights and obligations and as such, properly construed, the settlement agreement is a compromise.

[37] As I indicated earlier Mr Jones who appeared for the plaintiff argued that the defendant allegedly breached the settlement agreement and the breach is the

representation (namely the defendant's assurance to the plaintiff that vaccinations were administered to the Neu-Heusis Stud horses from 2011 to 2016) made by the defendant to the plaintiff leading to the conclusion of the settlement agreement. I therefore furthermore have no doubt in my mind that the cause of action on which the plaintiff relies is related to the dispute that previously existed between the parties and which dispute the parties compromised.

[38] I indicated earlier that Mr Jones argued that our courts have not dismissed the notion that a compromise is voidable at the instance of the aggrieved party in instances of misrepresentation or some other ground for rescission. Mr Jones is correct in this respect but the point he misses is the fact the plaintiff has not come to this Court seeking to rescind the settlement agreement on the ground that the agreement was induced by the defendant's misrepresentation and that her consent is as such vitiated. Ms Hoff, the plaintiff, has approached this Court seeking damages on the basis that the defendant breached the settlement agreement.

[39] The allegation by the plaintiff that the defendant breached the settlement is not borne out by the pleadings. Her allegation is as follows:

'7 The defendant has breached the agreement, in that-

- 7.1 Despite the defendant having expressly assured that the relevant and necessary vaccinations were administered to the horses during 2011 to 2016, this was not the case.
- 7.2 The representation by the defendant was false, in that no vaccinations against Rabies and/or African Horse Sickness and/or Tetanus were administered to the horses, by the defendant (or at all) during 2011 — 2017.
- 7.3 It was on the strength of the defendant's misrepresentations that the plaintiff assumed the risk of injury, sickness and/or death by natural causes to the horses and as such exempted the defendant from any liability concerning the horses and their continuous stay on farm Neu-Heusis, and thereafter.'

[40] Christie⁶ defines breach of contract as follows:

'The obligations imposed by the terms of a contract are meant to be performed, and if they are not performed at all, or performed late or performed in the wrong manner, the party on whom the duty of performance lay (the debtor) is said to have committed a breach of the contract or, in the first two cases, to be *in mora*, and, in the last case, to be guilty of positive malperformance.'

[41] The plaintiff in her particulars of claim does not allege that the defendant did not perform at all, or performed late or performed in the wrong manner under the settlement agreement. She accordingly has failed to establish that the defendant breached the settlement agreement. The plaintiff has, in my view, failed to establish that the general rule that a party is not entitled to approach the court on the very cause of action that was settled must not apply.

[42] Mr Jones' fall-back position was that clause 26 of the settlement agreement amounts to an exception clause and it must be narrowly interpreted, because it ousts common law rights. I am of the view that one must first establish whether clause 26 is an exemption clause as alleged by Mr Jones.

[43] Exemption clauses are known by many names. They have been referred to as 'indemnity clauses', 'exculpatory clauses', 'disclaimers' or 'waivers' and are usually found in standardised contracts, displayed on notices or printed on tickets. I will in this judgement however utilise the term 'exemption clause'. In the matter of *Swinburne v Newbee Investments (Pty) Ltd*⁷ the exemption clause which exemplifies exemption clauses read as follows:

'17. The LESSOR shall keep all main walls and roofs in order but shall not be responsible for any damages caused by leakage, rain, hail, snow or fire, or any cause whatsoever, nor shall the LESSOR be responsible for any loss or damage which the LESSEE may sustain by reason of any act whatsoever or neglect on the part of the LESSOR or employees or by reason of the PREMISES or the building in which they are situate at any time falling into a defective state of repair, or by reason of any repairs to be effected by the LESSOR, not being effected timeously or at all, and the LESSEE shall not be entitled for any of the

⁶ Christie R H: '*The Law of Contract in South Africa*.' 5th ed, LexisNexis Butterworths at 495.

⁷ *Swinburne v Newbee Investments (Pty) Ltd* 2010 (5) SA 296 (KZD).

reasons aforementioned or for any reason whatsoever, to withhold any moneys payable by him under this Agreement, or to claim any refund, in respect of moneys paid.

[44] From the above quoted clause it is apparent that an exemption clause is essentially terms which are used to limit or totally exclude the potential liability of a contracting party or parties which would normally arise from contractual relations. An exemption clause may also serve to exclude or limit other (e.g. common law) rights of a party, for example by excluding potential delictual liability.

[45] I have quoted clause 26 earlier and in my view that clause does not limit or totally exclude the potential liability of a contracting party or parties which would normally arise from contractual relations. Clause 26, in my view, simply affirms that the parties have settled their dispute and not to in future have any claims against each other in respect of a matter that they have settled. Even if I am wrong and clause 26 amounts to an exemption clause, the Courts have stated that the basis on which they decide whether or not they will enforce the exemption clause is public policy. In the matter of *Morrison v Angelo Deep Gold Mines Ltd*⁸, Innes CJ said:

‘Now it is a general principle that a man contracting without duress, without fraud, and understanding what he does, may freely waive any of his rights. There are certain exceptions to that rule, and certainly the law will not recognize any arrangement which is contrary to public policy.’

[46] I have earlier referred to the Supreme Court matter of *Government of the Republic of Namibia and Others v Katjizeu and Other*⁹ where the Supreme Court emphasized that Courts favour and encourage the settlement of disputes by agreement. There is therefore nothing that is contrary to public policy when parties in the pursuit of settling their disputes they agree to terms that may appear to limit their right to claim against each other in respect of terms so settled.

[47] In conclusion the legal principle that the settlement agreement entered into between the plaintiff and the defendant brought the original dispute or cause of action to an end thus finds application. I am therefore of the view that that the settlement

⁸ *Morrison v Angelo Deep Gold Mines Ltd*. 1905 TS 775 at 779.

⁹ *Supra* footnote 3.

agreement is a valid agreement of compromise, intended to avoid litigation between the plaintiff and the defendant on the cause of action that was compromised. There is thus no contractual basis upon which Ms Susanne Hoff can approach the court on the very cause of action that was settled and eternally put to bed by the parties.

[48] The general rule is that costs follow the event and that costs are in the discretion of the court. The court sees no reasons why the general rule must not apply in this matter. For the reasons set out in this judgment I make the following Order.

1. The defendants' special plea is upheld.
2. The plaintiff must pay the defendants costs of suit, such costs to include the costs of one instructing and one instructed counsel.
3. The matter is removed from the roll and regarded as finalised.

S F I Ueitele
Judge

APPEARANCES:

PLAINTIFF:

J P RAVENSCROFT-JONES

Instructed by Ellis Shilengudwa Inc., Windhoek, Namibia.

DEFENDANT:

J A N STRYDOM

Instructed by Theunissen, Louw and Partners, Windhoek,
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