REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2022/00020

In the matter between:

HEINRICH MARTIN BOHME **APPLICANT**

and

MEIKE BOHME **RESPONDENT**

Neutral citation: *Bohme v Bohme* (HC-MD-CIV-MOT-GEN-2022/00020) [2022] NAHCMD 581 (21 October 2022)

Coram: RAKOW J
Heard: **13 September 2022**
Delivered: **21 October 2022**

Flynote: Divorce – Settlement Agreement – Law of Contract – Christie's Law of Contract – 'If I promise to do something which, in general, can be done, but which I cannot do, I am liable on the contract – *Standard Bank Namibia Ltd v A-Z Investments Holdings (Pty) Ltd and Another.*

Summary: Mr and Mrs Bohme were divorced by this court and a settlement agreement was entered into between the parties dated 8 June 2017 which was made and order of court. An amended second deed of settlement was executed

subsequently and made an order of court on 23 September 2022, which is the subject matter of the application.

The applicant's qualm is that he is unable to maintain his obligations in terms of the second deed of settlement, more particularly regarding the educational institution the three minor children are to attend and which extra mural activities they should be engaged in. As a result he sought to mediate with the respondent in order to find an amicable resolution.

The Respondent, denies that any dispute exists between the parties, because the parties had already previously reached an agreement in respect of the applicant's obligations which arise in respect of the educational institution to be attended and extra mural activities to be engaged in.

Held – that the intention of the alternative dispute resolution process available at the High Court in terms of rule 38 of the High Court Rules are to be used for matters currently pending before court in an attempt to bring the parties closer together and ultimately reach a settlement and not for parties who cannot afford mediation to which they agreed.

Held further – that the parties in the second settlement agreement consulted and reached consensus in respect of the educational institution to be attended, extra-mural activities of the children.

ORDER

The application is dismissed with costs, costs to include one instructed and one instructing counsel.

JUDGMENT

RAKOW J

Introduction

[1] The parties in this matter are Mr. Bohme and Mrs. Bohme who used to be married until they were divorced by this court on 7 September 2017 where their bonds of marriage were dissolved and the settlement agreement entered into between the parties dated 8 June 2017, was made an order of court.

[2] Subsequently, on 13 December 2019 the parties executed an amended second deed of settlement, which was made an order of this court on 23 September 2020. This is the subject matter of the application before court, in that the applicant seeks a declaration of rights in respect of the interpretation and application of certain provisions in the second deed of settlement.

The settlement agreement

[4] In the initial settlement agreement of 2017, the plaintiff undertook to pay certain amounts towards maintenance of the couple's children. This amount was slightly reduced in the 2019 settlement agreement but overall the terms of the settlement agreement regarding the children seemed to have remained the same.

[5] The settlement agreement is broken down in parts with point number 2 dealing with the custody & access to the children and point 3 dealing with maintenance for the children. Under clause 2.5 the parties record that both will have joint decision making powers as stipulated in clause 3.1.7 (see underneath) and the parties then proceeded to indicate that in the event of a dispute regarding the applicant's access rights as set out under point 2, the parties agree to resolve the dispute with the assistance of a mediator.

[6] Point 3, dealing with the maintenance of the children is quoted in more detail as this is the bone of contention in the current application. It reads:

> '3.1 The Defendant shall maintain the children until they finalise their secondary education or become self-supporting, whichever event shall occur last, by:
>
> 3.1.1 paying to the Plaintiff on or before the first day of every month by way of debit order or EFT into such bank account as the Plaintiff may nominate in writing from time to time in respect of the general living expenses of the children:
>
> 3.1.1.1 an amount of NAD6 000.00 (six thousand Namibian dollars) per month per child payable from 1 December 2019 until 30 March 2020;

3.1.1.2 an amount of NAD7 500.00 (seven thousand five hundred Namibian dollars) per month per child from 1 April 2020 until 30 September 2020;
3.1.1.3 an amount of NAD9 000.00 (nine thousand Namibian dollars) per month per child from 1 October 2020;
3.1.2 increasing the maintenance payable in terms of clause 3.1.1.3 annually with effect from 1 October 2021, at a rate of 7% per annum; ...
3.1.3 bearing the costs of all reasonable expenditure in respect of medical, dental, surgical, hospital, orthodontic and ophthalmological treatment required by the children, including any sums payable to a psychiatrist/psychologist and chiropractor and/or similar treatment, the costs of all medication and supplements and the provision where necessary of spectacles and/or contact lenses and by retaining the children as dependents on his current medical aid scheme or one with similar benefits and by bearing the costs of all medical and related expenses of the children not covered by the said medical aid scheme.
3.1.4 bearing the costs of all fees and expenses (including private school fees) in respect of the education of the children, such costs to include, without limiting the generality of the aforegoing, all primary and secondary school and after-school care fees, additional tuition fees as well as the costs of all books, stationery and school uniforms;
3.1.5 bearing 50% of the costs of equipment (including computers and related equipment), instruments and attire relating to the children's education, school outings, camps, school tours and exchange programmes;
3.1.6 bearing 50% of the registration costs, fees and expenses (inclusive of club fees, attire, equipment, instruments, travelling and accommodation) of maximum two extra-mural, extra-curricular school and sport activities engaged in per child;
3.1.7 the parties shall consult each other in order to reach consensus in respect of the educational institution to be attended, extra-mural activities to be engaged in and specific medical expenses to be incurred in respect of the children;
3.3 in the event of a dispute regarding the children's maintenance and/or in respect of any of the aspects referred to hereinabove, the parties agree to resolve the dispute with the assistance of a mediator. The mediator may be assisted by a qualified professional to determine the best interests of the children.'

The application

[7] The applicant seeks the following relief:

'1. Declaring that the provisions of the Second Deed of Settlement is interpreted as follows:

1.1. the obligations created by clauses 3.1.4, 3.1.5 and 3.1.6 of the Second Deed of Settlement, are subject thereto that the Applicant and Respondent agree to the educational institution to be attended by the children and the extra-mural activities to be engaged in by the children, and consequently agree to the educational fees and costs, equipment and school tours costs, and the extra-mural costs to be incurred, as provided for in terms of clause 3.1.7; and

1.2. failing such agreement, such obligations are further subject to the outcome of mediation proceedings, as provided for in terms of clause 3.3;

2. Declaring that a dispute exists between the Applicant and the Respondent as provided for in terms of clause 3.3 of the Second Deed of Settlement;

3. A mandamus compelling the Respondent to enter mediation proceedings with the Applicant, within 7 (seven) days of the Order, with regards to the dispute;

4. Ordering the Respondent to pay the Applicant's costs, including the costs of one instructing and one instructed counsel.

5. Granting further and alternative relief to the applicants.'

<u>The background to the application and the affidavits filed by the parties</u>

[8] After the initial settlement agreement and divorce order, the parties entered into mediation which resulted in the subsequent settlement agreement which was also made an order of court on 23 September 2020. The applicant indicated in his founding affidavit that at the time the second settlement agreement was entered into, he was working as an Executive at the Meat Corporation of Namibia (Meatco). He was retrenched from that position on 31 March 2019. After this, he moved to South Africa to stay with his current wife, then girlfriend. They got married on 3 July 2010. He further explains that towards the middle of 2019 he realized that his financial position had significantly deteriorated and he placed certain of his properties up for sale to alleviate his financial distress.

[9] During September 2019 the parties attended mediation proceedings which resulted in the second settlement agreement. When this was executed he alleged that he maintained his concerns about his ability to continue the maintenance payments as set out under clause 3 of the agreement. He specifically maintained that the educational institution the children attend as well as their extra-mural activities must be reconsidered to reduce the costs associated therewith. He explained that he accepted the second settlement agreement and found comfort in

the belief that decisions regarding the choice of school and extra-mural activities of the children will be made between him and his ex-wife, and if no agreement were to be reached, then it will be revisited during a mediation process. He did however request to discuss this, but his request fell on deaf ears.

[10] The applicant then proceeds and sets out his financial woes which include his attempts to sell some of his properties as well as discuss these issues with his ex-wife. On 23 March 2020 he instructed his legal representatives to inform the respondent that he is no longer able to afford the DHPS private school fees for 2021 and that they will need to find an alternative educational institution for their children. The applicant feels he is excluded from the decisions regarding where his children goes to school but has to pay for the school fees and as such, his ex-wife, the respondent refuses to engage with him in mediation to discuss the problems he has. He further maintains that the settlement agreement provides for them to discuss these issues with the assistance of a mediator.

[11] The respondent on the other hand states that the application should be dismissed as there is currently no dispute that arose between the parties in terms of clause 3.3 of the settlement agreement as the parties previously reached an agreement in respect of the applicant's obligation which arose regarding the educational institution to be attended and the extra mural activities of the children. The applicant can no longer meet his obligations relating to school fees and extra mural activities. He seeks to amend the agreement between the parties because of the above reason and wants to invoke the mediation clause to achieve such changes to the agreement. The applicant from the start agreed that the children will attend DHPS but now, because he cannot afford the said school fees, wishes to withdraw the consent he previously gave for the children to attend the said school and change the terms of what was initially agreed. The specific clause 3.3 was never intended for the purpose that the applicant wants to utilize it now. That clause was inserted with the intention to cater for instances where the parties cannot agree on a particular access arrangement or where they cannot agree on which school or university the children should attend.

[12] She further explains that she secured a post at DHPS and as such, she could secure a significant discount in school fees, to the benefit of the applicant. She attempted to accommodate him in this manner as she understood he had financial difficulties and as a result she earns about N$10 000 less a month than what she normally would have earned. Without the discount on the school fees, it would have amounted to N$ 201 900 per annum for the three children but now with the discount it is only N$ 61 200 per annum. The applicant further remains in breach of payment of these obligations as well as paying for the extra mural activities of the children and is currently repaying these outstanding obligations at an amount of N$10 000 per month.

[13] The respondent also indicated that she cannot pay for the services of a mediator. She also indicated in a letter dated 1 November 2021 that she is willing to mediate with the applicant provided that he settles the arrear maintenance and make a full disclosure of his financial position. The applicant insisted that both parties are equally liable for the costs of a mediator and she accepted his offer to pay the arrear maintenance at an amount of N$10 000 per month but he still has not disclosed his financial position to her.

[14] The applicant further, according to the respondent, maintains a lavish lifestyle and travels abroad frequently. And up till now has not produced a shred of evidence supporting his claim that he cannot afford to pay the school fees any more. The children are further at an age where they decide for themselves what extra-mural activities they choose to participate in and the applicant has up till now, never had an objection against any of the extra-mural activities they choose. The total costs associated with extra-mural activities for 2021 amounted to less than N$500 per month. In 2022 the children decided to play Fist Ball and that will amount to an additional N$1 520 per annum per parent.

Arguments

[15] It was argued on behalf of the applicant that the crux of the applicant's case lies therein that, after the second deed of settlement was made an order of court, his financial position materially changed for the worse, as a result of which he could no

longer maintain his obligations in terms of the second deed of settlement, and as a result of which he sought to mediate with the respondent in order to find an amicable resolution to the disparity between his obligations in terms of the second deed of settlement and his ability to maintain those obligations as a result of his deteriorated financial position. Counsel further simplified the dispute and reduced it to one simple aspect being which educational institution the three minor children are to attend and which extra mural activities should be engaged in.

[16] It was further argued that the parties previously agreed that the three minor children may attend DHPS and participate in the extramural activities, however, in the interim the applicant's financial position seriously deteriorated and he can no longer afford the maintenance obligations imposed on him. The applicant simply wants the parties to revisit which educational institution the three minor children attend and in which extramural activities they participate.

[17] The counsel for the applicant summarized the issues as follows:

'- Whether the Applicant may expect of the Respondent to consult on the issue of which educational institution the three minor children are to attend and which extra mural activities they should be engaged in;

- Whether the Applicant can rely on clause 3.1.7 to do so

- The Respondent wants the children to continue at DHPS and to continue with the extramural activities that they currently participate in, the Applicant (by implication and although not expressly states as such in the papers) wants the children to attend a cheaper school and participate in either less extramural activities or cheaper extramural activities.'

[18] It was submitted that the above is a "…dispute regarding the children's maintenance and/or in respect of any of the aspects referred to…" and therefore falls within the ambit of clause 3.3, and as such the applicant is entitled to have the dispute resolved with the assistance of a mediator, if it is possible to resolve the dispute by way of mediation and subject to the parameters and limitations of mediation. Notwithstanding the possible failure of the mediation, the applicant is entitled to enforce the mediation clause – he has a legal right to do so. It is in any event completely unreasonable of the Respondent to refuse to take the economic realities of the applicant into consideration and further to refuse to even discuss this issue with the applicant.

[19] For the respondent it was argued that the applicant approaches the court and seeks two-pronged declaratory relief. The applicant seeks declaratory relief, firstly, which relates to the interpretation of the second settlement agreement. The second portion of the declaratory relief relates to whether or not a dispute exists between the parties. (The nature of the dispute is alleged to be which school the parties' minor children should attend and which extra mural activities the children should be engaged in). The applicant further seeks an order compelling the respondent to participate in mediation proceedings. It is further submitted that the legal principles which is stated by the applicant in his heads of argument which relates to supervening impossibility of performance are entirely irrelevant in the determination of this application.

[20] The respondent, further denies that any dispute exists between the parties as contemplated in clause 3.3 of the settlement agreement and because the parties had already previously reached agreement in respect of the applicant's obligations which arise in respect of the educational institution to be attended, extra mural activities to be engaged in and the specific medical expenses to be incurred in respect of the children (clauses 3.1.4, 3.1.5 and 3.1.6) as contemplated in clause 3.1.7.

[21] It was further argued that the minor children have attended DHPS since pre-primary and they continue to go to DHPS and the applicant's allegations that he could withdraw the consent previously given, should, with respect, be rejected. What educational institution the children would attend had never been an issue and the applicant paid DHPS school fees until he unilaterally decided and refused to pay such fees in spite of his obligation to do so.

The proposal to refer the matter to ADR in terms of rule 38 of the High Court rules

[22] There was a suggestion from the applicant that in the instance that the respondent cannot afford mediation, the matter should be referred to alternative dispute resolution process available at the High Court in terms of rule 38 of the High Court rules. I am of the opinion that it was never the intention of this process to be used for matters other than matters currently pending before court in an attempt to

bring the parties closer together and ultimately reach a settlement. This is inherently different in what the parties before court in the current matter wants to achieve and the ADR process was never intended to be an alternative process for parties who cannot afford mediation to which they agreed, to utilize. The issues in the current matter which will have to be dealt with by a mediator is not issues contained in a matter currently serving before court and as such the process cannot be utilized.

Legal considerations

[23] According to Christie's Law of Contract in South Africa 'If I promise to do something which, in general, can be done, but which I cannot do, I am liable on the contract.'[1] This trite principle was confirmed in *Standard Bank Namibia Ltd v A-Z Investments Holdings (Pty) Ltd and Another*[2] by Sibeya, J, and he stated as follows:

> '[17] 5(1) Lawsa first reissue para 160 states: " The contract is void on the ground of impossibility of performance only if the impossibility is absolute (objective). This means, in principle, that it must not be possible for anyone to make that performance. If the impossibility is peculiar to a particular contracting party because of his personal situation, that is if the impossibility is merely relative (subjective), the contract is valid and the party who finds it impossible to render performance will be held liable for breach of contract."
> [18] Flemming DJP in *Unibank Savings and Loans Ltd (formerly Community Bank) v Absa Bank Ltd*[3] further held that: *"Impossibility* is furthermore not implicit in a change of financial strength or in commercial circumstances which cause compliance with the contractual obligations to be difficult, expensive or unaffordable.'

[24] Regarding the interpretation that must be given to the so called mediation clause, the following was said in:

> 'It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another*,[4] namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the

[1] Christie's Law of Contract in South Africa, 6th ed at 97; D 45 1 137 5
[2] *Standard Bank Namibia Ltd v A-Z Investments Holdings (Pty) Ltd and Another* 2022 (1) NR 197 (HC) par 17 and 18
[3]
[4] *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662G – 663A

approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said:

"Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise."'[5]

[25] The Namibian Supreme court formulated the same principles as above as follows in Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC[6]:

'What is clear is that the courts in both the United Kingdom and in South Africa have accepted that the context in which a document is drafted is relevant to its construction in all circumstances, not only when the language of the contract appears ambiguous. That approach is consistent with our common-sense understanding that the meaning of words is, to a significant extent, determined by the context in which they are uttered. In my view, Namibian courts should also approach the question of construction on the basis that context is always relevant, regardless of whether the language is ambiguous or not.'

<u>Conclusion</u>

[26] The parties in the second settlement agreement undertook to 'consult each other in order to reach consensus in respect of the educational institution to be attended, extra-mural activities to be engaged in and specific medical expenses to be incurred in respect of the children….' It was never the argument of the applicant that he was not consulted in the educational institution to be attended by the children, on the contrary on his behalf it was argued that he indeed agreed to the institution they have to attend but that he now can no longer afford the said institution. So in this instance there was definitely consultation as well as consensus on the institution, the only thing that changed was the alleged ability of the applicant to pay the scholastic

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[5] *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* [1985] HLA 48 ((1985) 157 CLR 309) at 315

[6] *Total Namibia (Pty) Ltd v OBM Engineering and Petroleum Distributors CC*, case no.: SA 9/2014 ("OBM"), par [19]

fees of DHPS. There is no submission that it is in the interest of the children to be moved to another school or that there is no agreement on the content of the curriculum that is followed, the only interest put forward is the inability to pay the fees on the side of the applicant. It also seems that there is no issue taken with any of the extra-mural activities the children attend to except that the applicant cannot afford it. No indication was further given that he takes issue with what they do, it is only the costs associated with it.

[27] Clause 3.3 reads that 'in the event of a dispute regarding the children's maintenance and/or in respect of any of the aspects referred to hereinabove, the parties agree to resolve the dispute with the assistance of a mediator. The mediator may be assisted by a qualified professional to determine the best interests of the children.' There is no dispute regarding the children's maintenance, whether it should include for example text books for subjects not taken or that the subjects taken by the children are not covered by the curriculum or any other issues where there can be a dispute, the only issue is that the applicant cannot afford the maintenance any longer. He was invited to place his whole position on the table by the respondent, but did not do so and as such the court cannot find that there is a dispute in need of mediation.

[28] It is therefore incorrect, in law, for the applicant to say that his ability to perform his obligations in terms of the second settlement agreement has become impossible because his income earning potential had been negatively affected by the COVID-19 pandemic. His obligation to pay maintenance is and remains possible and the principles stated by the applicant in this regard cannot be applied.

[29] It is clear that the interpretation which must be given to clause 3.3 of the second settlement agreement, when looking at the wording as well as the context cannot be understood that it relates to a situation where the one party, in this instance can no longer afford the maintenance agreed upon. These terms were agreed upon at the time of the signing of the settlement and as such cannot be revisited at a whim by calling it now a disagreement because the applicant has no say in the determination of the educational institution the children attend as well as their extra-mural activities, he just have to pay for it. He already agreed to the

institution they attend and as such does not have per se a problem with the extra-mural activities that the children chose, just with paying for it.

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

The application is dismissed with costs, costs to include on instructed and one instructing counsel.

E RAKOW

Judge

APPEARANCES:

APPLICANT:	R Lewis (with her Z Duvenhage) Instructed by Fisher, Quarmby & Pfeifer, Windhoek
RESPONDENT:	Y Campbell (with her E Yssel) Instructed by Engling, Stritter & Partners, Windhoek