



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 2014/2011

In the matter between:

BUSISIWE MANANA

Applicant

And

FRANCO COLASUONNO

Respondent

In re:-

FRANCO COLASUONNO

1st Applicant

DIESEL ELECTRIC (PTY) LTD

2nd Applicant

And

BUSISIWE MANANA

1st Respondent

FASA LUSA (PTY) LTD

2nd Respondent

SPOIL ME INVESTMENT (PTY) LTD

3rd Respondent

**Neutral citation: Busisiwe Manana v Franco Colasuonno (2014/2011) [2013]
SZHC 11 (28 February 2013)**

Coram: M. Dlamini J.

Heard: 20th November 2012

Delivered: 28th February 2013

Application proceedings – applicant seeking setting aside of “Deed of Settlement” on basis of undue influence – factors to be considered – negotiations leading to deed whether to be taken into account.

Summary: The applicant seeks for an order setting aside a deed of settlement entered between herself and the respondent on the basis of undue influence. The respondent is opposed to the orders sought by applicant on the grounds that applicant has benefited from the deed by virtue of respondent performing part of his obligation under the agreement.

[1] The applicant and respondent co-habited together as lovers since 2004. In 2006 and 2008 two children were born out of their love relationship. While living together, they amassed a number of businesses where they are the only shareholders and directors.

[2] It appears that the relationship deteriorated around early 2011 and as a result respondent moved out of their common home. Respondent is presently in love with the biological sister of applicant.

[3] Three application proceedings were lodged in this court following the breakdown in their relationship. These are mainly case numbers 1438/2011, 1300/2011 and 1656/2011. In the height of these matters, the parties decided to conclude a deed of settlement. Issues in the three applications were incorporated and resolved in the deed signed on the 8th October 2011. These applications were by consent of both parties consolidated to the present case number.

[4] The question for determination is whether the deed of settlement is *void ab initio* by reason of undue influence on the part of respondent or illegality.

[5] Applicant contends that when she signed the deed of settlement she was under severe “*emotional and mental*” depression following respondent’s conduct of falling in love with her biological sister, locking her into a shop so as to dispossess her of an X-trail Nissan motor vehicle, with the said biological sister driving away the said motor vehicle, and that as respondent unilaterally controlled all the business accounts, she was without any finances and destitute with her children. She could not afford defending the number of law suits by respondent against herself as she was financially unstable. Applicant then concludes at pages 7-8 of the founding affidavit

“10. At about the same time, respondent was now too pressuring me to sign a document styled “deed of settlement” which, at such time he had promised would be the only means by which he would put food on our table and provide us with electricity and water. Notwithstanding everything he had put me through. I was emotionally, spiritually, psychologically and financially drained. I and my children were also physically hungry and needed food to eat. Much against my will and without even paying attention to detail, I appended my signature to the said deed. A copy of the said “deed of settlement” is herein attached and marked “CJ1”

10.1 As I have stated and demonstrated above, the respondent exercised his influence (financial, emotional and otherwise) over me. This influence exercised by respondent over me weakened my powers of resistance and made my will pliable. I was just not in any position to say no and let my children starve to

death. The respondent as shown above, exercised this influence over me in an unscrupulous manner;

- a) I learnt that the agreement I had signed actually allowed him to kick me out of our “matrimonial home”;*
- b) The agreement further allowed him to take custody over our children; and*
- c) Further that he keep most of the assets we had together amassed over the years living together as “husband and wife” and a business partners.*

10.2 I wish to state too, in clear and none-ambiguous terms, that all things being equal, I would not, with normal free will, have concluded such an agreement; I would not inter alia and for example;

- a) I would not sign a document which throws me out of a house I call my home and which house is strictu sensu, owned by a company in which I am 80% share holder.*
- b) I would further not sign a document in which I relinquish the custody of my children to the respondent to have him take them to live with my biological sister (Carol). To date the respondent and my biological sister live as husband and wife. This form of moral degeneration exhibited by the respondent and*

my sister (Carol) would certainly not be in the best interest and proper upbringing of my minor children.

10.3 *My mind did not have its normal measure of freedom. I was heavily suffering from depression and abuse at the hands of the respondent. The respondent's influence, given our relationship, its history and its effects upon me and my children weakened my resistance and made my will pliable. The respondent, having brought his influence to bear in an unprincipled manner, in order to prevail upon me to sin the "deed of settlement", cannot be allowed to benefit from his improper and unlawful conduct. I would not have agreed to such agreement had I been able to exercise my will normally freely.*

11. *The agreement is unlawful on a number of other legal aspects.*

a) *The agreement seeks to bind certain other companies Siyanda tool and Hardware (Pty) Ltd and Spoil Me (Pty) Ltd. I have never had any authority, express or implied, to bind the said companies in the said manner or to enter into the said agreement on their behalf. The agreement is therefore further invalid even in so far as it relates to them;*

b) *The agreement further purports to award custody of minor children, born out of wedlock to the respondent,*

without the involvement and sanction of the above court and attendant Social Welfare Office.

12. *I do therefore humbly state that, and from the above, there is abundant justification for the court to declare the purported deed of settlement as unlawful and void ab initio or to simply set it aside on the grounds of undue influence.”*

[6] In *au contraire*, respondent admits the relationship with applicant’s sister as appears at page 41 paragraph 8.9:

“My love relationship with Carol grew up from circumstances where both of us were tormented and brought together by our partners who deviously cahooted together to threaten our lives as they concluded that we had to be taught a lesson as we were accused of having an affair. As fate would have it “misery brought us together”. We actually started having love relationship around June 2011.”

[7] He further controverts applicant’s averments on his financial status at page 43 paragraph 9.2:

“11.2 The applicant is painting a false picture to the Honourable Court. She pretends as if she had no money at all and that I did not buy any food for the children. On a weekly basis I would buy food for the children to which she also denied or refused me to gain access to see them but she was insisting that I give her money to which I refused because she was still employed at Siyanda Tools and Hardware and earned a salary of about E6,000 per month.”

[8] On the question of pending legal actions against applicant he contends at page 44 paragraph 12:

“12.4 The applicant’s letter of reply brought some hope that we were going to settle our disputes amicably. I then offered her an agreement in respect of the maintenance of the children. We met at my lawyer’s office in June 2011 together with her lawyer where an agreement was reached about the maintenance of the children, but when it was reduced into writing she, all of a sudden, she refused to sign. I refer to a copy of the Deed of Settlement that the applicant refused to sign and I have marked this “FC38”

[9] He then concludes at paragraph 13:

“13.1 The contents of these paragraphs are vehemently denied and the applicant is put to strict proof thereof. I wish to outline briefly the circumstances that led up to the execution of the Deed of Settlement.

13.2 Having filed the various legal proceedings between myself and the applicant and between our various companies the applicant sent me an sms sometime in September 2011 and offered that we settle all our disputes. This was obviously inspired by the fact that lawyers at the time were on a court boycott so our matters could not proceed in court.

13.3 I jumped at the opportunity to negotiate settlement. I instructed my attorney to quickly draft a Deed of Settlement

in accordance with our discussions with the applicant. I wish to refer the court to a computer printout of the smses exchanged between the applicant and I. I have marked these printouts “FC39”

13.4 Upon having drafted the Deed of Settlement, my attorneys emailed the draft deed of settlement to me and I forwarded it to applicant for her final input. She emailed it back on the 5th October 2011 with her comments and input. I annex hereto a copy of the email and comments and I marked it “FC40”

13.5 Having taken into account the comments of the applicant, a final Deed of Settlement was then put together and was executed by myself and the applicant at the house in Coates Valley in the presence of witnesses. I had brought my workshop manger, Mr. Tapfadzwa Mapfeka, to witness the execution and the applicant had brought her friend Khangezile to witness the execution. Needless to point out that these two witnesses also appended their signatures on the Deed signifying that they had witnessed the execution. The agreement was signed without any arguments, disputes, coercion or undue influence.

13.6 I deny the insinuation that the agreement was meant to cheat the applicant. To me the agreement was made to provide the children with the most able future and upbringing. It is not true that I kept most of the assets since I handed over to her my 90 per cent shareholding of Fasa Lusa (Pty) Ltd; I gave her a car owned by my company Diesel Electric; I took over

the massive debts of Siyanda Tools and Hardware and went to the point of agreeing to split furniture and household belongings which I had purchased prior to me even meeting her. The applicant has not lost anything at all. She has been given, on a silver platter, asserts that she never worked for or purchased.”

[10] At paragraphs 15 and 16 states:

“15.1 It has taken the applicant 389 days for her to challenge the agreement and seek to avoid it;

15.2 The applicant has received all the benefits she contracted to receive from the agreement and only now when it is time to perform her part of the obligation does she turn around and say that the agreement is void, without even a tender to restore the benefits that she has derived from the agreement.

15.3 Full legal arguments on these points are going to be advanced by my attorneys at the hearing of this application.

16.1 I humbly urge the Court to note that the applicant’s resistance to my application to make the Deed of Settlement an order of court is mala fide.

16.2 The applicant is currently in occupation of the house which we agreed would be sold and proceeds thereof be paid towards settlement of debts of the company Spoil Me Investments (Pty) Ltd. She is not paying rent for her

occupation of the house. She is not paying rates for the property but I am. She is not paying the insurance premium for the property. I annex hereto proof of payment of insurance premiums and rates marked “FC41” and “FC42” respectively.

16.3 As such her resistance is not costing her anything, hence the more she delays the more she benefits yet I am prejudiced. I seek the Court’s intervention from the applicants wrongful and deplorable conduct.”

[11] In reply applicant *extenso* disputes almost every defence raised by respondent. It is prudent that I recapture her response.

“3.1 It is untrue that I was solely funded by responded in establishing “Spoil Me”. I had duly earned an agents commission, during such time, from sale of respondent’s house at Lugaganeni in the Manzini Region. The respondent had wanted an amount of E800,000-00 (eight hundred thousand Emalangeni) out of the sale and I had been able to sell it for the sum of E850,000-00 (eight hundred and fifty thousand Emalangeni). The commission I made was utilized towards such company’s establishment;

*4.1 The purchase of the house by “**Spoil Me**” was for our establishment as a family unit. The reason advanced by the respondent is untrue;*

4.2 *The source of such funds is in law irrelevant and simply amounted in law to such shareholders capital injection into the company. I deny any such loans referred to. I also wish to state that during such time I owned a house in Pigg's Peak. It didn't make sense for me, as per my discussion with respondent, to retain such house in Pigg's Peak since we had started a life together. We therefore came to the business decision and agreement that I sell the house, which I did, and the profits obtained therein as well were injected by myself as capital into the company and towards the purchase price of the company house;*

4.5 *I also deny that I was lazy and loafing at home at the relevant time. I wish to state that I was gainfully employed at FUNDZA (an NGO - under the Ministry of Education as I was a director there;*

6.3 *...I beg leave to refer to annexure CJ7 attached hereto being a handwritten letter by respondent directed to me and apologizing for assaulting me. I have further caused this letter to be properly typed for the visual benefit of the court and herein attach as well the typed version of the said letter;*

8 (a) *I wish to state that, and obviously during the time when relations were good, the attainment, enjoyment and use of the various assets overlapped between the companies and this was never an issue. I had actually had to trade in my Corsa-Sedan for purchase of an Isuzu Van for the said company. The Isuzu Van was, upon agreement between us, considered*

unsuited for me at such time since I had become pregnant with our first child. I personally chose it and fetched it from Mo-Truck in Manzini and I had driven in it until the respondent despoiled me. I again reiterate the contents of my paragraph 9 in founding;

9. *Contents thereof are denied. By the 11th February 2011, the shop had already been closed. I was not earning the said salary (or any for that matter). The respondent actually was in-charge of the payroll for such company and simply would not have given me any money. I relied on food, at a point in time, donated by the receptionist at my child's school – Stepping Stones. She would buy us food and offer transport for my children since at such time respondent, in concert with my sister, had despoiled me of the motor vehicle I utilized;*

9.1 *I can understand the respondent's confusion regarding the shop (s). Respondent initially spotted me on more than one occasion at a shop at River-stone – Mall belonging to a friend of mine, one Thembumenzi Mamba who I assisted since I was desperate at such time. This was a different shop from "Olala" (opened much later) – it was called "Arise Shoes". Respondent simply assumed it was mine;*

9.1 *I wish to point out that I began "Olala" out of funds sourced from a loan from a sympathetic friend on or about May 2011. I struggled businesswise in meeting financial obligations as a result mostly arising from acts of sabotage by the respondent. He was virtually threatening and intimidating any and*

everyone who sought to assist me. I therefore had to let the shop go and a friend by the name of Miliso Simelane took over it on or about July 2011. I and the said Miliso however did not alter the paperwork regarding the lease and so on and the paperwork relating to it remained in-tact and reflected me. On or about the end of December 2011 or about the early beginning of January 2012, the said Miliso decided she was also unable to continue running the shop and requested me, after reaching certain financial arrangements with her since I was broke, to re-take over the shop since it still reflected me in any case. She also left her entire stock in trade for me not to have to start over from scratch in light of my financial incapacity;

11.2 I wish for the court as well to take into careful consideration that the respondent and his present attorney knew I was represented and had attorney of record. They, however, completely by-passed my attorney, approached me directly and pushed me into a corner to sign the agreement which was presented directly to me. I also could not seek, at such time, my attorney's assistance for I was embarrassed as to the heavy indebtedness that I was towards him, but that still did not exonerate the respondents and his attorney from sending all documents relating to the matter to my attorneys as per their formal appointment as my attorneys of record. They simply took advantage of the said strike and knowing, as per previous verbal threats, of my financial capacity;

11.3 *The respondent has sought to refer the court to certain commentaries I made regarding the agreement. Actually and indeed, a clear reading of the same shows that we were clearly not in agreement with the respondent regarding the said “deed of settlement”. Firstly I was demanding that certain clauses be subject to certain suspensive conditions. It is also apparent there-from that I was not in agreement with the aspect pertaining to the children’s custody. I also therein made it clear I was not willing to vacate the homestead and my reasons were therein perfectly articulated. This document therefore actually supports my application and completely flies in the face of the respondents contentions. The commentaries and the deed of settlement are two diametrically opposed documents in their contents;*

13. *Contents thereof are denied. I have always challenged the agreement from inception by conduct exhibited by myself and through my persistence in challenging the various court actions moved by the respondent pursuant to the alleged document. For instance since signature, I have refused to vacate he house;*

13. *I reiterate that the respondent is merely attempting to get rid of me by virtue of an illegal document. I state that the papers actually justify the granting of the orders prayed for;*

13.1 *These allegations benefits have not been spelt out for me to deal with them specifically. I deny that I have made any gain from the deed of settlement. I find it apposite to explain that my arrangement with the respondent pertaining to “Fasa*

Lusa” was completely unrelated to the deed of settlement sought to be set aside herein. As stated in the documents attached to the respondent’s papers, this was a company for which the respondent really could not have cared any less for. We simply agreed to split it. Respondent took all stock and movable s assets relating to it which included the Corsa Van. This was before the deed of settlement and was independent of it. We then agreed I would only have access to one of the accounts of the company which had E100,000-00 (one hundred thousand) to start over. The said amount is actually very much well accounted for. Actually even in such transaction the respondent literally cheated me, viz the value of the assets and stock he took but that is an issue I do not find relevant for the present application and will not seek to polarize issues by delving into it.

[12] The deed of settlement signed by the parties is in our jurisprudence classified as a compromise. **Eloff R. P. in Blou Bul Boorkontrakteurs v McLaclilan 1991 (4) S. A. 283** expounds as follows on the subject:

“A compromise or transactio is an ordinary agreement whereby the parties settle a dispute which exists between them.”

[13] The learned judge continues to point out:

“Like any other agreement it is governed by the common law principles which are generally applicable to contracts.”

[14] Discussing one of the requisites of a contract **Le Roux J. in Samco Manufacturers v Berger 2000 (3) S. A. 454 at 461:**

“In order to establish a contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact contract on the terms alleged. It must be proved that there was in fact consensus ad idem.”

[15] Holding the same position **Brand A. J. in Afrox Healthcare BPR v Strydom 2002 (6) S. A. 21** at page 26 states:

“Elementary and basic general principle that it is in the public interest that contracts entered into freely and honestly by competent parties should be enforced.”

[16] In *casu*, the applicant informs the court that the compromise between respondent and herself was not “*entered into freely and honestly*” by reason of undue influence.

[17] Respondent has attached in addition to averments contradicting applicant, a correspondence in a form of e-mail between applicant and himself showing in essence that before the agreement was signed, the applicant was given opportunity to read and make her options. She opted to sign the contract.

[18] Applicant’s counsel however raised a formidable objection to the admissibility of the document stating that it was written “*without prejudice*”.

[19] **Roper J. in Millward v Glaser 1950 (3) S. A. 547** at page 554 F–G eloquently stated:

“There is authority for the proposition that negotiations between parties whether oral or written, which are undertaken with a view to settlement of their differences, are privileged from disclosure even though there is no express stipulation that they shall be without prejudice.”

[20] The learned judge cited with approval **Kurtz and Co. v Spence & Sons (1887) 57 L. J. C.H. 238** at 241 where **Kekewitch J.** pointed as follows:

“I shall not attempt to define the words ‘without prejudice’ but what I understand by negotiation without prejudice is this: The plaintiff or defendant – a party litigant may say to his opponent:

“Now you and I are likely to be engaged in severe warfare. If that warfare proceeds, you understand I shall take every advantage of you that the game of war permits; you must expect no mercy, and I shall ask for none; but before bloodshed let us discuss the matter, and let us agree that for the purpose of this discussion we will be more or less frank; we will try to come to terms with and nothing that each of us says shall ever be used against the other so as to interfere with our rights of war, if unfortunately, war results.”(My emphasis)

[21] Similarly **Ludorf J. in Eskom v Rini Town Council 1992 (4) S.A. 96** at **99 H** wrote:

“It is a well established principle that prior negotiations should in the absence of agreement between the parties not be revealed to the court and that evidence therefore is inadmissible. In the present matter the applicant, in my judgment, clearly fell foul of that principle and the respondent was entitled to bring the application to strike out.”

[22] I understand the authorities cited herein to be saying that where the negotiation do not lead to a settlement then the evidence prior to the settlement is inadmissible in court. However, where the negotiations lead to a settlement the evidence that resulted into the settlement is admissible.

[23] In *casu*, the negotiations led to the deed of settlement. To hold therefore that this is privilege information which ought not to be divulged in court is fallacious.

[24] At any rate applicant, has sought to persuade this court to consider circumstance pre- the deed of settlement in order to have it declared null and void. It is therefore not clear as to the reason she objects to the e-mail correspondence as forming part of the evidence. To hold otherwise, the court would be allowing applicant to approbate and reprobate at the same time, a position which is unattainable.

[25] In dealing with the enquiry as to whether the deed of settlement is valid in law, I am cautious of the principle by **Fleming J.** in **Credit Guarantee Insurance Corporation v Schreiner 1987 (3) SA 523 at 526 that:**

“When a contract is concluded in writing, an intention which was conveyed but was not taken up in the document generally becomes

as legally irrelevant to interpretation at least, as a reservatio mentalis.”

[26] I am further alive to the approach as laid down in **Collen v Reitfontein Engineering Works 1948 (1) S. A. 413 (A)** at 428:

“The problem for a court of construction must always be so to balance matters that without violation of essential principle, the dealings of a man may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains.”

[27] It is against the above back-drop that I consider the issue before me. **Amstrong v. Magid and Another 1937 A. D. 260** points.

“It is admitted and it seems clear law that a contract induced by undue influence is on the same footing as a contract induced by a fraudulent misrepresentation.”

[28] On the same subject of undue influence **Fagan J. A. in Preller and Others v. Jordaan 1956 (1) 483** held:

“The grounds of restitutio in integrum in the Roman Dutch Law are wide enough to cover the case where one person obtains an influence over another which weakens the latter’s resistance and makes his will pliable, and where such a person then brings his influence to bear in an unprincipled manner in order to prevail upon the other to agree to a prejudicial transaction which he would not normally have entered into his free will. The words “undue

influence” or such words as ...(improper influence) constitute an altogether suitable name for the ground of action which exists in these circumstances.”

[29] The leaned judge proceeds to hold:

“In determining whether a transaction induced by fraud or undue influence is void or merely voidable the test is whether the person seeking to have it set aside entered into the transaction willfully and knowingly, with intention to bring about the legal consequences which is entailed or not. If so then it is valid transaction until it is declared invalid although it may be voidable at his instance on the ground that he was induced to enter into it in unlawful manner. If, however, it was not his intention to enter into the transaction, then the transaction has no legal consequences.”

[30] This therefore calls for the court to interrogate those circumstances which existed or led to the conclusion of the deed.

[31] I propose to adopt the same approach as in **Credit Guarantee Insurance Corporation, op.cit.**, where the learned judge considered extrinsic facts in order to ascertain the intention of the parties in a contract of surety-ship. This approach had been taken by **Van den Heever J.** in **Oberholzer v Gabriel 1946 OPD 56** at **59** where he stated:

“I feel constrained to say that the rule is deduced from a danger which does not exist, for there are adequate safeguards in the principles governing the admission of extrinsic evidence as to a document, seeing that “matter of deed cannot be controlled by

matter of averment”. But there are two notions which we should not confuse, namely the sufficiency of a demonstration of the subject matter on the one hand and its application to physical phenomena on the other. There never has been and there cannot be a rule to exclude parole evidence on the latter.”

[32] Citing **Wigmore on Evidence** their **Lordships** could not be more precise when they stated on this approach.

“Once freed from the primitive formalities on which views the document as a self-contained and self-operative formula, we can fully appreciate the modern principle that the words of a document are never anything but indicates to extrinsic things, and that therefore all the circumstances must be considered which go to make clear the sense of the words – that is, their association with things.”

[35] I was, during submissions, not urged by any party to refer the matter for trial. Both parties urged the court to adjudicate on the matter based on the papers before it. I agree on this view.

[36] I have already ruled that the e-mail correspondence is admissible. I now turn to consider this document because it will inform the court of applicant’s response towards the deed when it was first presented to her. I must mention however that it is common cause that this deed was drawn by respondent and presented to applicant.

[37] Having had sight of the proposed deed, applicant commented and I quote *verbatim*.

“1. High Court Case 1656/2011

I have no issues with this section especially because as far as we are both concerned the applicant has collected all his personal, family heirloom and other household furniture he requires. This was also done on my suggestion and he together with his driver collected these things on Thursday 11th August and Saturday 13th August 2011. The only things left were his tools which I explained when he left the house on Saturday that he will get when he returns my tyre charger and rifter or pays me for it because he was now selling it under the guise that it belongs to DE when he knows very well that I refunded him E14,400-00 in cash, for the items I bought for my personal use at an auction for the wheel centre in Matsapha in 2007.

2. High Court Case 1438/2011

I did not agree to giving the applicant custody of the children. What I asked him was that he keeps the children until I am able to take care of them financially as he is refusing to pay maintenance. I am unemployed and it is extremely difficult to buy food, pay bills and fuel for trips to and from school. I am also unable to keep a profitable business because any money I make I have to use at home for expenses. What I have agreed to give is temporary custody and this includes when he leaves for USA because he is insisting on taking the children with him.

3. High Court Case 1304/2011

I have no qualms with this section considering that I have always said that the applicant knows very well that I have had peaceful possession of the said Nissan-Trail since the day it was purchased at Motruck in December 2006. Also the applicant bought me a Corsa from Swazi Delta which when we left for USA was traded in for the Isuzu KB currently used by DE. Applicant knows that these cars were all registered in DE name and he knows why but the fact remains he bought me a car and we agreed when we returned from USA that he will buy me a vehicle to replace the Corsa.

4. Spoil Me Investments (Pty) Ltd.

I do not agree with this section of the agreement because I just don't see how as 80% shareholder of this company that owns the said asset, I can remain with 20% of its value of assets? I also will not vacate the house while its put on the market for sale because:

- 1. As explained I am unemployed and have no means to pay rental.*
- 2. I am the major shareholder here and this should be handled by myself the same way applicant has been doing with our companies where he is major shareholder.*
- 3. The sale of the house shall be processed and done by me as major shareholder and naturally the proceeds will be shared as per the percentage stipulated on share certificates.*

4. *This is in line with applicant's advice to me that he is majority shareholder in Siyanda and can therefore do what he want with it when he forced me out and claimed to Labour Department that he is closing down (by the way this company is still operational and according to applicant this money helps him to pay here and there.)*
5. *I am not willing to compromise on this aspect and if the house should eventually be auctioned (as keeps threatening) then so be it.*
6. *Applicant was never appointed as an "agent" for FASA LUSA or any of our companies actually and there is no resolution to that effect (this is all news to me) and I am not aware of any loans as claimed by him in his court summons lodged by Cloete Lawyers. However, for the sake of progress in this fiasco I AGREE to give him his lawful 20% once the house has been sold. I think it is absolutely ridiculous to put it mildly, for the applicant to say he wants over E700,000 owed to him and 20% of the surplus from the proceeds.*
5. *Siyanda Motor Spare (Pty) Ltd.*
Siyanda Motor Spare is a company we started with the applicant in 2008 and I have been managing it since then, while he did the orders, payments and salaries (admin basically) and together we built it up to be what it was (me with finding customers and growing the company and he with admin).

1.1 *Siyanda Tools and Hardware (Pty) Ltd.*

Stock – plus minus E200,000

Fixtures - plus minus E30,000

Total Estimate Value: E230,000.00

1.2 *Siyanda Bosch Car Service (Pty) Ltd.*

Equipment – plus minus E200,000

Signage : E250,000

Fixtures - plus minus E50,000

Goodwill - plus minus E50,000

Total Estimate Value: E550,000.00

1.3 *Plot 28 Manzini City*

Estimated Evaluation Value 2010: E2.6 million

Clearly it is obvious how much this company is worth and applicant is suggesting I should just resign from this company with nothing. This is not practical and will not happen and a buy out is the legal and correct thing to do. It is my understanding that he is offering Fasa Lusa in exchange, so I will wait for a buy out offer from applicant in the form of allowing me to determine the real value of Fasa Lusa so I can be clear what is being offered in exchange.

I am also aware that applicant has formed a new company with the Workshop Manager Siyanda Bosch and will open a workshop in Manzini soon. I also am aware that the idea is to slowly but surely destruct Siyanda Bosch and transfer everything to this new company of theirs (I know this because he has done it before while I was with him for other companies). I feel this is gross prejudice on my part as

shareholder of Siyanda and do have the right to move an application before the local courts for protection of my shareholding.

It should also be noted by the applicant that there is still the issue of the Plot Loan and its connection to DE and Siyanda which I can also move an application with the court for because clearly there was something amiss with that transaction which I as shareholder was not aware of.

6. Fasa Lusa

As explained before to applicant's lawyer, I am willing to take this company because applicant has repeatedly said he doesn't care about it. However, as I said before, it is impossible for me to accept the offer before knowing what the actual value of the company is (it is business and legal practice to do this vital check). It is not because I don't believe or trust what the applicant says (that there is over E100,000 in the company account and stock of which he doesn't know its value) but as a business woman I have recently learnt that issues of trust and a person's word have nothing to do with business practice and sense. There are also still outstanding obligations with the Government which applicant never bothered to pay and as I explained before he needs to show proof of these payments before I take over this business. I will also need proof of the money he says is in the bank. This is not outside of a normal request and it is the same thing he would do.

I also since discovered that the said 10% share holding which applicant gave to me as a gift, was initially given to one Anabela

Colasuonno who the forms show as “resigned”. Anabela is applicant’s ex-wife and I am aware that they are now on “friendly” terms, so I need a written assurance that she will not institute any legal proceedings towards the company and or me as the new owner, concerning her shareholding. (Applicant knows the story behind this).

I would also need to see it in writing that on signature of this agreement applicant will withdraw all his matters before the court.

CONCLUSION

Applicant already owns another company (DE) worth well over E2 million and even if he loses money right now due to this “divorce” he can recover quickly unlike me. To prove this while I was struggling to pay my household bills and buy food for me and the children, he was away on holiday in USA with his partner for the whole month of September. It would therefore be folly of me to agree to the offered settlement which basically gives applicant everything including my children, dignity and pride, but for the sake of progress I have time and again agreed to many things and he has not agreed to even one thing suggested by me. Applicant is to also please note that this is my final offer out of court settlement, as explained to him time and again I would like to move on with my life as there are many opportunities waiting and cannot do so with this mess hanging over my head. Should all this fail once more, then I will proceed with testing the constitution and move for legal recourse as “common law wife” of applicant, which will be a long process but if that is what he prefers then so be it.”

[38]

I consider the totality of the following as having undue influence upon the applicant:

- That as admitted by respondent at paragraph 8.9 of answering affidavit (although I note that at paragraph 8.2, respondent first denies any relation with applicant's biological sister) the love relationship with applicant's own biological sister is capable of clouding applicant's mental faculties
- The act of sending the deed direct to the applicant whereas as the circumstances of the case show that applicant was represented by a lawyer;
- Applicant was on respondent's showing not employed and yet had two children to maintain.
- The letter where respondent admits assaulting applicant concludes:

“Take care of yourself and the children, it will be very painful for me to watch them grow up as Swazis (liars and thieves and beggars), it seems they already are – good luck with your shoe store, hopefully I will give you what you were looking for in life and please make me your first customer I need a pair of shoes.”

is indicative that applicant was left without any form of financial support together with the children and further demonstrates verbal assault which no wonder is certified by Dr. W. Marimira as appears

at page 20 of the book of pleadings where applicant was admitted for depression: At any rate at paragraph 11.2 respondent admits to refusing to give applicant any money and states the reason for such as that applicant was employed at Siyanda Tools & Hardware, an averment applicant denies.

- The fact that lawyers at that time were in a boycott as averred to by respondent himself at his paragraph 13.2 cited above where he states that applicant in signing the deed of surety was influenced by the fact that lawyers were at that time on a boycott.

[39] I consider further the following as having unduly influenced applicant in signing the none amended deed despite the comments in her email correspondence:

- I accept the evidence by applicant that the respondent has not fulfilled his part of the bargain as per the deed but anything pointing towards such was done before the deed except the taking of the children. This was in pursuant to applicant's wish to hand over custody on temporal measure until applicant was financially sound.
- It has not been allege by respondent that following the comments by applicant in her e-mail correspondence, there was any consideration by either party to amend the proposed deed of settlement.
- The total reading of the email correspondence by applicant indicates that applicant wanted amendments which were not adhered to. These are the very same amendments applicant is seeking to have the deed set aside as they were not included.

[40] It is my considered view that the totality of the above unduly influenced applicant to sign the deed of settlement without the amendments indicated in her e-mail correspondence.

[41] For the foregoing, I make the following orders:

1. The applicant's application succeeds.
2. The deed of settlement entered into on 8th October 2012 is hereby set aside.
3. Costs to follow the event.

M. DLAMINI
JUDGE

For Applicant : Mr. T. Ndlovu
For Respondent : Mr. N. Nkomonde