IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Appeal Case No. 78/2014

In the matter between:

IVEANAH JOHNSTON **Appellant**

And

MARLIN CHRISTOPHER JOHNSTON **First Respondent**

MAGAGULA HLOPHE ATTORNEYS **Second Respondent**

Neutral citation: Iveanah Johnston v Marlin Christopher Johnston & Magagula Hlophe Attorneys *(78/2015)* [2015] *SZSC 07 (29 July 2015)*

Coram: **M.J. DLAMINI AJA, R. CLOETE AJA and S. NKOSI AJA**

Heard: **16 July 2015**

Delivered: **29 July 2015**

Summary: *Civil Law – Requirements for final Interdict – Circumstances under which oral evidence can be led to interpret a contract.*

JUDGMENT

CLOETE AJA

PRELIMINARY

[1] By consent and with leave of this Court, the appeals in matters 78/2014 and 20/2015 were consolidated and heard together.

[2] Before commencement of hearing of the matter, Mr Mamba, the Attorney acting for First Respondent correctly advised the Court that after the Judgments in both matters referred to in [1] above, a sum of E500,000.00 was transferred to his Trust Account by the Second Respondent who retained a balance in the sum of E76,000.00.

[3] Mr Mamba, quite properly, gave an undertaking to the Court and to the Appellant that he would retain the funds in his Trust Account pending the finalisation of the subject matter of these Appeals.

UNDISPUTED BACKGROUND FACTS

[4] The majority of the facts relating to the parties, their marriage, their divorce and other personal matters are set out in the pleadings in both cases being 1525/2014 (Appeal 78/2014) and 1766/2014 (Appeal 20/2015) and appear in the Record of Appeal in 78/2014 which is the appeal which was to be argued before this Court.

[5] The parties were married to each other in community of property and as a result of problems in the marriage which need not be aired here, the Appellant brought an Application in Case No. 1802/06 and on 16 March 2007 the High Court granted an Order including an interdict relating to the property being an asset of the joint estate (the Property) and including the following specific Order which appears at page 26 of the Record:

"4. **That the First Respondent be ordered and directed to pay the Applicant maintenance for the benefit of the Applicant and the family in the sum of E12,000.00 per month which sum may be paid from the family business called Stiltek (Pty) Limited or such other estate assets as are in the First Respondent's control. Payment of the maintenance shall be with immediate effect and shall be made at the office of the Applicant's Attorneys namely; Masina Mazibuko and Company, Office NO. 10, President Place, Meintjies Street, P. O. Box 592, Manzini."**

[6] Appellant, as appears at page 56 of the Record, stated that she did not wish to administer the property concerned and an accountant, Mr. Zacharia Mkhonta, was subsequently appointed to do so. (There is a purported

acceptance by Mr Mkhonta but it is not clear from the papers from which date he was appointed into the position of Administrator).

[7] Divorce proceedings were initially instituted in the Courts of Swaziland (no known case number and no details before the Court) but these proceedings were withdrawn or abandoned at some point unknown to the Court.

[8] The Respondent then instituted proceedings against the Appellant in the North Gauteng High Court under Case No. 47672/2007 and it is clear from the papers before the Court that such action was defended by the Appellant and that she in fact filed a Plea and Counterclaim as appears on the Settlement Agreement referred to at page 61 of the Record.

[9] The parties entered into the Settlement Agreement which appears at page 61 of the Record and read as follows:

SETTLEMENT AGREEMENT

WHEREAS **the Plaintiff Instituted action against the Defendant in the above Honourable Court for a decree of divorce and**

further ancillary relief which action the defendant and filed a Plea and Counterclaim;

AND WHEREAS the parties confirm that the marriage relationship existing between the parties has irretrievable broken down and that no reasonable prospect exists for the continuation of a normal marriage relationship;

AND WHEREAS the parties are desirous of settling the abovementioned action on certain terms and conditions, subject to the approved of the above Honourable Court, and subject to the specific conditions that the Plaintiff shall proceed to produce a final decree of divorce, with the incorporation of this Agreement, on a uncontested basis, in which event the Defendant undertakes to withdraw her defence and Counterclaim;

NOW, THEREFORE, THESE PRESENTS WITNESSETH:

1. **MAINTENANCE BETWEEN THE PARTIES**

The parties abandon all claims regarding maintenance against each other *in toto*.

2. **DIVISION OF THE JOINT ESTATE**

With regard to the patrimonial consequences arising out of the marriage in community of property, the following shall apply:

2.1 The parties hereby appoint ALAN JORDAAN of PRETORIA

liquidator of the joint estate of the parties with the powers and obligations as more fully set out in Annexure "A" hereto.

3. **COSTS**

Both parties taxed party and party costs of the action and interlocutory application shall be regarded as a liability of the joint estate of the parties and shall be payable by the liquidator prior to the division of the joint estate.

4. **SETTLEMENT OF ALL CLAIMS**

On signature of this agreement, save as aforesaid, neither party shall have any further claims against the other of whatever nature whatsoever.

[10] An Order of divorce was granted by that Court and a liquidator in the form of Mr Alan Jordaan was appointed to act in that capacity and one of his reports appears at page 64 of the Record.

[11] The Property referred to previously was subsequently sold at a price agreed upon between the liquidator, the Appellant and the Respondent and the liquidator set about distributing the liquidated Estate (the Court acknowledges that the Appellant alleges that the liquidator did not diligently carry out his functions but for present purposes nothing turns on that even though it was suggested in papers before the Court that the actions of the liquidator should be taken on review).

[12] It came to the attention of the Appellant that the liquidator had left a sum of money in the Trust Account of the Second Respondent and it came to the Appellant's notice that a distribution of those funds was imminent.

[13] The Appellant accordingly launched urgent *ex-parte* motion proceedings before the Court *a quo* under Case No. 1525/2014 in terms of which she sought an Order in terms including the following which appear at pages 3 and 4 of the Record:

> **"3. Pending finalisation of this Application by the Applicant, that a *rule nisi* does issue returnable on a date and time to be determined by the above Honourable Court in the following terms:**
>
> **3.1 That the Second Respondent be interdicted from making any payments or otherwise releasing any sums of held by them in Trust, not exceeding E576,000.00, on behalf of the First Respondent.**
>
> **3.2 That upon finalization of this Application the Second Respondent be ordered to pay the aforesaid sums but not exceeding E576,000.00 to J M Currie Attorneys on behalf of the Applicant, to the following account.** [The account number set out]
>
> **3.3 That the Order prayed for be served on both Respondents together with this Application.**

3.4 That leave be granted to serve the Order prayed for on the First Respondent by way of substituted service by way of publication in the Times of Swaziland newspaper.

4. That the Orders in 3.1, 3.3 and 3.4 above operate with immediate effect pending the return date herein.

5. That the Respondent show cause on a date to be determined by this above Honourable Court as to why the above *rule nisi* should not be confirmed."

[14] The Appellant's founding affidavit appears at Page 6 of the Record and in essence she stated that in terms of the Order in Case No. 1802/06, she was entitled to maintenance at the rate of E12,000.00 per month and that as at the date of bringing the application the balance due was E576,000.00.

[15] At page 11 of the Record she alleged that she had a *prima facie* and accordingly clear right to monies which accrued to her in terms of the said Order.

[16] That relating to apprehensions of irreparable harm, she stated that all the known assets of the estate had been distributed save for the amount held by the Second Respondent and if the Second Respondent distributed the funds to the Respondent she would have no prospects of ever being paid her arrear maintenance and that the First Respondent had shown intent to prejudice her.

[17] She further stated that the balance of convenience exists in favour of interim relief and she further stated that she had no other satisfactory remedy.

[18] The Court *a quo* on 27 October 2015 issued an Order in the terms prayed for by her in the *ex-parte* application and the *rule nisi* was returnable on 15 November 2014.

[19] The Respondent filed an opposing affidavit which appears at page 34 of the Record and which *inter alia* includes the following (we quote only the salient allegations):

"4. On the 01st March, 2011 the marriage between the parties was dissolved by an Order of the High Court of South Africa (North

Gauteng). A copy of such Order is annexed hereto marked " MJ1".

5. In terms of Order number 2 of " MJ1" the agreement entered into between myself and the Applicant was made an Order of Court. The agreement is annexed hereto and marked " MJ2".

6. In terms of Clause 1 of "MJ2" the Applicant abandoned all claims regarding maintenance against me and I did the same against her.

11. In terms of that Order, I was ordered to pay the sum of E12,000.00 per month which sum was to be paid "…*from the family business called Stiltek (Pty) Limited or such other estate assets as are in the First Respondent's control*".

12. The main asset in the joint estate was the property referred to in paragraph 6.1 of the founding affidavit: Portion 29 (a Portion of Portion 22) of Farm No. 51.

13. Following the Order, the Applicant collected all rents that were receivable in respect of the property but did not account to me or provide me with a monthly report of monies collected and disbursements made in terms of 2 (a) of the Order.

14. As appears from the report of the liquidator, the Applicant at times failed to service the mortgage bonds and utilized the rentals for herself. The report is hereto annexed and marked "MJ3".

15. I therefore pray that it may please the Court to dismiss the application with costs on a scale as between attorney and own client."

[20] The Appellant replied as follows (we quote only the salient allegations):

"3. I deny that I abandoned the Judgment granted in my favour by this Honourable Court on 16 March 2007 ("the Maintenance Judgment") **in terms of which the First Respondent was ordered to pay to me the sum of E12,000.00 per month.**

7. Whilst it is true that the divorce proceedings were settled, they were settled on the basis that the task of effecting the actual division of the joint Estate post-divorce and the making of necessary adjustments between the parties to provide for payment of debts between husband and wife fell to the Liquidator. The Liquidator was under a duty not only to realize the assets, but also to make the necessary debit and credit

adjustments between First Respondent and me before finally calculating the respective amounts to be paid to each party.

10. Although I intended to and agree not to pursue any claim to future maintenance after the divorce, I did not abandon the Maintenance Judgment.

11. I made it clear to the Liquidator from the outset that I require payment of the Judgment debt still owing to me. I also made it clear to the attorney representing me in South Africa on a *pro bono,* basis, Mr Martin Dean-Hayward. The fact finds corroboration in the Liquidator's report in "MJ2" in my handwritten notes attached to same which read as follows: [not necessary to quote the full note as the Court has already acknowledged above that the Appellant was at odds with the liquidator].

15. As a result of First Respondent's failure to comply with the Maintenance Judgment, I have suffered financially, in that I was deprived of my right to receive the sum of E12,000.00 every month.

20.1 It is in particular denied that I was under an obligation to account to the First Respondent otherwise than was done by Mr

Mkhonta with whom the First Respondent is well-acquainted. When I was appointed in terms of the Court Order to administer the Property of the Joint Estate I decided that I did not want to administer the Property of the Joint Estate. I approached the Court under the same Case No. 1802/2006 and Mr Zachariah Mkhonta was appointed. Within the time constraints available I have not been able to locate a copy of the Order appointing Mr Mkhonta but attached hereto as Annexure "IJ3" is a copy of the Notice of Acceptance. It is evident from this that the First Respondent was cited in the Application and was aware of the appointment who then administered the collection and distribution of the rentals of our erstwhile joint property as per the report of the Liquidator.

24.1 There is an existing Order of Court of the above Honourable Court (namely the Maintenance Judgment) with which First Respondent refuses to comply.

36.2 A Judgment is not merely a claim. What the words in the Agreement mean is that neither party will seek any further or additional order for maintenance from the other from now on."

[21] The Court *a quo* per Mamba J handed down his judgement, which appears on page 77 of the Record, on 15 December 2014 in which he set out the facts by reference to all the salient facts.

[22] In addition he dealt with the law relating to interdicts by reference to numerous decisions referred to at page 83 of the Record.

[23] He dealt with the first of two points in *limine* by dismissing the allegations relating to any suggestion that the Appellant withheld any information from the Court. As regards the second objection, he found that the Appellant denied receiving maintenance from the Respondent and went on to state at paragraph 12 of the judgment at page 85 of the Record that **"She has not disclosed or revealed her role in the operations of the business in question. However, her overall assertion on this issue is that whatever benefits she might have received from this business were not in respect of maintenance or in compliance with the Court Order of 16 March 2007. There is clearly a dispute on this issue, between her and the First Respondent who has referred to the report of the liquidator in support of his assertion that the Applicant was drawing money for maintenance from the business."**

[24] At 13 of the judgment he further stated that **"In view of the above dispute – which is one of fact – I do not think that she should be unsuited herein – before that dispute of fact on whether she received maintenance or not from the family business – is resolved".**

[25] At paragraph 14 on page 86 of the Record he further states, **"There is clearly a sharp disagreement between the Applicant and the First Respondent pertaining to the terms of the Deed of Settlement and in particular the two clauses quoted above. Ultimately, I think, oral evidence may be necessary from the parties to shed light on what they intended to agree or not agree on in that document. I do not think that that document or agreement may be read and understood simply based on its literal wording as embodied in it. To do so may, I venture to suggest, cause an injustice to what the parties actually intended to convey or covenant. To interpret the document as it stands may be similar to interpreting a still photograph".**

[26] At paragraph 15 on page 86 of the Record he further states, **"Plainly therefore, the above disputes of fact which are irresoluble on the papers before me, have a direct bearing on whether or not the Applicant is**

owed any maintenance by the First Respondent and consequently whether or not the Applicant has a right at all to the monies held by the Second Respondent or indeed any money or monies owned by the First Respondent".

[27] At paragraph 16 on page 86 of the Record he further states, **"It is not insignificant to note that, if the Applicant is to be believed that she has not received any maintenance from the First Respondent as per the Court Order, she has waited for over seven years to assert her rights on that issue. I need not, however, resolve that issue in this Application".**

[28] At paragraph 17 on page 87 of the Record he further states, **"This Court is alive to the fact that the mere contestation of the Applicant's right herein is not of itself a ground for the rejection of her application. However, the disputes of fact are such that it would be grossly unfair or iniquitous to the First Respondent to confirm the interim interdict based on this highly contentious and seriously doubtful and questionable claim or right. (*Vide Setlegelo v Setlogelo 1914 AD)*** (and the

other authorities referred to on page 87 of the Record) **The Applicant has thus failed to establish a *prima facie* right herein".**

[29] Accordingly the Court *a quo* discharged the *rule nisi* with costs and it is accordingly that judgment which is being appealed against by the Appellant.

ARGUMENT BY MR FLYNN ON BEHALF OF THE APPELLANT

[30] Mr Flynn filed extensive Heads of Arguments which in the main dealt with factual issues and the main thrust of the Appellants case is as below.

[31] That the Maintenance Judgment in Case No. 1802/06 has never been abandoned and accordingly the sum of E576,000.00 is a judgment Debt which remains owing. It was alleged that a judgment has to be formally abandoned but he later conceded that a judgment could be obtained and not be acted upon.

[32] That there was no dispute of any fact as found by the Court *a quo* and specifically denied that the Court had the right to interpret the Agreement in

any other way but as proposed by the Appellant and as such there was no need for oral evidence.

[33] That there was no ambiguity of any nature in the wording of the Settlement Agreement which at clause 1 thereof reads

"1. <u>MAINTENANCE BETWEEN THE PARTIES</u>.

The parties abandon all claims regarding maintenance against each other in toto.

In the interpretation of the Settlement Agreement concerned the wording of the Agreement was crystal clear and related only to the matters relevant to the South Gauteng High Court matter in Case NO. 47672/2007 and could not be interpreted in any other way as to specifically exclude the reference to the maintenance Order in Swaziland Case No. 1802/06. Regarding the interpretation of the Settlement Agreement he specifically referred the Court to The Law of Contract by R H Christie between pages 233 and 248 and he specifically referred the Court to the matter of **Coopers & Lybrand v. Bryant 1995 3 SA 761 (A)** as being the authority relating to the so called "golden rule" of interpretation and he further relied on the matter of **Delmas Milling Company Limited v. Du Plessis 1955 3 SA 447 (A)** which he relied on.

[34] He dealt in some detail with the responses of the Respondent and stated that the Respondent did not deny the existence of the judgment in Case No. 1802/06.

[35] Stated that the word “claim” in clause 1 of the Settlement Agreement could not conceivably also include a judgment which was already *res judicata*.

[36] Confirmed that the Appellants case stood or fell on the interpretation of the Settlement Agreement.

ARGUMENT BY MR MAMBA ON BEHALF OF THE RESPONDENT

[37] Mr Mamba also filed extensive Heads of Arguments and indicated that he would not need to elaborate too much on his Heads.

[38] That the words “claim” and “judgment” are not mutually exclusive and a claim can be based on a judgment as in for example a claim in terms of the Insolvency Act which could include a judgment.

[39] That the meaning of clause 1 of the Settlement Agreement meant that neither party would have any claims of any nature against each other but not to the exclusion of the Swaziland judgment.

[40] That it was inconceivable that the Appellant would have agreed to the settlement of the South African matter without specifically dealing with the Swaziland Maintenance Order.

[41] That there were various issues which were clearly in dispute between the parties as correctly pointed out by the Court *a quo* and that the Appellant must have been aware of existence of disputes of facts and by way of example referred to page 18 of the Record where the Appellant must have been aware of the existence of the Agreement and the provisions thereof and at pages 45 and 46 of the Record where she must have been aware of the Liquidators report and the assertion of the First Respondent that the Appellant had used monies from the family business for maintenance issues as confirmed in the report by Mr Mkhonta.

[42] That there was clearly a dispute as to the meaning of the provisions of the Settlement Agreement and that the Appellant sought, for the first time in a replying affidavit, to give an interpretation as to the meaning of the clear words in the Agreement of Settlement and that her founding papers make no reference to such interpretation.

[43] He referred the Court to the decision of Stellenbosch Farmers' Winery Limited v. Stallenvale Winery (Pty) Limited 1957 (4) SA 234 C at 235 E-G where it was said that, **"where there is a dispute as to the facts a final interdict should only be granted in Notice of Motion proceedings if the facts as stated by the Respondents together with the admitted facts in the Applicant's Affidavits justify such an Order…"**

[44] Accordingly that the Appellant had not established a clear right and that such establishment is the most fundamental of all the requisites for a granting of a final interdict. **See Maziya v Ndzimandze (02/2012) [2012] SZSC 23 (31 May 2012)**

[45] That the Appellant had a clear alternative right and her attempt to deal with the requirements appears at page 12 of the Record where she says that she is advised that she has no other satisfactory remedy and there no explanation as to why a Writ could not be issued.

FINDINGS OF THE COURT

[46] In the view of this Court, the disputes of facts as referred to by the Court *a quo* are real and not just perceived. Those are the issues relating to the possible amount of maintenance received or not as the case may be from the rentals of the Property as referred to by Mkhonta as contained in the report of the Liquidator at page 68 of the Record where he says;

Mr Mkhonta confirmed that it was his mandate to collect the rentals and from there to firstly pay the loan and rates and taxes. He however concedes that the real reason that the loans and rates and taxes fell into arreas was that Mr Johnston used to regularly ask for advances before payment of the bond and rates and taxes due to the fact that she had other obligations to fulfil. The best example that Mr Mkhonta could use was the relatively high expenses Mrs Johnston had to draw from time to time for the upkeep and schooling of her son outside the borders of Swaziland.

[47] It cannot be said that the interpretation of the Settlement Agreement is unambiguous and for example the reference to the Appellant's Plea and Counterclaim in the preamble of the Settlement Agreement are not before the Court and further that clause 1 of the Settlement Agreement can only mean a claim for maintenance post-divorce and that the word "claim" could not possibly include a judgment.

[48] Mr Flynn, as above, referred the Court to the matter of **Coopers & Lybrand** as setting out the "golden rule" but with respect it is clear that as set out on page 234 of **Christie** the Court in fact found that **"the correct approach to the Application of the golden rule of interpretation, after having ascertained the literal meaning of the word or phrase is, broadly speaking, to have regard:**

(1) [Not relevant here]

(2) [Not relevant here]

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which

they acted on the document, save direct evidence of their own intentions. (our paraphrasing)

[49] Mr Flynn further referred the Court to the matter of **Delmas Milling**, referred to above and there too at page 245 of **Christi**e the following quotes appear from that judgment;

"If the difficulty cannot be cleared up with sufficient certainty by studying the language, recourse may be had to 'surrounding circumstances', i.e. matters that were probably present to the minds of the parties when they contracted (but not actual negotiations and similar statements). It is commonly said that the Court is entitled to be informed of all such circumstances in all cases….."

And further on

"The usual examples of such true ambiguity come from testamentary documents, but examples are conceivable in the case of contract. In these cases, which will naturally be much rarer then those of uncertainty, recourse may be had to what passed between the parties on the subject of the contract. One must use outside evidence as conservatively as possible but one must use it if it is necessary to reach what seems to be sufficient degree of certainty as to the right meaning"

[50] The matter cannot be resolved on the papers before the Court and the Court *a quo* was accordingly correct in its findings that under those circumstances no clear right had been established.

[51] As regards costs Mr Flynn asked for costs to include costs of Counsel in terms of Rule 68 and Mr Mamba applied for costs on the Attorney and own client scale.

[52] Accordingly in appeal 78/2014 the following Order is made;

a) The undertaking by Attorney Mamba that the funds in his possession will not be disbursed pending the outcome of the matters being subject to the appeal in Case No. 78/2014 (and insofar as the appeal in Case No. 20/2015 is concerned, insofar as is relevant) is made an Order.

b) The appeal in Case No. 78/2004 accordingly fails.

c) The matter is referred to the Court a quo to hear oral or such other evidence as it may deem necessary on all matters in dispute between the parties including but not limited to the interpretation of the Consent Order (referred to as the Settlement Agreement in this judgment) in

Case No. 47672/2007, the sums, if any appropriated by the Appellant from the proceeds of the rental of the Property in *lieu* of maintenance.

d) The costs of this appeal to be costs in cause in the Court *a quo*.

[53] As regards the appeal in Case No. 20/2015 we find that in the light of the undertaking by Mamba as above and in the light of the decision in appeal 78/2014, the appeal in this matter has been overtaken by events and we do not deem it necessary to deal with this appeal and accordingly no Order is made on the appeal itself and no Order is made as to costs.

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CLOETE AJA

I agree _____

DLAMINI AJA

I agree _____

NKOSI AJA

For the Appellant	**:**	Mr P. Flynn
For the Respondents	**:**	Mr L. Mamba