

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Date: 28/08/2008
Case No: 313/2007

REPORTABLE

In the matter between:

CRAIG ANDREW HANEKOM

Applicant

And

SHAN JENEA HANEKOM

Respondent

JUDGMENT

WEBSTER J

1. On 15 March, 2006, this Court granted a decree of divorce terminating the marriage of the parties. A written settlement agreement concluded and signed by the Applicant on 09/12/2004 and by the Respondent on 22/12/2004 was made an order of court.
2. The applicant seeks an order compelling the Respondent to comply with two terms of the settlement agreement which are part of the court order. The respondent resists the application on the basis that (1) the settlement agreement is the subject of a dispute and of an intended application for leave to appeal; (2) the applicant has repudiated the settlement agreement which repudiation has been accepted by her and that pursuant to her acceptance of such repudiation by the applicant the settlement agreement has been cancelled. It is common cause between the parties that the respondent has not moved her application

for leave to appeal.

3. The redress sought by the applicant arises from two paragraphs in the 'incorporated court order' which reads as follows:

"5.2 The Plaintiff shall retain the motor vehicle in her possession as her sole and exclusive property. The Defendant shall register the vehicle in the Plaintiff's name at his cost within 30 (THIRTY) days of the granting of a divorce order.

5.3 The Defendant shall, by the 31st January 2005, pay to the Plaintiff the sum of R115 000.00 as compensation for her half share in the property in Richard's Bay owned by the parties jointly. The Plaintiff undertakes to sign all documents to affect (sic) transfer of her half share of the property to the Defendant which transfer shall be done at the cost of the Defendant."

4. The applicant avers in his founding affidavit that "both these transfers require the assistance and active participation of the respondent which assistance she refuses to give".
5. The respondent's answer to this reads as follows: "Save that the written agreement of settlement is the subject of dispute and of an intended

application for leave to appeal, particulars of which appear more fully hereunder, this paragraph is admitted".

6. The "... particulars ... which appear more fully hereunder ..." are
 - 6.1 that the applicant, whilst obliged to submit the documents necessary to effect transfer of ownership of the motor vehicle to the respondent after he has collected the motor vehicle from her, taken it for a roadworthy test and obtained the necessary certificate of roadworthiness for her, he has failed to do so; and
 - 6.2 that the transfer of the property cannot be registered because the balance owing on the mortgage bond must first be settled and the conveyancer's fees for the cancellation of the mortgage bond must first be paid by the applicant before "... the holder of the first mortgage bond against the property..." may grant the necessary consent to cancel the bond. She avers that the applicant has not done any of the aforesaid and that the necessary transfer cannot be registered.
 - 6.3 The applicant's reply to this is that (i) he stands by the contents of his affidavit; and (ii) that as way back as 26 September, 2006, the respondent, through her attorney, indicated that she had no intention of complying with the terms of the court order. In this regard he relies on a letter of 26/09/2006 from the respondent's

attorneys. That letter reads as follows:

"PER TELEFAX

Fax: No.: (013) 656 5977

ERASMUS, FERREIRA & ACKERMANN

WITBANK

Dear Sirs

S J / C A HANEKOM

1. I refer to the above matter-.
2. I have at long last received the transcript of the judgment and counsel has been briefed on advice and to prepare documents in accordance therewith.
3. Your client has not performed, purported to perform or attempted to perform, partially or in full or at all, in terms of the agreement of settlement (as ordered by the High Court). Your client's failure to do so is with the intention to repudiate the agreement of settlement, and his repudiation thereof is hereby accepted by my client subject to

all her claims and rights.

4. The contents hereof are not intended to be, and are not, a novation or waiver of any of my client's rights.

5. Kindly acknowledge receipt hereof."

7. The respondent also filed a "Conditional Counter Application" which "...is conditional upon the above Honourable Court not postponing the applicant's application pending the hearing of applications for leave to appeal and condonation for the late delivery thereof, and if successful the appeal, and if not successful the further relief which will be sought by me on the advice of my legal representatives". In view of the decision to which I have come it is unnecessary to deal with the "Conditional Counter Application".

8. It is clear from the applicant's attitude, or perhaps more forthrightly and appropriately, that of the person advising her, that she has no intention of bringing finality to a marriage that had broken down before 15 March, 2006, despite an order of divorce.

9. Before the Settlement Agreement was made an order of Court it was a document recording the terms and conditions of the settlement of the matrimonial matters of the applicant and the respondent. The parties

were entitled to delete, revisit, alter or amend anything on the document by consent. They could, if one or both of them sought to resile from it, do so with the legal consequences that would follow upon that act. Once, however, this Court made the order "That the settlement agreement in Exh A from pages 13 to 21 (excluding page 14), between the parties filed of record be and is hereby made an order of this Court" neither of the parties could resile from, or repudiate anything on the document for it was then a Court Order. Until such time as an appropriate court order so directs or orders neither of the parties can "repudiate" anything in the order with impunity for such "repudiation" constitutes contempt of court with the attendant consequences. This is a fundamental and most basic tenet of our law.

10. It was conceded in argument before me that no party to an agreement that has been incorporated in and forms part of a court order can repudiate any provision of such incorporated settlement agreement. It was further agreed that where one of the parties is in default of performance the recourse against such defaulter is contempt proceedings or an application for specific performance.
11. It is clear from the papers before me that the respondent has never had the intention to comply with the court order. Her reasons for not doing so are spurious and without justification. In fact her intent not to comply with the court order appears clearly from the letter dated 26 September, 2006, quoted above. The respondent's conduct is

clearly in flagrant defiance of a court order and therefore unlawful. The applicant is entitled to the relief he seeks. Whatever problems the applicant will encounter with the officials in the vehicle registration office are not of the respondent's concern. Likewise the prerequisites of the bondholder are a matter between the applicant and the bondholder and not the respondent.

12. I turn to consider the question of a postponement of this matter to enable the respondent to launch her application for leave to appeal. No reasons have been advanced for the inordinate delay in approaching the trial court for leave to appeal. Secondly, I can conceive of no reasons that can be advanced by the respondent to approach the trial court for leave to appeal. None have been advanced. In any event, the respondent is hopelessly out of time in doing so (Vide Rule 49(1)(a) and Rule 49(1)(b) of the Uniform Rules of Court).

13. I turn to the Conditional Counter Application. Whatever obligations the applicant may have failed to comply with, if indeed they exist, the relief sought by the respondent, namely

- "1. confirmation of cancellation of the agreement of settlement between the parties dated 22nd December, 2004 and a copy of which is annexure "CAH2" to the Applicant's founding affidavit;

2. that the Rule 43 order dated 19th April, 2004 as amended by the order dated 5th October, 2005 revives, pending the final determination of maintenance in the divorce action under case number 4249/2004;
3. that the divorce action under case number 4249/2004 be set down for hearing in respect of the aspect of maintenance for the Respondent and the minor children and costs flowing therefrom;"

are legally untenable. The respondent's redress against the applicant's failure to fulfil his legal obligations are contempt proceedings or legal enforcement of the applicant's obligations.

14. In the circumstances this court grants the relief set out in the applicant's draft order marked "X".

G. WEBSTER
JUDGE IN THE HIGH COURT

Date of Hearing:	26 August 2008
Counsel for the Applicant:	Adv. D A Smith SC
Instructing Attorneys:	Erasmus, Ferreira and Ackermann Witbank
Counsel for the Respondent:	Adv. J Van Heerden
Instructing Attorneys:	Louis Weinstein Attorney Lonehill