**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION. PRETORIA**

**CASE NUMBER: 64399/2013**

**DATE: 24 OCTOBER 2014**

**NOT REPORTABLE**

**NOT OF INTEREST TO OTHER JUDGES**

**In the matter between:**

**L[...] A[...] S[...]** **APPLICANT**

**AND**

**J[...] D[...] V[...]** **RESPONDENT**

**JUDGMENT**

LEPHOKO AJ

[1] This is an application for an account and debate of profits. The applicant and the respondent were married to each other out of community of property without application of the accrual system. Their marriage was dissolved on 21 December 2007. The divorce order incorporated a settlement agreement between the parties, which was made an order of court.

[2] The respondent applied for condonation of the late filing of his answering affidavit on grounds the court found to constitute sufficient cause.

[3] The settlement agreement provides, among others, that the respondent would keep the property situate at No 16 O[...] F[...] Street, E[...] as his exclusive property but that in the event of the property being sold the applicant would be entitled to 25% of the profit made from the sale of the property. The agreement provides that payment due to the applicant must be made directly to the applicant on date of registration of transfer.

The agreement also provides that it constitute all the terms of the agreement between the parties and that it can only be varied in writing upon signature by both parties.

[4] The issue to be decided in this application is whether the oral variation of the settlement agreement as alleged by the respondent is legally enforceable notwithstanding the terms of the non- variation clause contained in the settlement agreement.

[5] It is common cause that the settlement agreement was never varied in writing and that the respondent subsequently sold the property but never made any payment directly to the applicant as required in terms of the settlement agreement.

[6] The respondent alleges that he made the payment to the applicant's mother, Mrs M[...], in terms of an oral agreement with the applicant. This oral agreement Is denied by the applicant. The applicant alleges that the payments made by the respondent to Mrs M[...] were in terms of a personal loan (the loan) granted to the respondent by Mrs M[...]. She further alleges that that loan agreement relates to an entirely separate transaction from the one concerned in the present application. The applicant alleges that during 2006 Mrs M[...] lent and advanced to the respondent an amount of R100 000-00 and thereafter a further R40 000-00 in terms of the loan. The loan is confirmed by Mrs M[...].

[7] The respondent alleges that prior to the divorce the applicant was employed as a bookkeeper at respondent erstwhile firm of attorneys, Jay and Vogel Inc. The firm suffered a trust account shortfall of R100 000-00 as a result of gross negligent bookkeeping by the applicant. Mrs M[...], in terms of an oral agreement, loaned the applicant and the respondent an amount of R100 000-00 to enable them to repay the trust account shortfall. The respondent subsequently borrowed R40 000-00 from Mrs. M[...] in order to assist with cash flow for his new business.

[8] The respondent further alleges that clause 6 (the stipulation regarding the sale of the immovable property) was inserted in the agreement in order to save the applicant face regarding the repayment of the trust shortfall at Jay and Vogel Incorporated which was the real reason for the loan of R100 00-00 from Mrs M[...]. The other reason for the insertion and wording of clause 6 was to protect the interests of Mrs M[...] regarding repayment of the R100 000-00 loan.

[9] The respondent further alleges that as the parties were married out of community of property without application of the accrual system and he being the sole owner of the property, there would have been no reason for the payment of 25% of the profit to the applicant other than to accommodate the repayment to Mrs M[...].

[10] The respondent's reason for the agreement is totally at variance with that of the applicant. Whether or

not the respondent's version can be preferred over that of the applicant must be weighed in the light of the inherent probabilities: In order to resolve the factual dispute where there are two irreconcilable versions, the court must make findings on the credibility of the various factual witnesses, their reliability, and the probabilities. When all factors are equipoised probabilities prevail: see *Stellenbosch Farmers' Winery Group Ltd & Another v Martell ET CIE & Others* 2003 (1) SA 11 SCA at 14i - 15d.

[11] It could be so that the applicant may not have been entitled to payment as joint owner of the property, but the parties agreed to the payment. That agreement is enforceable in law unless it can be shown that it is unlawful or that it was not the intention of the parties to enter into the agreement.

[12] Whilst the parties were married as they were, clause 6 seems a perfect fit within the divorce settlement agreement as opposed to a contemplated payment to Mrs. M[...] for reasons advanced by the respondent. The explanation given by the respondent is not credible. If the intention was to secure the payment due to Mrs M[...], the agreement could have simply stipulated that an amount R100 000-00 would be payable directly to Mrs M[...] from the proceeds of the sale of the property. There was no need to simulate liability to the applicant.

[13] The other problem with the reason provided by the respondent for the wording of clause 6 is that it does not protect the interest of Mrs. M[...] at all, as the respondent seems to suggest is the case. Clause 6 provides for direct payment to the applicant and not the creditor, Mrs M[...]. It also provides for payment of 25% of the profit whilst the amount due to Mrs M[...] was R100 000-00 plus R3 000-00 interest. 25% of the profit could have been any amount. It could have been disproportionate to the actual debt, either too little or too much. It is unlikely that if the applicant and or Mrs M[...] were at the time aware of the respondent's understanding of clause 6, they would have agreed to make the repayment of the R100 00-00 to Mrs Moodie dependent on the sale of the property at the sole discretion of the respondent.

[14] The e-mail, annexure JV10 to the respondent's answering affidavit, confirms that an arrangement had been made between Mrs Moodie and the respondent for the payment of a debt of R150 000-00 (R140 000-00 plus R10 000-00 interest). However, this e-mail refers to an amount owing by the respondent and not to his portion of the debt. This seems to suggest that in so far as Mrs M[...] was concerned the debt was due and payable by the respondent.

[15] There is also no reasonable explanation given by the respondent for suggesting that the applicant was expected to contribute to the repayment of the R100 000-00 trust shortfall as she was neither a director nor a member of Jay and Vogel Inc. The respondent also allege that the applicant misled him to signing the settlement agreement incorporating clause 6 thereof without offering any plausible reasons how he was misled.

[16] I find it highly improbable that the respondent, being a practicing attorney, would have agreed to give away 25% of the profit from the sale of his property in which the applicant had no interest, for payment of a debt owed to Mrs M[...], without putting measures in the agreement to ensure that that payment would definitely reach Mrs M[...]. Instead the respondent entrusted that repayment to the applicant. This is difficult to understand as according to his own version the respondent was in the process of divorcing the applicant "*for everything that happened coupled with ample personal problems between the applicant and I was just too much to bear".*

[17] It is improbable that the respondent would have suddenly relied on the applicant to become a suitable conduit for the repayment to Mrs M[...]. This conduct of the respondent contradict his overall version that the applicant was incompetent at handling financial matters and had displayed gross negligence in the manner she had handled the books of his erstwhile firm, which culminated in the respondent's woes.

[18] The respondent's former partner, Mr Peter Jay confirmed the allegations of the respondent regarding the trust shortfall at Jay and Vogel Incorporated and the reasons therefore. He stated that the respondent informed him of the loan advanced by Mrs M[...] for the repayment of the trust shortfall. This evidence does not take the respondent's case much further as Mr Jay had no factual knowledge of the alleged loan.

[19] The respondent argued that the settlement agreement had to be interpreted in the light of the underlying causa, being the loan from Mrs M[...] regarding the trust shortfall. This matter involves the interpretation of a settlement agreement made an order of court. It is trite that when interpreting a document or a court order the same rules apply. In *Firestone South Africa (Pty) Ltd v Genticuro A.G.* 1977(4) SA 298 (AD) at 304E-F the court stated that "as *in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it "* See also *Garlick v Smartt and Another* 1928 AD 82 at 87, *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 188, *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

[20] In my view the settlement agreement between the parties is clear and unambiguous and it should follow that the same applies to the court order. I am not persuaded that interference with the court order would be justified in the present case.

[21] In *SA Sentrale KO-OP Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) at 766G-767C it was held that a written contract could not be verbally altered where it contained a stipulation that it could only be varied in writing otherwise the variation would be of no force or effect. The court also held that a non-variation clause was in line with the parties' freedom of contract and not contrary to public policy. This

approach was also reiterated by the Supreme Court of Appeal *in Brisley v Drotsky* 2002 (4) SA 1 SCA. In *SH v GF and Others* 2013 (6) SA 621 SCA at para 16 the court reaffirmed the position that a non-variation clause in a written agreement that required it to be varied in writing and on signature of the parties could not be varied by an oral agreement.

[22] The respondent argued that the applicant should have foreseen that the application involved a dispute of fact that could not be resolved on the papers. I do not agree with this contention as the real issue in this matter is the interpretation of the non-variation clause, a subject that is fairly settled in our law. For what constitute a dispute of fact and the test applied by our courts: see *Room Hire Co (Pty) Ltd v Jeppe Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163. On how to determine whether a genuine dispute of fact exists: see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I-635A, *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154F.

[23] This matter was called for hearing on 12 August 2014 and the respondent failed to appear. The order made on 12 August 2014 was subsequently recalled and the matter heard on 15 August 2014. In my view it would be equitable that the respondent should bear the wasted costs incurred by the applicant on 12 August 2014 and that the costs of the application should follow the cause. See *In re Alluvial Creek Ltd 1929* CPD 532 at 535; *Camps Bay Ratepayers' And Residents' Association v Harrison* 2011 (4) SA 42 (CC) at 71B. The cost order takes into account that the application was necessitated by the respondent's failure to comply with a prior court order.

**In the premises I would make the following order:**

1. The respondent's late filing of his opposing affidavit is condoned.

2. The respondent is ordered to render a full account, supported by vouchers, of the sale of the immovable property described as SS Sectional Title Unit no 47 S[...]-O[...], Sectional Scheme number 286, City of Tshwane Metropolitan Municipality, Gauteng, also known as number 16 O[...], F[...] Street, E[...], Pretoria, Gauteng Province ("the property").

3. Debate of the aforesaid account within 14 days of the date of this order.

4. The respondent is ordered to pay to the applicant 25% of the profits of the sale of the property upon debate of the account.

5. The respondent is ordered to pay the applicant's wasted costs of the 12 August 2014 on an attorney and client scale.

6. The respondent is ordered to pay the costs of the application on an attorney and client scale.

A L C M LEPHOKO

ACTING JUDGE OF THE HIGH COURT

Heard on: 15 August 2014.

Judgment delivered on: 24 October 2014.

For the Appellant: Adv A Politis.

Instructed by: Gross Papadopulo & Associates.

For the Respondent: Adv W Roos.

Instructed by: Stegmanns Incorporated.