



REPORTABLE

CASE NO.: SA 100/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

SUSANNE HOFF

Appellant

and

EGBERT OTTO EUGEN HOFF

Respondent

Coram: DAMASEB DCJ, MAINGA JA and HOFF JA

Heard: 29 March 2023

Delivered: 23 June 2023

Summary: The appellant and the respondent were previously married to each other. In their divorce action in the High Court, the parties concluded a settlement agreement. In terms of that agreement, the appellant and the respondent *inter alia* agreed that the appellant will retain as her sole and exclusive property, all horses and genetic bloodline in connection and / or associated with the Neu-Heusis horse stud

kept on farm Neu-Heusis as at 20 June 2017 or wherever else the stud or portions of the stud may be kept.

The appellant and the respondent further agreed that by no later than 29 June 2017 the respondent shall provide the appellant with all records and/or invoices of vaccinations and other relevant veterinary records, if any, pertaining to and/or connected with the horses of the Neu-Heusis stud. They further recorded in the agreement, that the respondent 'shall do his utmost to obtain proof of such records and invoices but, if same are not available', the appellant accepted the respondent's assurance that such vaccinations were administered to the Neu-Heusis stud from 2011-2016.

They also agreed in clause 26 of the agreement that the settlement agreement was the full and final settlement of 'past, present and future claims that the parties may have against each other'. The agreement was made an order of court and the divorce action was then finalized.

The appellant alleging non-compliance by the respondent with the terms of the agreement instituted an action for damages in the court *a quo*. The respondent defended that action and raised a special plea of *res judicata*. In the special plea, the respondent alleged that the claims set out in the particulars of claim by the appellant in the action for damages were part and parcel of the divorce action which was already settled. Further that, on account of clause 26, the appellant had no claim against the respondent.

The court *a quo* upheld the special plea of *res judicata*. The appellant unsatisfied with the court *a quo*'s decision appealed to this Court.

Held that, from a reading of the clauses of the settlement agreement and the allegations made by the appellant, it is very clear that the appellant attempted to resurrect a cause of action under the guise of a misrepresentation, which in my

opinion was extinguished previously between the parties, when no reservations were made in the event something unforeseen at the time of signature arose.

Held that, given the language of the settlement agreement, clause 26 provided for, present, past and future disputes. Clause 26 cannot be read in isolation – it should be read with other clauses of the agreement and the issue whether it limits appellant to sue on the agreement does not arise. There is nothing to suggest that when the appellant accepted the assurances of the respondent on the vaccinations and signed the clause in its current form, she was not aware of what she was agreeing to.

Consequently, the appeal is dismissed with costs.

APPEAL JUDGMENT

MAINGA JA (DAMASEB DCJ and HOFF JA concurring):

Introduction

[1] The plaintiff (Mrs H) and the defendant (Mr H) *a quo* are appellant and respondent in this Court and were formerly married. They divorced in a divorce action instituted under Case No. I 1750/2012. In the process of that divorce, on 22 June 2017 and in Windhoek, both parties acting in person entered into a settlement agreement in respect of the patrimonial consequences of their erstwhile marriage.

[2] This appeal is against the entire judgment and order of the court *a quo* and concerns the order upholding respondent's special plea to appellant's claim.

[3] For the purposes of this judgment the relevant terms of the settlement agreement are in this form:

'SETTLEMENT AGREEMENT

- 2.2 The defendant shall retain, as her sole and exclusive property, all horses and genetic bloodlines connected and/or associated with the Neu-Heusis horse stud that is kept on Farm Neu-Heusis (registered with the Namibian Horse Breeders Association under number F10025) as at 20 June 2017, or wherever else the stud or portions of the stud may be.

5. In the event of the defendant not collecting and removing the horses from Farm Neu-Heusis by 8 July 2017, the defendant shall bear all risks associated with the horses including, but not limited to, the risk of injury, sickness and/or death by natural causes, and the plaintiff shall be exempted from any liability concerning the horses and their continuous stay on Farm Neu-Heusis.

7. The plaintiff otherwise confirms and warrants that each of the above-mentioned horses returned in terms of this agreement, are as identified or referred to during the inspection conducted on Farm Neu-Heusis on 20 June 2017.

8. The plaintiff shall immediately arrange for a veterinarian to administer the full range of necessary vaccinations on the horses by 29 June 2017, and shall perform a follow up vaccination no longer than two weeks thereafter (and prior to the 8th of July 2017). The costs for such vaccination shall be borne by the defendant.

10. By no later than 29 June 2017, the plaintiff shall provide the defendant with all records and/or invoices of vaccinations and other relevant veterinary records, if any, pertaining to and/or connected with the horses of the Neu-Heusis Stud. However, it is recorded herewith, that the plaintiff shall do his utmost to obtain proof of such records and invoices but, if not available, the defendant shall accept the plaintiff's assurance that such vaccinations were administered to the Neu-Heusis Stud from 2011 to 2016.

26. The parties record the terms of this settlement to be in full and final settlement of all present, past and future claims that the parties may have against each other.'

[4] On 4 December 2018 the appellant, on the strength of the above clauses of the settlement agreement brought an action against the respondent in the High Court claiming damages in four claims in the amount of N\$1 054 962,40 plus interest on the amounts of the four claims at the rate of 20 per cent per annum from the date of judgment until date of payment, costs of suit consequent upon employment of one instructing and one instructed legal practitioner.

[5] Appellant alleged that it was an implied term that the provisions of clause 26 would not relate to any claims pursuant to the agreement itself and / or the enforcement thereof and that she complied with all of her obligations in terms of the agreement and that the respondent has breached the agreement in that:

- '7.1 Despite the defendant having expressly assured that the relevant and necessary vaccinations were administered to the horses during 2011 to 2016, this was not the case.
- 7.2 The representation by the defendant was false, in that no vaccinations against Rabies and/or African Horse Sickness and/or Tetanus were administered to the horses, by the defendant (or at all) during 2011 – 2017.
8. It was on the strength of the defendant's misrepresentations that the plaintiff assumed the risk of injury, sickness and/or death by natural causes to the horses and as such exempted the defendant from any liability concerning the horses and their continuous stay on farm Neu-Heusis, and thereafter.

9. In the circumstances the defendant is not entitled to the rights that accrue to him in clause 5 of the agreement.'

[6] The four claims are pleaded in this form:

Claim 1

As a result of the fact that the horses had not been vaccinated and/or sufficiently vaccinated and/or had not received booster vaccinations against African Horse Sickness 1 and 2, Tetanus and Rabies, the appellant would cause to have a veterinarian attend to the horses every six months in place of 12 months to fully immunise the horses, which is an additional three vaccinations per horse over three years. The reasonable cost would be N\$23 778,30 per 'vaccination run' which would have been avoided had respondent caused the vaccinations administered during 2011- 2017. Therefore, the appellant would suffer damages in the amount N\$71 334,90 over the three year period.

Claim 2

[7] For the fact that respondent had failed to vaccinate the horses against African Horse Sickness during the period 2011 - 2017 the horses, particularly "no Fathers Girl", "All Inclusive" and "Kalkutta" were insufficiently protected and/or immunized against African Horse Sickness, resulting (disclosure by respondent) in their deaths about July 2017 and January – February 2018. The appellant would not have assumed the risk of profit and loss of the three horses had she been aware of the fact

that all three were insufficiently protected and/or immunized. Therefore, the appellant suffered damages in the amount of N\$110 000 being the reasonable value at the time of their death, no Fathers Girl and All Inclusive N\$25 0000 each and Kalkutta N\$60 000.

Claim 3

[8] The respondent was at all material times aware or ought to have been aware that failure to vaccinate the horses would increase the risk of the horses contracting African Horse Sickness.

[9] There being no cure for African Horse Sickness, once contracted, the horse would in most cases die. Breeding stud horses has the purpose of selling the offspring and the horses themselves from time to time. Failure to have vaccinated the horses has reduced the value of the individual horses because they are susceptible to contracting African Horse Sickness which has a direct impact on their marketability and value for the three year period which ended in 2020. After 2020 for the reason of ageing compounded by the risk of contracting African Horse Sickness, the horses would not have any reasonable commercial value. Therefore respondent suffered damages in the amount of N\$515 000 calculated as follows:

'24.1 An amount of N\$258 000 being the decrease in value of each of the horses listed below, from their original value (as pleaded below) to zero:

24.1.1	Miss Arizona (A1)	N\$10 000
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24.1.2	Celine Dion (A2)	N\$25 000
24.1.3	Kassandra (A12)	N\$10 000
24.1.4	Desdemona (A13)	N\$25 000
24.1.5	Laissez Faire (A3)	N\$15 000
24.1.6	C'est la vie (A4)	N\$20 000
24.1.7	C'est Si Bon (A5)	N\$10 000
24.1.8	Laurentio (A14)	N\$18 000
24.1.9	Karisna (A8)	N\$25 000
24.1.10	Kat De Luna (A9)	N\$40 000
24.1.11	Auld Lang Syne (A10)	N\$60 000

24.2 An amount of N\$257 000 being the decrease in value of each of the horses listed below, from their original value (as pleaded below) to their current value as pleaded below:

- 24.2.1 No Mercy (S3) from N\$30 000 to N\$8000
- 24.2.2 No Father's Boy (A11) from N\$12 000 to N\$2000
- 24.2.3 Lexington (S2) from N\$75 000 to N\$15 000
- 24.2.4 Never Say never (A6) from N\$50 000 from N\$15 000
- 24.2.5 Lancelot (S1) (Now Lou Bega) from N\$50 000 to N\$15 000
- 24.2.6 Stallion (S3) from N\$35 000 to N\$10 000
- 24.2.7 Mare (A19) from N\$25 000 to N\$5 000
- 24.2.8 Kalgary (A16) from N\$35 000 to N\$10 000
- 24.2.9 Curacão (A18) from N\$35 000 to N\$10 000'

Claim 4

[10] Despite the first list of horses above having no commercial value appellant is still obliged to maintain and care for them and as pleaded above, appellant is unable to sell them alternatively will only be able to donate them. The reasonable cost of maintaining and caring for a Namibian Warmblood Horse is N\$10 862,50 per annum per horse, excluding incidental services and/or other sundries. As a result, appellant

would suffer damages in the amount of N\$358 627,50 for the period June 2017 to June 2020.

[11] Despite demand, respondent fails to compensate the appellant for her damages in the amount of N\$71 334,90, N\$110 000, N\$515 000 and N\$358 627,50.

[12] The respondent defended the appellant's claim. In his plea, respondent raised the special plea averring that the appellant's whole cause of action in her particulars of claim is derived from a written settlement agreement concluded between the parties on 22 June 2017, which settlement agreement was made an order of the court *a quo*. Respondent further averred that all the claims set out in the appellant's particulars of claim were part and parcel of the disputes and subject matters of disputes which were settled in terms of the settlement agreement.

[13] Respondent further avers that additional to the terms and conditions in the settlement agreement, clauses 2 (the introduction to clause 2¹ thereof), 23² and 26³ have a direct and express bearing upon the claims being pursued by the appellant and that the particulars of claim are directly relevant to the Neu-Heusis horse stud which horses formed the subject matter of clauses 2.2 – 2.4 as well as clauses 4 – 16 of the settlement agreement and in respect of which clauses 23 and 26 thereof directly relate and apply.

¹ 'In settlement of all proprietary claims between the parties pursuant to this divorce action and emanating from the parties' accrued estate form the marital relationship . . . '.

² ' . . . It is recorded that the plaintiff has no pending criminal and/or civil action against the defendant.'

³ See provisions of clause 26 para 3 above.

[14] In the premises, respondent averred that appellant has no claim whatsoever on the bases set out in her particulars of claim and sought dismissal of the claims with costs.

[15] The appellant replicated and denies that she, by virtue of the provisions of the settlement agreement is not entitled to institute action against the respondent premised on the enforcement of her rights stemming from that very settlement agreement. She avers that the settlement agreement had the effect that a compromise was reached in respect to the issues forming part of the divorce, more particularly the issues pursuant to the parties' proprietary claims as a consequence of the divorce action and emanating from the 'accrued estate'.

[16] She further avers that the issues in the current matter related directly to the compromise agreement so are the rights and obligations that arose when the agreement was concluded, thus her cause of action stems directly from the operation of the agreement itself and thus clauses 2, 23 and 26 of the settlement agreement are unhelpful to the respondent in as far as the appellant is seeking enforcement of the agreement itself or seeking contractual damages pursuant to respondent having breached the agreement.

[17] Appellant continued to aver that reference to full and final settlement of all present, past and future claims that the parties may have against each other, is reference to claims which stemmed from the issues prior to the compromise having

been agreed upon and the respondent cannot rely on the clause as by law appellant is not prohibited to rely on the agreement.

[18] She denies that she has no claim whatsoever against the respondent and she reiterates that her cause of action is founded on the respondent's alleged misrepresentation prior to the conclusion of the agreement, ultimately a breach of the settlement agreement. She prays for the special plea to be dismissed.

[19] She also replicated on the merits, a plea which is also not relevant for the present purposes.

Judgment of the High Court

[20] The High Court upheld the special plea holding that given the provisions of clause 26 of the settlement agreement – it means both parties at the conclusion of the agreement were well aware of the implications of concluding and signing such an agreement – which they sought to be made an order of court. The court *a quo* further held that when one signs a contract he or she is taken to be bound by the ordinary meaning and effect of the words which appear in the contract. Therefore, appellant and respondent were bound to the terms of the agreement and the consequences thereof.

[21] The court *a quo* further found that the settlement agreement, appellant and respondent had entered into brought the original dispute and cause of action to an

end. The appellant was therefore not entitled under the said circumstances to approach the court on the very cause of action that was settled and eternally put to bed by the parties.

The submissions

[22] On behalf of the appellant it was argued and laid as background that the appellant's cause of action is based on a misrepresentation made in clause 10 of the settlement agreement which is in this form:

'By no later than 29 June 2017, the plaintiff shall provide the defendant with all records and/or invoices of vaccinations and other relevant veterinary records, if any, pertaining to and/or connected with the horses of the Neu-Heusis Stud. However, it is recorded herewith, that the plaintiff shall do his utmost to obtain proof of such records and invoices but, if not available, the defendant shall accept the plaintiff's assurance that such vaccinations were administered to the Neu-Heusis stud from 2011 to 2016.'

(My underlining)

[23] It was further contended that after the agreement was concluded, the appellant discovered (but not explained how) that the relevant and necessary vaccinations were as a fact not administered to the horses during 2011 to 2017 as per the respondent's assurance; specifically not vaccinated against Rabies and/or African Horse Sickness and/or Tetanus. Appellant's claim being founded on contract and delict, as a result appellant instituted action alleging that the respondent breached the agreement and that when respondent made the express representation he must have known it was

not true, upon the strength of which misrepresentation, appellant acted and suffered damages.

[24] It was contended that the claims based on contract and delict are new causes of action and do not at all relate to the cause of action that was settled by the compromise.

[25] It was further argued that by framing the issue for determination as 'effect the settlement agreement has on the parties' rights and obligations' the court *a quo* considered the effect that the settlement agreement has on the parties' future rights and obligations arising out of the settlement agreement, irrespective of the consequence of the misrepresentation and the fact that it clearly raised a new, separate and distinct cause(s) of action, far removed from the issues that were settled between the parties in their divorce and as a result the court *a quo* wrongly concluded that it had no doubt in its mind 'that the cause of action on which the plaintiff relies is related to the dispute that previously existed between the parties and which dispute the parties compromised'.

[26] Counsel restated the requirements for a defence of *res judicata* and argued that the first suit between the parties (which was settled) was a divorce and division of the joint estate and that in this matter appellant is claiming damages as a result of misrepresentation, founded on breach of contract and/or fraud. It is submitted that appellant is not prohibited from instituting action pursuant to the respondent's

misrepresentation and consequently the court *a quo* failed to recognise that the appellant's cause of action was a new and distinct cause of action and could never, have been included in the bundle of issues that were compromised and therefore the court *a quo* was wrong. Relying on *Mbambus v Motor Vehicle Accident Fund*⁴, counsel argued that a misrepresentation renders a compromise voidable at the instance of an aggrieved party, even if it is made an order of court and submitted that the misrepresentation entitled the appellant to stand by the compromise and to claim damages, either in contract or delict and further that the appellant had a valid cause of action, which cannot be ended by a plea of *res judicata*.

[27] Mr Strydom for the respondent's argument is opposite. From the outset he argued that all the current claims in the appellant's particulars of claim were part and parcel of the disputes and subject matters of disputes which were so settled in terms of the settlement agreement and as a consequence appellant has no claim whatsoever. He further contended that for the appellant to pursue any claim derived from the settlement agreement, she can only do so upon having either the settlement agreement set aside or having clauses 23 and 26 thereof set aside. He submitted that the underlying cause which led to the conclusion of the settlement agreement between the parties was to settle and regulate their differences in a compromised manner, thereby avoiding or terminating litigation. He also argued that, it is evident from the settlement agreement that the parties and their lawyers at the time were very much attendant to the hostile and acrimonious situation between the parties and

⁴ *Mbambus v Motor Vehicle Accident Fund* 2013 (2) NR 458 (HC) para 7.

much effort was invested in ensuring that the parties parted with no loose strings remaining and that, that is so when regard is had to the effect of clauses 1, 2, 5, 10, 12, 23, 24 and 26. Counsel further submitted that the insertion of clause 26 into the settlement agreement was to put an end to all pending disputes between the parties, constituting a compromise between the parties which finally and in perpetuity settled the differences as contained in the settlement agreement or even elsewhere. Counsel pointed out that the Neu-Heusis horse studs were part of the disputes so settled and submitted that appellant's cause of action hinges on the allegation in para 7 of her particulars of claim – that the respondent misrepresented to her the fact that the relevant and necessary vaccinations were administered to the horses during the period 2011 until 2017.

[28] Mr Strydom further contended that the bold statement of misrepresentation is not embodied in the settlement because of clause 10 which provides that the appellant herein shall accept the assurance given by the respondent herein that the required vaccinations were administered during the period in question; which words 'shall accept the assurance given by the respondent' connotes bringing about a finality to the issues whether the horses were so vaccinated or not. Counsel further pointed out that clause 5 in the settlement agreement exempts respondent from any liability concerning the horses from the date of the agreement and among other things appellant assumed all risks related to injury, sickness or death by natural causes.

[29] Mr Strydom further contended that there were no warranties in the agreement particularly clause 7 indicative that the parties were satisfied to accept the wording in clause 10 and if appellant wanted more than assurances she would have insisted to different types of assurances than what is contained in the settlement agreement or declined to have entered into the agreement and that it was for the reason of mutual assent that the parties agreed to the settlement agreement and willingly employed the wording in clause 10.

[30] Counsel further argued that even if this Court were to find misrepresentation on the part of the respondent, he submitted that the only remedy available to the appellant would be to attack and seek rescission of clauses 10 and 26 on the basis of fraud and that the assertion that the settlement is voidable would only be acceptable in circumstances when the appellant sought relief to set aside the agreement or a declaration of voidability of the agreement or part of the settlement agreement which embodies clauses 10 and 26 but nonetheless counsel still submitted that the ambit and meaning of clause 10 is clear – that the mere assurance so given renders the issue final.

[31] It was at this point of Mr Strydom's submission that my brother Damaseb DCJ presiding asked the parties to file supplementary heads on the question 'how would a litigant enforce a payment term contained in a deed of settlement which has been made an order of court'?

[32] Mr Strydom addresses this question on the basis of (a) the status of a judgment or order so rendered by court incorporating a settlement agreement; and (b) the nature of the enforceability of the said judgment or order. On the status of the judgment in my opinion the arguments and submissions reiterates what Mr Strydom already placed before court – to the effect that once the parties have reached a settlement agreement, they may apply to court to have the settlement made an order of court and that it is trite that a settlement should be one that is intended to bring about an end to the suit as a whole and that was the case in this matter when the agreement signaled the end of a protracted and hostile divorce action that ensued between the parties. That intention he argued is founded on the various clauses of the agreement as already stated. He further submitted that the effect of a *transactio* is the same as a *res judicata* or a judgment given by consent.

[33] On the nature of enforceability of the judgment or order incorporating a settlement agreement, Mr Strydom argues that once a judgment has been issued, the judgment creditor may enforce it by execution. If it is a judgment sounding in money, execution by issuing a writ of execution and if it is an order to do or not to do something is enforceable by way of committal for contempt proceedings.

[34] In a situation like in this case, Mr Strydom argued that if the settlement provides for payment by way of installments, the execution where the debtor has failed to comply with the order can be addressed in two ways, namely: (1) the judgment creditor can apply to the registrar of the court for a writ of execution in

respect of that part of the debt which the judgment debtor is in arrears with whereupon the assets of the judgment debtor could be attached and sold in execution; and (2) the judgment creditor can apply through the registrar to a judge for judgment in the amount in arrears and execution can then follow. Mr Strydom further submitted that once a judgment is *res judicata* the rules of procedure clearly make provision for the enforcement thereof and instituting proceedings to enforce by a separate action or motion would be superfluous.

[35] The appellant does not agree with the respondent's arguments in the supplementary heads of argument. It was submitted on behalf of the appellant that for the appellant to first set aside several of the terms in the settlement agreement (clause 26 in particular) before she could seek any remedy, this cannot be the legal position and it would offend against public policy and that that proposition by the respondent was dealt with and dismissed by the Constitutional Court of South Africa⁵, in this Court⁶ and in two matters in the High Court⁷. We are urged to follow the approach of the Constitutional Court of South Africa on the enforceability of settlement agreements. It is contended that rights created by the settlement agreement, and the subsequent cause of action (brought about by misrepresentation) is distinct and separate from the *lis* that was settled and thus cannot be visited with a special plea of *res judicata* and that in the circumstances of appellant's cause of

⁵ *Eke v Parsons* 2016 (3) SA 37 (CC) paras 29-30.

⁶ *Ex parte Judge-President of the High Court (Attorney-General of Namibia Intervening): In re Kazekondjo & others v Minister of Safety and Security & others* 2022 (1) NR 1 (SC).

⁷ *Hamuteta v Ministry of Home Affairs and Immigration* HC-MD-LAB-APP-AAA-2019-00072 [2020] NALCMD 37 (30 November 2020), *Auas Valley Residents Association v Minister of Environment and Tourism* (HC-MD-CIV-APP-ALT-2019/00002 [2020] NAHCMD (7 May 2020).

action, her rights cannot be enforced by way of a writ of execution, contempt of proceedings or a mandamus – the only remedy for the appellant is to have instituted the action.

[36] It is further contended that contextually and purposefully interpreted clause 26 relates only to litigation surrounding the compromised *lis* ie the divorce action.

[37] Finally it is contended that public policy denotes fairness, justice and reasonableness and a contractual term that deprives a party from seeking redress at any time in the courts of justice for any future injury or wrong committed against him or her may offend public policy. Counsel further contend that in interpreting clause 26, regard must be had to public policy, the context of the contract as well as the appellant's case on the pleadings and submits that for the misrepresentation, respondent should not be heard to rely on clause 26, thereby preventing the appellant from seeking damages on a new cause of action as that would offend public policy.

[38] The issue for determination remains as was framed by the court *a quo* namely, what effect the settlement agreement has on the parties' rights and obligations.

[39] The status of the settlement agreement was sufficiently canvassed in the court *a quo*, save to say – it is a practice well-established in our legal system.⁸ The effect of a settlement agreement in this court was articulated in *Katjizeu*,⁹ where the court

⁸ *Van Schalkwyk v Van Schalkwyk* 1947 (4) SA 86 (O) at 95.

⁹ *Government of the Republic of Namibia & others v Katjizeu & others* 2015 (1) NR 45 (SC) at 54E-G.

referred with approval to a Canadian case *George v 1008810 Ontario Ltd* 2004 CanLII 33763 (ON LRB) when the Court at para 23, said:

'At common-law, the effect of a settlement was to put an end to the underlying cause of action: *Halsbury's Law of England*, 4 ed, vol 37 para 391:

"Effect of settlement or compromise. Where the parties settle or compromise pending proceedings, whether before, at or during the trial, the settlement or compromise constitutes a new and independent agreement between them made for good consideration. Its effects are (1) *to put an end to the proceedings, for they are thereby spent and exhausted*, (2) *to preclude the parties from taking any further steps in the action except where they are provided for liberty to apply to enforce the agreed terms*, and (3) *to supersede the original cause of action altogether*. A judgment or order made by consent is binding unless and until it has been set aside in proceedings instituted for that purpose and its acts, moreover, as an estoppel by record."

[40] In *Eke v Parsons*, the matter counsel for the appellant relies on, which we are urged to follow, on the effect of the settlement the court said:

'[31] The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties; the *lis* becomes *res judicata* (literally, "a matter judged"). It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order. That form may possibly be some litigation the nature of which will be one step removed from seeking committal for contempt; an example being a *mandamus*.'

[41] Once a settlement has been made an order of court, it is an order like any other.¹⁰ It will be interpreted like all other court orders.¹¹ The well-established test on the interpretation of court orders is this:

‘The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. 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.’¹²

[42] The interpretation of a judgment or order would be equally true of court orders following on settlement agreements, with a slight change specific to settlement agreements:

‘The court order in this case records an agreement of settlement and the basic principles of the interpretation of contracts need therefore be applied to ascertain the meaning of the agreement . . .

The intention of the parties is ascertained from the language used read in its contextual setting and in the light of admissible evidence. There are three classes of admissible evidence. Evidence of background facts is always admissible. These facts, matters probably present in the mind of the parties when they contracted, are part of the context and explain the “genesis of the transaction” or its “factual matrix”. Its aim is to put the Court “in the armchair of the author(s)” of the document. Evidence of “surrounding circumstances” is admissible only if a contextual interpretation fails to clear up an ambiguity or uncertainty. Evidence of what passed between the parties during the negotiations that preceded the conclusion of the agreement is admissible

¹⁰ *Eke v Parsons* para 29.

¹¹ *Ibid.*

¹² *Ibid.* See also *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd & others* 2013 (2) SA 204 (SCA) para 13, *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A).

only in the case where evidence of the surrounding circumstances does not provide “sufficient certainty”.¹³

[43] In *Eke v Parsons* on the enforcement of settlement agreements the court went on to say:

[32] Litigation antecedent to enforcement is not necessarily objectionable. That is so because ordinarily a settlement agreement and the resultant settlement order will have disposed of the underlying dispute. Generally, litigation preceding enforcement will relate to non-compliance with the settlement order, and not the merits of the original underlying dispute. That means the court will have been spared the need to determine that dispute, which – depending on the nature of the litigation – might have entailed many days of contested hearing.

[33] Does the mere fact of coming back to court for the determination of issues arising for alleged non-compliance with a settlement order duplicate the use of court resources? No. Not all settlements where enforcement has to be preceded by litigation result in the envisaged antecedent litigation.

[34] The less restrictive approach that I prefer does not mean any settlement order proposed by the parties should be accepted. The court must still act in a stewardly manner that ensures that its resources are used efficiently. After all, its “institutional interests . . . are not subordinate to the wishes of the parties”. Where necessary, it must “insist that the parties effect the necessary changes to the proposed terms as a condition for the making of the order”. It may even reject the settlement outright.

[35] A settlement order that makes provision for payment of a judgment debt by instalments does not become unacceptable only because payment is to be in instalments. With an order of this nature, proceedings straight to execution may not be

¹³ See above note 5 para 30. See also *Engelbrecht & another NNO v Senwes Ltd* 2007 (3) SA 29 (SCA) paras 6 and 7.

practical because what remains owing may first have to be quantified. That is what necessitates another approach to court. Is that objectionable. I think not.

[36] In sum, what all this means is that even with the possibility of an additional approach to court, settlements of this nature do comport with the efficient use of judicial resources. First, the original underlying dispute is settled and becomes *res judicata*. Second, what litigation there may be after the settlement order will relate to non-compliance with this order, and not the original underlying dispute. Third, matters that culminate in litigation that precedes enforcement are fewer than those that don't.

Application of the law

[44] There are 27 clauses to the settlement agreement; fifteen of those are on the horses. It was only in clause 7 that respondent confirmed and warranted that each of the horses returned in terms of the agreement, are as were identified or referred to during the inspection conducted on Farm Neu-Heusis on 20 June 2017. Paragraph 3 of the preamble records that the parties were desirous of settling the matter between them, which they did voluntarily. In the very first clause respondent in a peremptory tone, in obtaining the restitution of conjugal rights (RCR) or the final order of divorce, is prohibited to make reference to the appellant's arrest or conviction.

[45] Clause 2 provides for settlement of all proprietary claims between the parties emanating from the parties' accrued estate from their marital relationship. Under clause 2.2 appellant got the same and exclusive ownership of the 27 horses. On 20 June 2017, an inspection of the horses was conducted and all 27 horses identified and recorded by their names. By 20 June 2017, everything except for the horses and specific assets that needed to be collected or delivered had to be done. Clause 4

provided for the horses to be removed or collected from Farm Neu-Heusis at the appellant's own cost by 8 July 2017. In the event they were not collected by that date, clause 5 provided for appellant to bear all risks associated with the horses including but not limited to, the risk of injury, sickness and/or death by natural causes, and the respondent shall be exempted from any liability concerning the horses and their continuous stay on Farm Neu-Heusis.

[46] Clause 6 provides for DNA identification of the three horses which respondent had to obtain, and provide written confirmation of DNA to appellant by no later than 31 August 2017. In clause 7 respondent warranted the identification of each of the horses as identified at the inspection of 20 June 2017.

[47] Clause 8 provides for immediate arrangement for a veterinarian to administer full range of necessary vaccinations on the horses by 29 June 2017 and a follow-up two weeks thereafter, costs of the vaccinations to be borne by appellant.

[48] Clause 9 provides for the taking of photos by the appellant and veterinarian of the horses which were not shown to the appellant at the inspection of 20 June 2017 and that upon signature of the agreement the photos be forwarded to appellant's lawyers together with confirmation by the veterinarian of the estimated age of each horse.

[49] It is clause 10 which triggered the new claim which provides that by 29 June 2017, respondent shall have provided the appellant with all records and/or invoices of vaccinations and other relevant veterinary records, if any, connected to the horses – but if not available after an effort to find such records, the appellant shall accept the respondent's assurance that such vaccinations were administered to the Neu-Heusis stud from 2011 to 2016.

[50] Clauses 11,12,13,14,15 and 16 provide for the appellant to breed the horses under the name 'NH stud' meaning change the name of her stud from Neu-Heusis stud to NH stud and she exclusively retained the logo/trademark attached to the Neu-Heusis stud. She also had to prove deregistration by no later than 31 July 2017. She was prohibited to publish the name Neu-Heusis in any form, even publication of the word formerly Neu-Heusis stud was prohibited – short of it; she was prohibited to use the name Neu-Heusis for any purposes whatsoever. Respondent was to deregister himself from the Namibian Stud Breeders Association and the Namibian Warmblood Association as owner or part owner of the Neu-Heusis stud. He had to cause his name removed from all documentation, or media connected with the name Neu-Heusis stud. He had to prove deregistration to the appellant in writing no later than 7 July 2017. If he desired to form a new stud he was prohibited to use the names Neu-Heusis. He was even prohibited to use the bloodlines emanating from horses born of certain mare lines except if he purchased any of the bloodlines on the open market. Respondent is also prohibited to publish the name Neu-Heusis horse stud in any form whatsoever in connection with any horse stud or horses associated with the Neu-

Heusis stud, nor publish the words 'formerly Neu-Heusis stud' in any form with reference to the horse stud. He however retained the exclusive use of the name Neu-Heusis in respect of his cattle and/or any other animal stud he may wish to register (to the exclusion of horses). Clause 18 provides for appellant to immediately remove her Facebook post where reference is made to the death of the horse Countess.

[51] Clauses 22 and 23 provide:

- '22. The plaintiff shall cause a letter to be delivered to First National Bank, on or before 7 July 2017, recording that the cheque presented by defendant to First National Bank on 8 April 2011 for payment in the amount of N\$60 000 was lawfully presented. The letter should contain the following wording.

"I, Egbert Hoff, herewith state that I have withdrawn all my claims against Susanne Hoff in respect of the cheque dated 8 April 2011 in the amount of N\$60 000, attached hereto as annexure "FNB1".

A copy of the letter, evidencing delivery, shall be provided to the defendant's attorneys of record by no later than 7 July 2017.

23. The defendant agrees to withdraw any and all pending criminal or civil actions she has against the plaintiff as well as the criminal cases instituted against the plaintiff's erstwhile legal representative, Mr EPF Gous, and the parties will desist from uttering or publishing defamatory remarks about each other, whether in relation to this matter or any other pending matter. It is recorded that the plaintiff has no pending criminal and/or other civil action against the defendant aside from this action.'

[52] From a reading of the clauses of the settlement agreement and the allegations in her claims it is very clear to me that appellant attempts to resurrect a cause of action under the guise of a misrepresentation, which in my opinion was extinguished previously between the parties, when no reservations were made in the event something unforeseen at the time of signature arose.

[53] The settlement agreement was signed on 22 June 2017. Clause 9 provides that on or before 29 June 2017, the respondent and/or the veterinarian shall take photographs of the horses, not shown to appellant during the inspection of Farm Neu-Heusis on 20 June 2017, and after signature of the agreement the photos shall immediately be forwarded to appellant's lawyers – together with confirmation by the veterinarian of the estimated age of each horse. The photos were taken and form part of the record and were most probably forwarded to appellant's lawyers. Clause 10 also provides that by no later than 29 June 2017, respondent shall provide to appellant with proof of all records and/or invoices of vaccinations and other relevant veterinary records, if any, pertaining to the horses. What follows is that, however the respondent 'shall do his utmost to obtain proof, but if not available, the defendant (appellant) shall accept the plaintiff's assurance that such vaccinations were administered to the Neu-Heusis stud from 2011 to 2016'. From 2011 to June 2017 when the agreement was signed is six and a half years. It is not clear from the pleading(s) where appellant was between 2011 to June 2017. I assume that she was not residing on Farm Neu-Heusis hence the provisions of clause 10. Six and a half years is a long period – one would have expected her to insist on the records or make

reservations in that regard. The four claims are based on the importance of the vaccinations of the horses and yet that reality was not accorded its importance in the agreement, by accepting respondent's assurances only. She states that there is no cure for African Horse Sickness, and if not vaccinated or properly so, the value of individual horses would be reduced and they would be susceptible to contracting the African Horse Sickness and they would have no commercial value.

[54] Appellant insisted on things like proof of DNA identification (clause 7) by no later than 31 August 2017, that the horses be vaccinated by 29 June 2017 and a follow-up vaccination no longer than two weeks, the inspection of the horses, the photos taken and forwarded to her lawyers and all the dos and don'ts in clauses 11, 12, 13,14,15,16 and 18 but accepted the assurances of the respondent that vaccinations were administered to the horses from 2011-2016. In clause 5 she took all risks associated with the horses, including, but not limited to, the risk of injury, sickness and/or death by natural causes and respondent exempted from any liability concerning the horses and their continuous stay on the Farm Neu-Heusis.

[55] In clause 22, the letter to the bank had to contain certain wording and a copy of the said letter, evidencing delivery, 'shall be provided to the defendant's [appellant's] attorneys of record no later than 7 July 2017'. All pending cases, criminal and civil, were withdrawn against each other.

[56] I cannot find any reason why she was lackadaisical in accepting clause 10 as it is. The clauses read holistically including the fact that the clauses on the horses are the majority and drafted in detail, I must accept that she wanted to and did settle and the claim she attempts to bring against the respondent is *res judicata*. In my opinion, six and a half years is a long time and she should have insisted on the records or seek reservations in that regard.

[57] Counsel for the appellant in the supplementary heads of argument relies on the decision of *Eke v Parsons*, paras 29 to 36 thereof, but that decision under the circumstances does not assist appellant's case. In para 32 indeed the court said, 'litigation antecedent to enforcement is not necessarily objectionable . . . and that 'generally, litigation preceding enforcement will relate to non-compliance with the settlement order, and not the merits of the original underlying dispute', but as I have already indicated, in casu, the effect of the settlement agreement between the parties given the manifest purpose of the order, the language of the settlement agreement clauses, including the extent the parties went into in providing particularity for the horses between the parties, there can be no doubt that the order brought finality to the *lis* between the parties. The *lis* became *res judicata*.

[58] Given the language of the settlement agreement, clause 26 just provided for having settled then present, past and future disputes. Clause 26 cannot be read in isolation – it should be read with other clauses of the agreement and the issue whether it limits appellant to sue on the agreement does not arise. There is nothing to

suggest that when the appellant accepted the assurances of the respondent on the vaccinations and signed the clause in its current form, she was not aware what she was agreeing to.

[59] Consequently, I would find no reason to disagree with the High Court's finding (*albeit* for different reasons) that the settlement agreement is final as per its clauses. Accordingly, the appeal stands to be dismissed and costs to follow the order.

[60] I therefore make the following order:

(a) The appeal is dismissed.

(b) Appellant to pay costs consequent upon the employment of one instructing and one instructed legal practitioner.

MAINGA JA

DAMASEB DCJ

HOFF JA

APPEARANCES:

Appellant:

J P Ravenscroft-Jones

Instructed by Ellis Shilengudwa Inc.

Respondent:

J A N Strydom

Instructed by Theunissen, Louw &
Partners