IN THE SUPREME COURT OF APPEAL

Case no:
ECPE CASE NO: 984/2011

In the matter between:

PETRUS STEPHANUS JACOBUS LE GRANGE First Applicant

and

YOLANDA LE GRANGE (born SCHEEPERS) Second Applicant

FOUNDING AFFIDAVIT

I, the undersigned

Petrus Stephanus Le Grange

do hereby make oath and state:

1. I am the first applicant in this application to seek an order to extend the grounds of appeal in an appeal against the judgment of His Lordship, Mr Justice Alkema in a divorce action between the Second Applicant and myself.

2. I am an adult male employed as a XXXXXXX Port Elizabeth.

3. The Second Applicant is my ex-wife, currently residing at XXXX

4. I issued summons against the Second Applicant out of the Port Elizabeth High Court in April 2011. I attach this summons hereto as **ANNEXURE A.**

5. Thereafter, during or about June 2011, we had reached an agreement on how to settle the outstanding issues in our divorce. At this stage each of us were represented by our own attorney and a Deed of Settlement was prepared and signed by each of us. I attach this Deed of Settlement hereto as **ANNEXURE B.**

6. Pursuant hereto my attorney filed a Notice of Set-down for a Divorce Order and that the Deed of Settlement concluded between the Second Applicant and myself be made an order of Court. This Notice of Set-down is attached hereto as **ANNEXURE C.**

7. The Deed of Settlement was also served on the Family Advocate who endorsed same to the effect that the settlement was in the best interests of our children.

8. On 13 September 2011 I attended the divorce court, where I was due to give evidence in seeking the order as agreed between the Second Applicant and I. The Second Applicant did not attend the court as we were both of the opinion that an order as requested in the Notice of Set-down would be sought and granted. I listened to the evidence of other Plaintiffs. In some matters prior to mine there were also consent papers, but the judge was refusing to make any settlement agreement an order of court. He indicated that the agreement would be enforceable between the parties and as such need not be made an order of court. It seemed that the legal representatives were caught off guard by this stance of the judge.

9. I then testified in my divorce action. I attached hereto a copy of the transcript of my evidence as **ANNEXURE D**.

10. In my matter the judge (similarly) refused to make the Deed of Settlement an order of Court, whereupon my attorney requested the judge to at least make the paragraphs dealing with immovable property an order. The Judge refused. Instead, I have later learned, the Honourable Judge had, without being asked to do so, made an order relating to the children and a forfeiture order as set out in my Particulars of Claim. The

order sought in the Particulars of Claim in respect of the children differs from the agreement reached by the Second Applicant and I.

11. Realising the discrepancy between what we intended the divorce order to be and on the advice of our respective attorneys, the Second Applicant and I decided to appeal against the decision. However, we did not have money to proceed with a private attorney. Acting in person, the Second Applicant and I filed an Application for Leave to Appeal against the judgment of the Honourable Judge. I attached this Notice hereto as **ANNEXURE E.**

12. At the time of preparing that Notice of Application for Leave to Appeal, we relied on an order that was wrongly typed by the Registrar. I attach this wrong order hereto as **ANNEXURE F**. It was only at the time that the transcript of the proceedings became available that it was brought to our attention that the Honourable Judge had made orders that were not requested.

13. The correct order is as per the last page of the transcription.

14. The Second Applicant and I sought leave to appeal against the judgment as we were of the opinion that our rights would be better protected by the order sought by us. In particular we were informed that in order to effect an endorsement to have the immovable property registered in my name we needed an order of the court to this effect.

15. We contend that the Honourable Court:

15.1. Did not apply his mind to the Deed of Settlement;

15.2. Erred in not making the Deed of Settlement an order of court, alternatively not incorporating some of the clauses of the Deed of Settlement into the Court order.

16. After the filing of the Application for Leave to Appeal, Legal Aid South Africa filed a notice of acting. Only thereafter did the transcription with the correct order come to light.

17. On 16 November 2011 the Leave to Appeal Application was argued before the Honourable Judge. Argument was presented that the Honourable Court had erred in that:

17.1. The Honourable Court had made orders not requested, in that the Court made a forfeiture order against the Second Applicant and made an order in respect of the minor children that differed from the order sought in the consent paper.

17.2. The Honourable Court had not made orders requested, in that we wanted the Deed of Settlement to be made an order of court as set out in the Notice of Set-down. Had the Honourable Judge not refused all previous such requests, my then attorney of record would not have only asked for an order in terms of the paragraphs dealing with the immovable property. Even so, the Honourable Judge declined even to make this paragraph an order of court.

17.3. His reliance on his previous judgment in **Thutha v Thutha 2008(3) SA 494 (TK)** is wrong and causes legal uncertainty in the Division as consent papers should be made an order of court, except if a judge in the exercise of his discretion finds that the consent paper or certain clauses therein are unlawful, undesirable or against public policy. In fact I am informed that this Honourable Judge is the only judge that follows the **Thutha** judgment in this division in divorce court.

18. Counsel prepared a List of Authority, attached hereto as **ANNEXURE G** which was used during argument.

19. On 13 December 2011 written judgment was handed down in the matter. A copy of the judgment and the order of Court in the Leave to Appeal application are attached hereto as **ANNEXURE H** and **ANNEXURE I** respectively

20. In this judgment the Honourable Judge granted only leave to appeal on the basis that his "judgment" (sic) should be overturned, if his decision in Thutha is wrong.

21. He refused to grant leave to appeal against his decision:

21.1. To make a forfeiture order against the Second Applicant.

21.2. To grant an order in respect of the children that differ from the terms as agreed between the Second Applicant and I;

21.3. Not to at least have granted an order in respect of the immovable property set out in clause 8.2 of the Deed of Settlement.

22. This narrow ground of appeal on which the Court allows us to appeal will prejudice the Second Applicant and I when the appeal is argued and I request that in fairness to us that the grounds of appeal be extended to include that the Court had not properly applied his mind to the terms of the Deed of Settlement and as a result had made orders which were not requested and did not make an order as requested.

23. In dealing with the merits of the further grounds, I refrain from dealing with argument concerning the ground on which we have already been given leave to appeal upon.

24. In paragraphs 14-21 of his judgment on the Leave to Appeal Application, the judge deals with the reasons that he is not allowing us to Appeal against his judgment on this ground.

25. Because the Judge's aversion to make a consent paper an order of court, he did not consider the agreement in the deed of settlement as an option. This resulted in a different order as the one that the Family Advocate had endorsed and to which we agreed. The Honourable Judge's point of departure should have been that as parents of the children our joint decision on what is in their best interests should be

considered. Only if he had found this not to be in their best interests, should he have deviated from our agreement. There is with respect no reason to have deviated there from. The Honourable Judge in paragraph 21 states that, if it is in the best interests of the children to have the precise wording of the consent papers to be made an order of court, then we are free to approach the court again and present evidence in support of such an amended order. With the greatest respect this reasoning is flawed. A court cannot say, I will make any order I see fit despite the agreement between the parties and then the parties must approach the court again to ask for an amendment of the order. Such reasoning is not conducive to saving costs and bringing finality to an emotionally challenging period when we go through a divorce. It is especially not in the best interests of children to be subjected to yet another scrutiny by the Family Advocate and the Court. The Honourable Judge seems to want to blame my then attorney of record for making this wrong order. However, as is the practice the Notice of Set-down clearly sets out the relief sought.

26. The Judge had made a forfeiture order against the Second Applicant as I had requested in the Particulars of Claim, prior to our reaching a Settlement. The Second Applicant was not in court. We had clearly

divided our joint estate as per the consent paper. The Second Applicant had reached this agreement so that no forfeiture order be made against her. The Honourable Court should not have made this order, but should have granted an order as per the clauses in the consent paper.

27. The judge in paragraph 27 says that the order that the Second Applicant forfeit the benefits of the marriage in community of property prevents the automatic dissolution of the marriage in community of property and "*paves the way for an agreement between the parties as to how the assets are to be divided*." This reasoning is with the greatest respect flawed. We have already agreed and this order by the judge now undoes our agreement. Why would we want our way paved to come to a new agreement?

28. In paragraph 28 the Honourable Judge comes to a conclusion that our respective rights are governed by the Deed of Settlement irrespective of the forfeiture order he made. If so, why did he make such an order? More importantly the Honourable Judge neglected to consider the protection against third parties that would follow after the court has made an order in terms of the Deed of Settlement.

29. The judge should have at least made clause 8.2 in respect of the immovable property an order of court. He refused to do so and in so doing erred. I have been informed that because the property is not being dealt with in terms of a court order, the Registrar of Deeds might refuse to make an endorsement to affect transfer of the property into my name.

30. The Judge should have allowed us to appeal on each of these grounds. Therefore to only allow us to appeal on the limited ground that the Thutha decision was wrong, unnecessarily limits the scope of our appeal.

31. The Second Applicant supports the bringing of this petition. I attach her confirmatory affidavit hereto as **Annexure J**.

32. Wherefore I request an order in terms of our Notice of Motion, pre-fixed hereto.

DATED AT PORT ELIZABETH THIS ___ DAY OF JANUARY 2012.

_____

Petrus Stephanus Le Grange

I certify that the deponent has acknowledged and that he knows and understands the contents of this affidavit which was sworn to and signed before me at PORT ELIZABETH on this the ___ day of January 2012, the Regulations prescribed by Government Notice No. R 1258 of 21 July 1972 , as amended having been complied with.

_____

COMMISSIONER OF OATHS

Full Names:

Capacity:

Address:

Area: