Settlement agreements and freedom of testation – what you need to know

In the recent High Court matter of Heynike v Van der Westhuizen, the parties ended their romantic relationship and entered into an agreement akin to a settlement agreement in divorce proceedings.

In terms of the settlement agreement, Mr Van der Westhuizen wanted to ensure that Ms Heynike is financially looked after, and as such, he included certain terms in the agreement, most notably, a clause wherein he bequeathed his residence to Ms Heynike, alternatively, should the house be sold during his lifetime, then Ms Heynike will be entitled to 50% of the net proceeds received for the house. The settlement also provided for Ms Heynike to enjoy cover on Mr Van der Westhuizen's medical aid.

Approximately two months after the settlement was signed, Mr Van der Westhuizen reconsidered and informed Ms Heynike that he no longer intended to be bound by the agreement. Ms Heynike then instructed her attorney to address correspondence to Mr Van der Westhuizen, informing him that his conduct amounted to a repudiation of the agreement, which repudiation was not accepted by Ms Heynike and that she wanted to enforce the agreement.

There was a back and forth between the parties, with Mr Van der Westhuizen attempting to amend the agreement with an amended document containing new terms, which Ms Heynike refused to sign. Ms Heynike then approached the Johannesburg High Court for an order declaring the agreement valid and enforceable.

One of the main issues that the court had to consider was whether the terms of the agreement denied Mr Van der Westhuizen his right to freedom of testation with specific reference to the clauses bequeathing his house to Ms Heynike.

The court held the initial agreement between the parties is valid and binding on Mr Van der Westhuizen, save for the clauses infringing on his right to freedom of testation. Mr Van der Westhuizen was ordered to retain Ms Heynike on his

medical aid until December 2031 unless she remarries or returns to her previous life partner, and lastly that Mr Van der Westhuizen had to pay Ms Heynike's legal costs for the proceedings.

Considering this judgement, it should be kept in mind that settlement agreements will only be made an order of the court if they conform to the Constitution and the law. Freedom of testation is considered one of the founding principles of the South African Law of Testate Succession. Therefore, a court will not declare a clause enforceable if it restricts a party's right to determine who should inherit their assets in a will. It is, therefore, advisable to refrain from including similar clauses in settlement agreements. Should a party seek to bequeath certain property to another, the utilisation of a will is the best option to ensure that your last wishes are adhered to should the time come to avoid any unnecessary delays.

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