# TETENE v. TETENE

SUPREME COURT (Alcantara, A.J.): October 11th, 1993

*Family Law—financial provision—maintenance agreements—binding on parties before formally sanctioned as consent order if negotiated at arm's length with benefit of legal advice and proper financial disclosure*

The petitioner applied for ancillary relief in divorce proceedings.

The petitioner filed a divorce petition, seeking no provision for maintenance for herself or the child of the family. The petition stated that the parties' solicitors had negotiated an agreement regarding financial provision, and that the court's sanction of that agreement would be sought before decree absolute was granted. The divorce was undefended. The respondent, who had been paying maintenance for his wife and the child in the two years since their separation, entered an appearance, stating that he had paid the petitioner's costs and had reached agreement with her on financial provision. A decree *nisi* was granted.

It was subsequently suggested to the petitioner that the respondent's income was substantially greater than she had previously been led to believe. She applied for an order for maintenance for herself and increased maintenance for the child and a settlement of the matrimonial property. The respondent ceased the maintenance payments which he had been making. The respondent filed an affidavit of means denying having earnings as alleged by the petitioner. The court made an interim order that he should pay the arrears of maintenance for his child and continue to pay until further order.

The petitioner submitted that the parties were not bound by the agreement negotiated by their solicitors and set out in a consent order for the court's approval, since (a) a wife could not contract out of her right to seek financial provision under s.32 of the Matrimonial Causes Ordinance; and (b) the agreement had been made without proper financial disclosure on the part of the respondent.

The respondent submitted in reply that the agreement should be upheld, since (a) it had been negotiated at arm's length, on the basis of proper legal advice, and was binding even without the court's sanction; and (b) the petitioner's allegation that his means were greater than he had disclosed was pure speculation founded on hearsay.

**Held,** making the following order:

The existing agreement for financial provision should be enforced and its terms were approved as a consent order. There was no evidence of non-disclosure by the respondent. The agreement had been negotiated at

arm's length by the parties and with the benefit of expert legal advice, and was to be regarded as binding as between them even before it received the court's formal sanction. The provisions for the settlement of matrimonial property were to be complied with as soon as possible. The interim order was merged in the consent order (page 182, line 10 – page 183, line 27).

**Cases cited:**
(1) *Barber* v. *Barber* (1987), 17 Fam. Law 125.
(2) *Edgar* v. *Edgar*, [1980] 1 W.L.R. 1410; [1980] 3 All E.R. 887, considered.
(3) *Smallman* v. *Smallman*, [1972] Fam. 25; [1971] 3 All E.R. 717, applied.

**Legislation construed:**
Matrimonial Causes Ordinance (1984 Edition), s.32(1):

> "It shall be the duty of the court in deciding whether to exercise its powers under this Part in respect of a decree of divorce … in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case … and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."

*Sir J.A. Hassan, Q.C.* for the petitioner;
*Ms. J.A. Evans* for the respondent.

**ALCANTARA, A.J.:** Mary Jane Sandra Heather Tetene, the petitioner, married Theodoseos Tetene on July 7th, 1977. A girl was born 30 of the marriage (Eva Olga Tetene), on May 2nd, 1978.

The petitioner is a qualified school teacher, now in temporary employment. The respondent is a pilot in the Port of Gibraltar. The petitioner lives at Flat 222 Water Gardens with her daughter, and the respondent resides at 3b Rulander House, Vineyards. 35

The petitioner presented a petition for divorce against the respondent on May 18th, 1992, on the ground of adultery. Paragraph 11 of the said petition reads:

> "Terms of agreement regarding matrimonial property, custody and care and control of the child of the marriage have been agreed 40 between the parties and the court's sanction thereto will be sought between decree *nisi* and decree absolute."

The prayer in the petition sought only (a) dissolution of the marriage; (b) costs; (c) joint custody of the child with care and control to the petitioner; and (d) access by the respondent. There was no prayer for alimony, 45

maintenance or secured provision. The respondent entered an appearance on June 9th, 1992 and in the memorandum he stated the following:

"1. Costs: Already agreed and paid to Hassan & Partners.
2. Custody of the child: Joint custody already agreed.
3. Maintenance of the child: Already agreed.
4. Alimony &
5. Maintenance: Settlement agreed already.
6. Secured provision: Already agreed."

The petition was undefended and came for hearing on November 17th, 1992, and a decree *nisi* was pronounced on the ground of adultery by the respondent with a woman unknown. It is pertinent to point out that the respondent provided the evidence himself in the form of a written statement. There and then custody, care and control of the child were committed to the petitioner with reasonable access for the respondent. All ancillary matters were adjourned into chambers, including consideration of the agreed settlement.

On January 22nd, 1993 the petitioner issued a summons asking for an order (a) that the respondent pay fair and reasonable maintenance to the petitioner and to the child of the marriage until she finishes full-time education, and (b) for a proper settlement of the matrimonial property. What the petitioner is seeking to do is to go back on the agreement referred to in para. 11 of her petition. The ground on which she seeks to resile from the agreement is that since the hearing of the petition, she has found out that the respondent's income is £100,000 and not £44,000 a year, as she had been led to believe.

The agreement as to the matrimonial property was drafted and agreed to by the solicitors of both parties in the form of a consent order to be approved by the court. I think that I should set it out in full:

"UPON HEARING Sir Joshua Hassan, Q.C., counsel for the petitioner instructed by Messrs. J.A. Hassan & Partners, and Ms. J.A. Evans, solicitor with Messrs. Stagnetto & Co. for the respondent, BY CONSENT and upon the petitioner undertaking to indemnify the respondent against any future liability under the mortgage in favour of Banco de Bilbao Vizcaya (Gibraltar) Ltd. secured on the property hereinafter mentioned and to use her best endeavours to procure his release from his covenants thereunder, AND UPON the basis that each party abandons such claim (if any) as each may have to any interest in any chattel now in the possession of the other and in any property or account now in the name of the other, IT IS ORDERED THAT:

1. The respondent shall, within three months from the date of this order, execute such document as may be required to transfer and release to the petitioner all his legal and equitable interest in the former matrimonial home known as 222 Water Gardens, Gibraltar ('the property'), such document to be prepared by the respondent's solicitors and at his expense.

2. The respondent will—
(a) assign the Norwich Union Life Insurance Policy No. A10543547F to the petitioner;
(b) assign the benefit of the Norwich Union Life Insurance Policy No. A3256518T to Eva Olga Tetene, the child of the family; and
(c) continue to pay the premiums due for the duration of the said policies.

3. The respondent shall pay, by way of periodical payments, in respect of the child of the family, Eva Olga Tetene, born on May 2nd, 1978, £1,400 per month for the period of four years from the 1st day of January 1992 and at the rate of £200 per month thereafter until the said child of the family finishes full-time education.

4. The petitioner's application for maintenance pending suit, a periodical payments order, a secured periodical payments order and a lump sum order for herself, be dismissed.

5. Save as aforesaid, there be no further order made in favour of either party under the Gibraltar Maintenance Ordinance or any other Ordinance and the application in that behalf in the prayer of the petition filed by the petitioner be and is hereby dismissed."

The approval of the above draft consent order never came before me. Instead, the summons referred to above came for hearing on March 1st, 1993. I then ordered that the parties file affidavits of means and adjourned the matter into court, *in camera*, for the parties to be cross-examined. The hearing took place on July 28th and August 3rd, 1993.

The evidence before me is that the respondent left the matrimonial home at Water Gardens on October 26th, 1990. He started to pay his wife, the petitioner, £150 a week for her maintenance and that of her daughter. He stopped making any payments on January 14th, 1993. Before the respondent stopped his payments a settlement was being negotiated. The petitioner has stated that she agreed to the proposed settlement because she was under the impression that her husband's income was in the region of £42–45,000 a year. However, after the decree *nisi*, she learnt from a former pilot's wife that pilots earn about £100,000 a year. She now wants more. She has no means other than what she earns as a temporary school teacher. Her income from that source is about £1,000 a month. The house she is living in now is mortgaged. The respondent paid the interest on the mortgage up to December 1992, but stopped in January 1993.

The respondent has not been very explicit as to his earnings. He admits to £45,000 but does not admit to £100,000, although he has a trust from which he derives income, and last year only had an income of £75,000. When he left the matrimonial home he had to buy a home. Where he is living now is 75% mortgaged. He says he did not want a divorce, but was willing to have it. They reached an agreement, however, that he would provide the necessary evidence, and a settlement was agreed with legal advice.

There is correspondence between the legal advisers of both parties which proves that the agreement was voluntarily entered. Long before the petition for divorce was presented, the solicitors for the respondent wrote to the solicitors for the petitioner on January 29th, 1992 in the following 5 terms:

> "We enclose herewith our client's cheque for £500 as agreed, as his contribution towards your client's divorce costs, upon your undertaking that there will be no claim for costs in the petition or on the ancillary relief application and that the petition will be pursued 10 to its finality with all expedition, and on further condition that your client accepts our client's offer, contained in the draft consent order enclosed herewith, in full and final settlement of all her financial and property claims against our client on a clean-break basis. Our client will not defend the divorce."

15 The reply by the petitioner's solicitors was this one, on February 18th, 1992:

> "We will, of course, honour our undertaking that there will be no claim for further costs in the petition or on the ancillary relief application and we wish to pursue the divorce with all expedition to 20 its finality.
>
> We confirm our client's acceptance of the terms of the draft consent order enclosed in your letter of January 29th, 1992."

A week before the actual hearing of the petition the respondent's solicitors wrote to the petitioner's solicitors to the following effect:

> 25 "We enclose herewith the original of the confession statement. As you are aware, Mr. Tetene would like to obtain the decree absolute as soon as possible and therefore we request that you apply, at the divorce hearing on November 17th, for ancillary matters to be adjourned to chambers and that to this end you prepare the summons 30 for the ancillary relief application immediately after the hearing, with a request for an early date, as this will be a very short matter, as the terms of the order have been agreed between us."

The decree *nisi* was pronounced on November 17th, 1992 and the ancillary relief matters were adjourned into chambers. A week later a 35 bombshell arrived in so far as the respondent was concerned: A letter from the petitioner's solicitors to the respondent's solicitors stating that the petitioner would like to negotiate new terms of settlement before decree absolute. The grounds stated were that the circumstances had changed considerably and that she had been misled by the respondent as 40 to his earnings.

Two things happened. First, the respondent ceased making any payments after January 14th, 1993 (another bombshell) and did not start paying under the settlement agreement, which on the face of it envisaged coming into operation some time in late 1992. Secondly, the petitioner, 45 instead of seeking the approval of the court to the agreed settlement,

issued the present summons on January 22nd, 1993. In it she asks that the court should disregard the agreement and impose new terms of settlement in the form of alimony and maintenance.

Sir Joshua Hassan, Q.C., for the petitioner, submits that this court is not bound by the settlement agreement. He has referred me to s.32 of the Matrimonial Causes Ordinance, which deals with the matters to which the court is to have regard in deciding how to exercise its power as to financial arrangements. Section 32 of the Matrimonial Causes Ordinance is the equivalent of s.25 of the English Matrimonial Causes Act 1973. The law on the matter is stated with clarity in Duckworth, 1 *Matrimonial Property & Finance*, 4th ed., at 334–335 (1991):

> "…[I]t is impossible for the wife by private agreement to contract out of her right to financial provision. Consequently, she may apply for ancillary relief in the usual way, and if she does so, the court must treat it as any other application and apply the provisions of MCA 1973, s.25… But among the matters to be taken into account under s.25(2) is the conduct of the parties and, in the present context, the fact that the wife has chosen to enter into an agreement is itself a weighty piece of conduct… The court has a duty to satisfy itself that the provision made is reasonable, but in approaching this task it should adopt a broad rather than a particular approach… Thus the mere fact, for example, that the wife would have got more if she had gone to court, is wholly immaterial so long as she has had the benefit of proper legal advice."

And (*ibid.,* at 335):

> "Still, it is no part of the court's duty to upset agreements fairly and freely entered into by individuals possessing the requisite degree of competence. Provided there has been independent legal advice and the parties have acted at arm's length—and provided, of course, there has been proper financial disclosure—the court will rarely intervene."

In support of the respondent's case, Ms. Evans has brought to my attention a good number of cases which I have considered, and in particular *Edgar* v. *Edgar* (2) and *Smallman* v. *Smallman* (3). The headnote to the latter case in *The All England Law Reports* ([1971] 3 All E.R. at 717–718) reads:

> "**Held** — The parties having reached agreement on all essential matters, it was no longer open to either of them to refuse to carry out the obligations assumed thereunder. Where parties had reached agreement, then the clause 'subject to the approval of the court' did not mean that there was no agreement at all; there was an agreement, but its operation was suspended until the court approved it. It was the duty of one party or the other to bring the agreement before the court for approval. If the court approved, it was binding on the parties; if the court did not approve, it was not binding; but, pending

the application to the court, it remained a binding agreement, which neither party could disavow…"

Ms. Evans argues that the negotiations were at arm's length. In fact, the settlement was agreed and costs paid long before the petition was presented. Secondly, the petitioner had the best advice she could seek in Gibraltar, in the form of Sir Joshua Hassan, Q.C., from the very beginning. Thirdly, there is no good evidence that the respondent is earning £100,000 a year; just the gossip of another wife. In any case, during the negotiations the petitioner must have been aware of the living standard she had enjoyed when the parties were living together. On this latter point, counsel has referred me to *Barber* v. *Barber* (1).

I have come to the conclusion that, on the evidence before me, the settlement arrived at between the parties should stand and, accordingly, I approve the same as an order by consent. On July 28th, 1993 I made the following order:

"That the respondent should pay to his daughter, Eva Olga, the sum of £8,400 in respect of her maintenance for the period from January 1st, 1993 to June 30th, 1993 within 14 days, and continue paying maintenance to the daughter at the rate of £1,400 per month commencing on the last day of every month starting at the end of July 1993, until further order."

The reason for this interim order was that the respondent had, in a counter-move against his wife for issuing the present summons, left his daughter without any maintenance whatsoever. This was wrong on his part. He could, had he wanted to, have sought the approval of the consent order regardless of what his wife was doing. The above interim order will now merge in the consent order approved by this court.

I am not clear on what the present position is as regards paras. 1 and 2 of the consent order. All I do know is that the petitioner is at present living in the matrimonial home. It might well be that the proper course is to back-date those two paragraphs to January 1st, 1993 if the property at Water Gardens has not been legally transferred to the wife and the policies have not been assigned or paid as agreed. I am quite sure that counsel, in a spirit of co-operation and not confrontation, can work this out.

The consent order is approved with retrospective effect to January 1st, 1993.

*Order accordingly.*