



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

NOT REPORTABLE

Case no: 2283/2021

In the matter between:

JENNIFER ANNE NELSON

Applicant

and

NEIL CHRISTOPHER NELSON

Respondent

LEAVE TO APPEAL JUDGMENT

Govindjee J

[1] The parties were married out of community of property with the inclusion of the accrual system during 1996. They divorced on 18 June 2019, having entered into a settlement agreement made an order of court ('the order'). The applicant sought rescission of the order, alternatively that certain paragraphs of the settlement agreement made an order be expunged from that agreement. The application was dismissed with costs, excluding costs of an application to strike, on 17 May 2022 ('the judgment').

[2] The grounds on which this application is premised are the following:

- a. The court erred in its judgment, another court may reasonably possibly come to a different conclusion and an appeal enjoys a reasonable prospect of success.
- b. The court erred in deciding that the *Plascon-Evans* rule was applicable, alternatively erred in its application of that rule.
- c. The principle of the sanctity of a court order was over-emphasised when considering the injustice that will result from dismissal of the application.
- d. The court erred in equating the order to one obtained in contested proceedings and thereby applying a more stringent test for rescission.
- e. The court erred by finding that there was no mistake common to the parties and should have accepted that the parties were in agreement that a further amount was due to the applicant, despite the consent paper to the contrary.
- f. The respondent's conflicting statements on the papers were not properly interrogated.
- g. The concepts of 'good cause' and 'iustus error' were interpreted too narrowly and erroneously limited to the applicant's conduct.
- h. The court should have found that the applicant had not made an informed decision when signing the deed of settlement, so that no true consensus existed.
- i. The parties' attorney's role and affidavit had not been examined critically.
- j. The court neglected to consider whether the implementation of the contract was against public policy and unlawful and erred in not rescinding the order on this basis.

[3] Many of the grounds advanced follow this court's finding that the *Plascon-Evans* rule was applicable. Counsel for the applicant had argued during the hearing of the application, and based on *Gangat v Acoon*,¹ that the rule was completely

¹ *Gangat v Acoon* [2021] ZAGPJHC 828.

inapplicable in rescission applications, because the order to be made would not be a final order on the legal aspects of the dispute. The court delved into *Gangat* and distinguished that decision, placing reliance on *Storti v Nugent and Others*.² The conclusion reached was that there is a difference in cases involving rescission of an order which should never have been granted (the effect of such an order being interim only), and orders correctly made but to be permanently set aside for one or another reason. In the present instance, following *Storti*, the order was correctly made and a decision to set aside the order was expected to have final effect so that factual disputes became an obstacle to the applicant. The application before court sought final relief in the form of rescinding parts of the order that governed the division of the parties' estates at the time of the divorce. The question of the validity of the order and settlement agreement would not be considered again. Instead, the consequences of the dissolution of the marriage would be considered afresh and without reference to material terms of the settlement agreement incorporated into the order. As a result, the court held that the relief sought was final in nature so that the *Plascon-Evans* rule applied.

[4] Importantly, the court found support in its reading in the judgment of the SCA in *Slabbert v MEC for Health and Social Development, Gauteng*.³ This matter concerned a compromise agreement made an order of court. An application for rescission was launched. The SCA confirmed that *Plascon-Evans* ought to have been applied by the court a quo. Although counsel suggested that there were philosophical principles that should result in a different outcome, I am not persuaded that there is a reasonable prospect of success in this regard, particularly given the authority relied upon and the absence of any authority to support a different interpretation.

[5] Likewise, given the clear averments on the papers, I am unable to conclude that there are reasonable prospects of success in respect of the court's application of the *Plascon-Evans* rule, contained in paragraphs 19-21 of the judgment. The type of interrogation and scrutiny of the respondent's version proposed by the applicant would completely negate the very purpose of the rule and require a

² *Storti v Nugent and Others* 2001 (3) SA 783 (W).

³ *Slabbert v MEC for Health and Social Development, Gauteng* [2016] ZASCA 157.

referral for oral evidence in many more cases. In any event, in this instance counsel were in agreement that no such referral was warranted. The plea, in essence, was for the court to scrutinise the submissions of the respondent and attorney with scepticism and draw inferences based on the probabilities that the applicant would not have knowingly entered into the settlement agreement. Unfortunately for the applicant, that is simply not the appropriate application of the rule where real, genuine and bona fide disputes are apparent on the papers.

[6] The argument based on the suggested common mistake falls as a result of the application of the *Plascon-Evans* rule and based on the unchallenged authorities that required this court to focus, in the first place, on the order, rather than the underlying agreement, in considering the application. The same difficulty is encountered in respect of the argument that the court should have scrutinised the applicant's state of mind at the time she entered into the settlement agreement.

[7] There is copious authority emphasising the importance of the finality of judgments, also included in the judgment, so that the suggestion that the court over-emphasised this point has no reasonable prospect of success. No authorities suggesting the contrary position were presented. Likewise, in relation to the application of a more stringent test, no authorities were advanced to counter the reliance on *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others*⁴ and other authorities quoted in footnote 30 of the judgment. As a result, there is no reasonable prospect of an appeal succeeding on this ground.

[8] The proposed 'wider' interpretation of 'good cause' and 'iustus error' also lacks a legal underpinning and, on the accepted facts, cannot support the applicant's argument. The arguments relating to the court's treatment of the attorney's role in the matter are unfounded: the court not only applied *Plascon-Evans* to the attorney's version but also remarked, in paragraph 45, on the attorney's conduct in advising both parties, acknowledging possible separate proceedings.

⁴ *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others* [2017] ZASCA 54; 2017 (5) SA 508 (SCA).

[9] Finally, the court considered the broader issue of ‘the interests of justice’ in deciding whether to grant the relief sought, with full reference to the leading authorities on the point. The applicant was unable to point to an erroneous interpretation of those authorities, or to other authorities supporting rescission of a consent order in such circumstances. Much of the argument, reduced to its essence, was that the outcome was unjust or unfair for the applicant, who could have obtained so much more had she not entered into the settlement agreement made an order of court. But no proper basis was advanced to explain how another court might be able to circumvent the authorities relied upon in the judgment to refuse rescission or variation. Ultimately, that is the main difficulty with the present application. That being the case, there is no basis for concluding that the applicant enjoys reasonable prospects of success and the application stands to be dismissed with costs.

Order

[10] The application for leave to appeal is dismissed with costs.

A. GOVINDJEE
JUDGE OF THE HIGH COURT

Heard:29 July 2022

Delivered:10 August 2022

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