

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2021/44477

- (1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO

**6 September 2022**

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DATE

SIGNATURE

In the matter between:

**GUNGIAH, THESANDRAN KRISHNA**

Applicant

And

**NAIDOO, MICHELLE**

Respondent

**In re: APPLICATION FOR RESCISSION**

**NAIDOO, MICHELLE**

Applicant

And

**GUNGIAH, THESANDRAN KRISHNA**

Respondent

(This judgment is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 6 September 2022.)

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## **JUDGMENT**

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### **MIA, J**

[1] The applicant seeks a rescission of the order granted by Segal J on 21 November 2021 where a decree of divorce was granted incorporating a settlement signed by the applicant and respondent. The respondent lodged a counter application requesting the referral to oral evidence in the rescission application. The respondent lodged a counter application requesting the dismissal of the application for rescission of judgment. For the purposes of this matter, the parties will be referred to as in the application for rescission of judgment.

### **BACKGROUND FACTS**

[2] The applicant and respondent were married to each other in Mauritius, according to the laws of Mauritius, on 21 July 2001 whilst on holiday. They were born and reside in South Africa. There are two children born of this union, both children are major adults at the time of the dissolution, but are not self-supporting. The parties' relationship broke down and reached a state of disintegration where they were they were unable to restore the relationship. The applicant left the marital home in October 2018 and had formed a new relationship. Initially the applicant resided in rented accommodation however, the applicant was desirous of purchasing a new home.

[3] The parties discussed the separation of their estates and attempted to settle the matter. The applicant indicates that she considered a draft agreement proposed by the respondent and proposed her amendments to the settlement. The respondent informed her that the amendments were unnecessary and they could formulate a verbal agreement to accommodate her requirements. She signed the

settlement agreement based on the respondent's assurance that it was unnecessary for her to approach a legal representative as it would incur costs, whilst his legal representative was capable of advising both parties on how best to resolve the matter. He assured her his legal representative would be in a position to finalise the divorce on an unopposed basis. The respondent persuaded her that approaching another legal representative which would increase the costs in order to alter the terms of the draft agreement. The applicant believing that the respondent assured her he was disclosing all the information he would have to disclose in court and she had the best information, persuaded the applicant to sign the settlement agreement. He also assured her that her amendments would be honoured despite not forming part of the agreement. This agreement was made an order of court. After the divorce order was granted the respondent removed her from his medical aid, and reneged on the verbal agreements they had made.

- [4] In support of the verbal agreement, he requested that she obtain a quote for her car insurance which he agreed to pay for. He also agreed to assist with dropping and fetching the children from Hartebeespoort where she purchased a property and indicated he would afford the children the use of his motor vehicle. The respondent to agreed he would pay for their cell phone contracts. According to the applicant, the respondent agreed to retain her as a dependent on his medical aid until she could afford her own medical insurance. He also indicated that he would assist with the care of four of the parties' seven cats. The respondent agreed to compensate her for household contents purchased during the subsistence of the marriage, and to reimburse her for funds she had withdrawn from a pension fund to avoid her laying claim to his pension interest. The respondent assured her that the verbal agreement need not form part of the agreement of settlement. To coerce her to sign the settlement agreement he refused to provide her with a letter relating to the former matrimonial home until she signed the settlement agreement.

- [5] He also refused to provide her with funds to pay a deposit to purchase the house in Hartebeestpoort and indicated he would not comply with the terms of verbal agreement in the absence of her signing the agreement. The applicant believed that the respondent would adhere to the verbal agreement and signed the agreement of settlement presented by the respondent.
- [6] On the respondent's version of the context to the settlement agreement, the parties had long separated their personal and household effects and established separate homes. Their relationship was good and they were transparent with each other. They agreed about the financial, proprietary and maintenance aspects. They only needed assistance to reduce the agreement to writing. He indicates that they were provided with a template and advised to seek the advice of an attorney with specialist knowledge because they were married in a foreign jurisdiction. He was assisted by a friend, however, he maintains that both he and the applicant they both contributed to the Draft Settlement Agreement, which passed between them with amendments. He refers to the thread of emails and the amendments suggested by the applicant indicating that she was fully engaged during the drafting and negotiation process.
- [7] He contends further, that the agreements outside of the settlement agreement were merely transitional and supplementary agreements and were not substantial. He refers to supplementary arrangements relating to medical aid and insurance of the applicant's vehicle. According to the respondent, the applicant's view regarding the settlement changed once she ascertained that he was in a serious relationship. The respondent contends that the applicant had obtained legal advice after the signing of the first settlement agreement. The concerns that she had could have been raised before signing the second settlement agreement. The applicant, in his view, was being dishonest in claiming that she had not received legal advice and that

she was misled and coerced into signing the second settlement agreement.

[8] Counsel for the applicant argued that the applicant was prejudiced when the respondent made the settlement agreement an order of the court without incorporating the verbal agreements. The respondent's request to refer the matter to oral evidence does not assist as this raises further issues and amounts to a concession that there are issues in dispute. Counsel submitted that the applicant has demonstrated based on the admissions made by the respondent that there is a satisfactory explanation why the judgment was granted by default. On the merits there is a dispute regarding the marital regime whether the parties are married according to the laws of Mauritius as the respondent believed or whether South African law governs the parties' marriage. The respondent relied on the opinion of his legal adviser and the applicant having since obtained legal advice differs from this opinion.

[9] The respondent was granted an unopposed divorce incorporating a settlement agreement concluded by the parties where they believed that a particular regime was applicable. In this regard the respondent believed Mauritanian Law was applicable and persuaded the applicant that this was the position, despite the parties being domiciled in South Africa. The applicant was unaware of the law applicable, moreover the verbal agreements entered into did not form part of the settlement agreement.

[10] In *Chetty v Law Society, Transvaal*<sup>1</sup>, the court stated:

“In the Supreme Court, a judgment granted by default can be set aside in terms of Rule 31 (2) (b); in terms of Rule 42 (1); and under the common law. *De Wet and Others v Western Bank Ltd* 1979 (2) SA at 1037H - 1038A. Neither Rule 31 (2) (b) nor Rule 42 (1) has any application to the facts of the present case. The appellant can only

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<sup>1</sup> *Chetty v Law Society Transvaal* 1985(2) 756 (A) at 761b-e

seek relief under the common law. Under the common law, a Court was empowered to rescind a judgment obtained on default of appearance on sufficient cause shown. This power was entrusted to the discretion of the Court and no rigid limits were set for the circumstances which constituted sufficient cause. Broadly speaking, the exercise of the Court's discretion was influenced by considerations of fairness and justice, having regard to all the facts and circumstances of the particular case.

[10] Counsel for the applicant had argued that insofar as the respondent had requested that aspects be referred to oral evidence, the applicant had made out a case and specifically counsel referred to aspects of the matter where the respondent referred to issues which the agreement falls outside of the settlement agreement. The facts which supported the rescission were thus that the respondent had advised the applicant that she did not require her own attorney that he was capable of advising her on how best to resolve the matter on the basis that it would be finalized on an unopposed basis, that approaching another legal representative would incur further costs. Whilst the applicant and respondent could reach separate verbal agreement regarding the amendments, the applicant required the respondent to make in relation to the Settlement Agreement. The respondent made proposals to the applicant regarding payment of insurance, regarding dropping and collecting of the children. These agreements the respondent admits having made and he admits that the applicant wanted to seek out her own legal representative. However, he denies that he advised her that his attorney was capable of assisting them to resolve the matter.

[11] Counsel for the applicant argued that the application be dismissed outright applying the *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*<sup>2</sup> and *Stellenbosch Farmers' Winery Group Ltd and Another v*

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<sup>2</sup>*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

*Martell et Cie and Others*<sup>3</sup> decisions. The rule was revisited *Wightman v Headfour*<sup>4</sup> where the Court stated:

“[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”

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<sup>3</sup> *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at [5]

<sup>4</sup> *Wightman v Headfour* 2008(3) SA 371 (SCA) at [13]

- [12] Having regard to the verbal agreements which the respondent refers to I am unable to find that there are grounds to dismiss the application as argued on behalf of the respondent. Counsel for the respondent argued that in the event that the application was not dismissed, that this court should refer the issues in dispute to oral evidence. In considering this referral, there is the submission on behalf of the applicant that the respondent should not cherry-pick which issue to refer to oral evidence. I have considered that in the present circumstances the decree of divorce incorporating the settlement order was granted under circumstances where the respondent sought a legal opinion and persuaded the applicant that the opinion was correct. There was no expert advice sought on the relevant marital regime applicable as is evident from the papers. Furthermore, the respondent held out to the applicant a particular position with regard to financial disclosure which may have caused the applicant to make decisions differently to if she had more and complete disclosure. The respondent appears to have changed a number of the agreements made prior to the settlement agreement being concluded and upon which there was reliance placed by the applicant.
- [13] Having regard to the common law requirement I am satisfied that the applicant has made out a case on a balance of probabilities and demonstrated that she has a reasonable explanation why the judgment by default was granted. On the merits there are issues that are in dispute namely the marital regime that is applicable as well as the financial disclosure which was misrepresented. The respondent's conduct and reliance on an opinion induced the applicant to sign the settlement. Whether the settlement was signed under duress or the applicant was misled it is apparent that the settlement agreement is not voluntarily signed by the applicant.
- [14] I am of the view that it would be inappropriate to refer certain of the issues to oral evidence where the parties have raised extensive disputes



on the matter. In the circumstances it is appropriate that the matter be referred back to the divorce court for determination.

## **ORDER**

[15] In the result I make the following order:

1. The judgment granted by Segal AJ on 12 November 2021 is hereby rescinded.
2. The respondent's counterapplication seeking an order to refer the rescission application to oral evidence is dismissed with costs.
3. The respondent is ordered to pay the applicant's costs for the rescission application

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**S C MIA  
JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG**

### **Appearances:**

On behalf of the Applicant : Adv. A Saldulker  
(NAIDOO)

Instructed by : Cuthbertson & Palmeira Attorneys Inc

On behalf of the Respondents : Adv J Kayser  
(GUNGIAH)

Instructed by : DHD Attorneys

Date of hearing : 23 August 2022

Date of judgment : 06 September 2022