IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A5003/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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MATSEMELA, RACHEL QUEEN APPELLANT

and

MATSEMELA, MICHAEL BAFANA RESPONDENT

JUDGMENT

FRANCIS J (MEYER AND WILSON JJ CONCURRING)

1. The appellant and respondent were husband and wife. They got divorced on 30 July 2010 when a settlement agreement was made an order of court. In terms of clause 5 of the settlement agreement, the appellant (the plaintiff in the divorce proceedings) was required to pay for temporary alternative rental accommodation of the respondent (the defendant in the divorce proceedings) not exceeding an amount of R10 000 per month, water and electricity inclusive pending full division of the joint estate.

2. On 20 April 2017 the respondent brought an application against the appellant

seeking to hold her in contempt of court for failure to comply with clause 5 of the settlement agreement and that she be ordered to pay him the sum of R416 300.00 which was for temporary accommodation.

3. The application was opposed by the appellant on several bases. The appellant disputed that she should be held in contempt of court. The respondent had failed to disclose that he owned immovable property before they got married and this was not covered in the settlement agreement. After she had discovered that he was owning immovable property she brought an application to vary the divorce order in 2011 which led to the dispute being settled between the parties in 2012. She had also raised prescription as a defence.

4. On 15 August 2019 the court *a quo* dismissed the contempt of court application but ordered the appellant to pay the respondent the sum of R416 300.00 with further rentals at the rate of R7 300 per month from 1 May 2016 to the last day of the month when the joint estate was finally distributed. Payment had to be made within 60 business days after the order was granted and there was no order as to costs.

5. The appeal is with leave of the court *a quo*.

The Issues on appeal

6. The appellant contends that the court *a quo* was wrong to order her to make payment in terms of the settlement agreement, because the parties had agreed during prior litigation the relevant term of the agreement would not be

enforced. However, the court *a quo* had found that that, while this meant that the appellant was not in contempt of court, she was nonetheless liable to pay the respondent in terms of the settlement agreement. In the absence of a it mattered not variation order having been granted the appellant was under a duty to cover he ex-husband's costs of securing accommodation. It mattered not that the process of distributing the joint estate took long and the temporary order enjoyed force over many years; it might have been a basis for an application for varying the court order that the resolution of the matter took so long, but since the variation application was never pressed, the order stood. The order did not include any provision suggesting that a delay in distribution of the joint estate would warrant non-compliance of the order in due course.

7. The court *a quo* further said that the appellant could not decline to comply with the order simply because, on her version the respondent had no need for temporary arrangement for accommodation given that he was the registered owner of a property in Soweto. The order did not make the appellant's obligation to pay the rental amounts dependent on need. There was no obligation upon the respondent to first prove that he could not find alternative accommodation with family or that he had no property registered in his name. The order was clear in its terms, and compliance was a simple matter.

8. Nor could the court accept the appellant's claim of prescription. The claim was based on the statement that the matter was resolved in 2012. However, the court was not told in what manner the matter was so resolved, even assuming that prescription could in principle be raised as a defence in the

circumstances of this case where rental amount contributions continued to fall due from month to month.

9. The court *a quo* said that it was entitled to reject allegations in the appellant's answer, that clause 5 of the settlement had effectively been abrogated by compromise, as far-fetched or clearly untenable having regard to *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H – 635C. If the appellant wanted the court to conclude in her favour that the matter had somehow been resolved, she ought to have provided details of that resolution.

10. The court *a quo* said further that the only indication of the alleged resolution was the allegation that the appellant had in 2012 paid to the respondent, through the office of the Liquidator/Receiver what was due to him in respect of the joint estate. That was inconsistent with the allegation that the joint estate had not been distributed by the time the application was launched. The obligation to pay the rental accommodation of the respondent was not dependent on whether the appellant had made some other payments due to him: it was dependent only on whether the joint estate had been distributed. Until such time as it was, the appellant was obliged to carry the rental costs, even if she had purchased the formerly jointly owned residence. The respondent had provided proof of rental costs in the amount of R416 000 incurred from the date of the order to 31 August 2016, and he claimed R7 300 per month from 1 May 2016 to date of the granting of the order, based on the terms of a lease agreement provided as part of the papers. The court found

that he is entitled to those costs. Objections that the respondent rented a property from his sister were ill-founded. Nothing in the order prohibited that. Payment was not dependent on conclusion of any rental agreement and he might well have been entitled simply to demand the amount of R10 000 on a monthly basis. The court took note that the respondent's rental never reached the maximum limited amount contemplated in the order, so that he does not appear to have abused the terms of the order.

11. The appeal was opposed by the respondent on the following grounds:

11.1 The court *a quo* properly found that the appellant did not make out a case based on the various points *in limine* raised by the applicant namely prescription, res *judicata*, and settlement and as a result granted an order in favour of the respondent;

11.2 The appellant knew as far back as 14 September 2017, how to resolve the issue regarding her discovery in respect of the respondent's ability to afford and/or pay for his rental accommodation through the availability of the alternative accommodation available to the respondent in terms of a house in Meadowlands and failed to pursue the variation of order application for no apparent reason;

11.3 Instead, the appellant without finalisation of the said variation order application expected the court *a quo* to dismiss the respondent's contempt of court proceedings despite the respondent having made out a case therein based on hearsay evidence that the said application was withdrawn with the agreement between the parties which the respondent vehemently denied;

11.4 The respondent sought an order dismissing the appeal with costs.

The Plascon-Evans test

12. It is common cause that the respondent did not file a replying affidavit in the proceedings in the court *a quo*. His case in the founding papers was that the appellant had failed to comply with clause 5 of the settlement agreement and that she was therefore liable to pay him the sum of R416 300.00 and further rentals at the rate of R7 300.00 per month until the final division of the joint estate. He had provided proof of rental.

13. It is further common cause that the application was opposed by the respondent on several grounds amongst others prescription and that the dispute had been settled between the parties in 2012 and after she had brought a variation application in 2011. This was after she had discovered that the respondent had failed to disclose that he had immovable property before they got married. Her version was uncontested.

14. The court *a quo* had referred to the *Plascon-Evans* test which is set out in paragraphs 634-635 as follows:

"Where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In

certain instances the denial by respondent of a fact alleged- by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact…. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross examination under Rule 6(5)(g0 of the Uniform Rules of court … and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines thereof and include this fact amongst those upon which it determines whether the applicant is entitled to the final relief which he seeks…".

15. The court *a quo* in applying the *Plascon-Evans* test said that it was entitled to reject the allegations in the appellant's answer as far-fetched or clearly untenable and if the appellant wanted the court to conclude in her favour that the matter had somehow been resolved, she ought to have provided details of that resolution. It is unclear what more details the appellant was required to provide to deal with the resolution or settlement of the matter as stated in her answering affidavit. The court had clearly failed to take into account that the respondent did not file any replying affidavit. It is also unclear on what basis it had concluded that the appellant's version of settlement was vehemently opposed bearing in mind that the respondent did not deal with that in his founding affidavit, The appellant's version that the matter was settled between the parties was therefore undisputed and it cannot be said that the appellant's answer was far-fetched and clearly untenable. The court should have found that the dispute had been settled after she had launched the

variation application. The court had made reference to the *Plascon-Evans* test but appears to have wrongly applied it. The appellant's version cannot be said to have been far-fetched. She had discovered after the settlement agreement was made an order of court that the respondent had failed to disclose that he had a house. That led her to bring a variation application in 2011 which was not opposed by the respondent. It resulted in a settlement in 2012 as stated by the appellant in her answering affidavit which version was not contradicted by the respondent who could have disputed that in a replying affidavit. It is telling that the respondent waited until 2017 when he launched the contempt of court application. It is also telling that he had decided not to refer to the variation application in the founding affidavit and the settlement that was reached between the parties. It is further telling that he had not filed a replying affidavit. It is also unclear on what basis the court had found that the respondent had vehemently denied the appellant's version about the settlement when no reference was made by the respondent in his founding affidavit about it nor did he file a replying affidavit. The appellant's version was undisputed.

16. It is clear from the court *a quo's* judgment that it had rejected the appellant's version despite no replying affidavit having been filed. There was simply no basis t have made that fining. The respondent's case in its founding papers did not deal with the issues that the appellant had raised in her answering affidavit. The court had applied the *Plascon-Evans* test wrongly which is a material misdirection that vitiates its ultimate finding and the outcome of the appeal before us.

17. The court *a quo* had said that the appellant did not pursue the variation application. What the court failed to take into account is that the appellant's case was that after she had brought the variation application it then led to a settlement between the parties. To insist that the appellant did not pursue the variation application indicates that the court *a quo* misconstrued the defence of settlement. If a party brings a variation application which results in a settlement of the dispute I simply do not understand why that party should still pursue the variation application.

18. For these reasons, I find that the court *a quo* misapplied the *Plascon-Evans* test. Had it properly applied the test to the facts before us, the court would have dismissed the application.

19. It follows that the appeal should be upheld.

Costs

20. The appellant contended that the appeal sh20ld be granted with costs since the court *a quo* erred in granting the order in light of the fact that the purpose of clause 5 of the settlement agreement was to provide for alternative accommodation for the respondent pending the finalisation and distribution of the liquidation and distribution of the parties' joint estate by the appointed receiver and liquidation. Subsequent to the conclusion of the settlement and subsequent to the granting of the divorce order, it transpired that the respondent had concealed from the appellant, the fact that, prior, to the marriage to the appellant, he owned a house in Meadowlands, Soweto in

which house he had resided in during the parties' separation and divorce. There was therefore no need for the appellant to have paid for the respondent's alternative accommodation. Whatever the merits of those claims, the appellant has been successful and there is no reason why costs should not follow the result.

Order

21. In the circumstances I make the following order is made:

21.1 The appeal is upheld with costs.

21.2 The order of the court a quo is set aside and is replaced with the following order:

21.2.1 'The application is dismissed with costs.'

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pp FRANCIS J
JUDGE OF THE HIGH COURT

FOR APPELLANT	:	G MASHIGO INSTRUCTED BY NYACHOWE ATTORNEYS
FOR RESPONDENT	:	KHOZA INSTRUCTED BY SP CHAUKE ATTORNEYS
DATE OF HEARING	:	16 NOVEMBER 2022
DATE OF JUDGMENT	:	11 JANUARY 2023

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to caselines. The date and time for hand-down is deemed to be 10h00 on 11 January 2023.