

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF  
KWAZULU-NATAL  
HELD AT DURBAN**

Case  
no:KZN/DBN/RC1571/2015

In the matter between:

**V[...] M[...]  
Applicant**

and

**N[...] M[...]  
Respondent**

Accused

*Ex Tempore* Judgment: 19 MARCH 2019

[1] This is an opposed rescission of judgment application pursuant to an order granted on 20 January 2017 dissolving the bonds of marriage between the parties

which incorporated the terms of a settlement agreement granting *inter alia* division of the joint estate. The application was argued on 19 March 2019. The Applicant, Mr V[...] M[...] Appeared in person and Mr M Nxasana appeared for the Respondent.

### **Common Cause Facts**

[2] It is common cause that the parties were married to each other on 18 May 1973, out of community of property. On 20 January 2017 a decree of divorce was granted in the following terms:

*'That the bond of marriage subsisting between Plaintiff and Defendant be and are hereby dissolved*

*That the settlement agreement, Exhibit "B" is made an order of Court*

*That the joint estate shall be divided as set out in Exhibit "B"*

*That there is no order as to costs.'*

[3] Clause 5 of the settlement agreement dealing with immovable property states that:

*'5.1 the Defendant shall retain the ownership of the Escombe property unconditionally;*

*5.5 the Plaintiff shall relocate from the Amanzimtoti property subject to him erecting his dwelling on the B[...] property below the cemetery within 18 months from date hereof and subject to further condition (sic):*

*5.2.1 that the Defendant, as well as the children born of the marriage, shall be allowed to hold and stage cultural functions and/or activities at the aforementioned property provided that they prove the Plaintiff with reasonable notice;*

*5.2.2 in the event that the Defendant, or children or their issues pass on, they will be buried on the aforementioned property, should they so wish, however, in the event that the Defendant remarries, she forfeits the right to be buried on the aforementioned property;*

5.2.3 *the aforementioned property may not be used as security or be encumbered in any manner whatsoever without the written consent of the children born of the marriage.'*

[4] Clause 9 deals with ownership of immovable property and essentially states:

*'Ownership of the immovable property shall pass on children born of the marriage to the exclusion of any matrimonial regime they may enter into'*

[5] The term "*immovable property*" as defined in the settlement agreement means:

*'1.1.4...*

*(a) The immovable property described as House Number [...], Road [...], Amanzimtoti (hereinafter referred to as Amanzimtoti property); and*

*(b) The immovable property described as House Number [...] Road, Escombe, Queensburgh (hereinafter referred to as Escombe property);...'*

### **Principle submissions by the parties**

[6] A number of submissions were made by the parties in the papers and also during argument. In light of the conclusion to which I will come I do not deem it necessary to deal with each of the points raised *ad seriatim*, and will for the purposes of this judgement, focus on the salient submissions made by the parties.

[7] The Applicant contended that the settlement agreement entered into between the parties were contrary to law, morality or public policy. The Applicant stated that *'at the time when entered into the said agreement, his mind did not have its normal measure of freedom and was acting under influence.'*<sup>1</sup> Consequently, the Applicant argued that there was no consensus between the parties and therefore no valid contract arose from the purported settlement agreement.

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<sup>1</sup> Para 14 of Applicant's founding affidavit.

[8] The Applicant further submitted that the Amanzimtoti property is a tribal allotment and as such, the ownership thereof resides with the Ingonyama Trust Board in terms of the Ingonyama Trust, Act No.3 of 1994, as amended. Consequently, it cannot devolve by Will or by agreement between the parties in an action. The Applicant argued that this is tantamount to a mistake common to the parties and *void ab origine*. The Applicant argued that the parties acted ultra vires and erred in attempting to regulate the devolution of the property.

[9] The Respondent argued that the Applicant should have cited the Ingonyama Trust Board in these proceedings alternatively, should have filed a confirmatory affidavit in this regard.

[10] On the other hand, the Respondent refuted that there is a mistake common to the parties as the Applicant is a senior Attorney and was himself represented by an Attorney during the divorce proceedings, was fully conscious and clearly understood and appreciated what he was doing when he signed the settlement agreement.

[11] Moreover, Applicant submitted that the said property is his parental home and according to African culture, the said property belongs to his siblings and their descendants as well. The Applicant further stated that African custom dictates that he,

as the custodian of the property should maintain same and as such, it cannot be owned by any one person, more especially not the Respondent.

[12] The Respondent denied that the Applicant is the custodian of the property. In this regard it was contended that before the Applicant's late father passed away, he gave the property as a family home to the Applicant, Respondent and their children.

[13] Applicant prayed for the following relief:

1. *That the orders made by this Honourable court on the 20<sup>th</sup> January 2017 that:-*
  - (a) *'...the settlement agreement, Exhibit "B", is hereby made the order of Court...'; and*
  - (b) *'...the joint estate shall be divided as set out in Exhibit "B"*  
*Be, and are hereby rescinded;*
2. *Other, further or alternative relief'*
3. *Costs of suit, if this application is opposed*

[14] The Respondent prayed for the dismissal of the Applicant's application with costs as the Applicant has failed to prove on the preponderance of probabilities that he will suffer irreparable harm if the court does not grant him the relief sought.

### **Issues not in dispute**

[15] The Applicant submitted that by virtue of the parties' marriage out of community of property any reference in the order to division of the joint estate is *void ab origine*.

[16] The Respondent conceded that any reference to a joint estate should be rescinded, but argued that the said error does not render the settlement agreement void in its entirety.

### **Issues for determination**

[17] The crisp issue for determination is whether the court erred in:

- (a) making Exhibit “B” and order of court and
- (b) Ordering a division of the joint estate as set out in Exhibit “B”.

### **Legal Principals**

[18] It is trite that an order of a court of law stands until set aside by a court of competent jurisdiction<sup>2</sup>. Until that is done, the court order must be obeyed even if it may be wrong;<sup>3</sup> there is a presumption that the judgment is correct. At common law a court’s order becomes final and unalterable by that court at the moment of its pronouncement by the Judicial Officer, who thereafter becomes *functus officio*. Save in exceptional circumstances it cannot thereafter be varied or rescinded. Section 36 is an exception and it is submitted that a Magistrate’s Court may correct or vary its judgment only in

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<sup>2</sup> *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229B-C; *MEC for Economic Affairs, Environment and Tourism v Kruissenga* 2008 (6) SA 264 (CkHC) at 277C; *Jacobs v Baumann NO* 2009 (5) SA 432 (SCA) at 439G-H.

<sup>3</sup> *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2009 (1) SA 470 (W) at 473C; *Culverwell v Beira* 1992 (4) SA 494A-C.

those cases that are covered by the section.”<sup>4</sup> Section 36(1)<sup>5</sup> stipulates which judgments may be rescinded or varied.

[19] The Applicant brought the application in terms of section 36(1) (b) of the Magistrate’s Act<sup>6</sup>.

[20] Rule 49<sup>7</sup> states: *‘(1) A party to proceedings in which a default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for a rescission or variation of the judgment and the court may, upon good cause shown, or if it is satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit...(8) Where the rescission or variation of a judgment sort on the ground that it is void ab origine or was obtained by fraud or mistake, the application must be served and filed within one year after the application first had knowledge of such voidness, fraud or mistake.’*

[21] Jones and Buckle<sup>8</sup> defines what is meant by mistake common to the parties in amplification of section 36(1) (b) of the Magistrates Court Act:

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<sup>4</sup> Jones and Buckle *‘The Civil Practice of the Magistrates’ Courts in South Africa’* Juta Law [service 25, 2010]

<sup>5</sup> “ (1) The court may, upon application by any person affected thereby, or in cases falling under paragraph (c), *suo moto* –

- (a) Rescind or vary any judgment granted by it in the absences of the person against whom that judgment was granted;
- (b) Rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties;
- (c) Correct patent errors in any judgment in respect of which no appeal is pending;
- (d) Rescind or vary any judgment in respect of which no appeal lies.

(2) If a plaintiff in whose favour a default judgment has been granted agreed in writing that the judgment be rescinded or varied, a court must rescind or vary such judgment on application by any person affected by it.”

<sup>6</sup> Act 32 of 1944.

<sup>7</sup> Rules regulating the Conduct of the Proceedings of the Magistrate’s Court Act of SA.

<sup>8</sup> Jones and Buckle *‘The Civil Practice of the Magistrates’ Courts in South Africa’* Ninth Ed, Vol II, The Rules, Erasmus, Van Loggerenberg (Juta Law) [2010] pg. 252.

*'...These words envisage a situation where the parties are both mistaken as to the correctness of certain facts...'*

[22] It is a fundamental legal principal that the Applicant bears the onus to prove that there was a mistake common to the parties. The court held in the **Joseph v Joseph**<sup>9</sup> that:

*'If a litigant, by mistake of himself or his legal advisers, abandons relief to which he is, or may be entitled, the court has no jurisdiction to or power to recall or amend the order it has in consequence deliberately made, in the absence of fraud of the other party in the course of the proceedings including the order.'*<sup>10</sup>

## Discussion

[23] It behoves me to refer to the Civil Practice Directive<sup>11</sup> which states that *'all Regional Magistrates must ensure that all orders made are executable, including in respect of settlement agreements'*. This flows from the KZN Practice Manual for the High Court, where the following directives are entrenched pertaining to divorce settlement agreements.<sup>12</sup>

'Unlike some other Divisions it is an established and long-standing practice that the entire agreement of settlement cannot be made an order of court. The principle has been clearly enunciated by Broome JP in **Mansell v Mansell** as follows:

*"For many years this court has set its face against the making of agreements orders of court merely on consent. We have frequently pointed out that the court is not a registry of obligations. Where persons enter into an agreement, the obligee's remedy is to sue on it, obtain judgment and execute. If the agreement is made an order of court the obligee's remedy is to execute merely. The only merit in making such an*

<sup>9</sup> 1951 (3) ALL SA 405 (N).

<sup>10</sup> See also Van Zyl vs Van Der Merwe 1986 (2) SA 152 (NKA).

<sup>11</sup> CIVIL PRACTICE DIRECTIVES FOR THE REGIONAL COURTS IN SOUTH AFRICA 2017 Fourth Revision, para 5.6.1.

<sup>12</sup> At para 15.



*agreement an order of court is to cut out the necessity for instituting action and to enable the obligee to proceed direct to execution. When, therefore, the court is asked to make an agreement an order of court it must, in my opinion, look at the agreement and ask itself the question 'Is this the sort of agreement upon which the obligee (normally the plaintiff) can proceed direct to execution?' If it is, it may well be proper for the court to make it an order. If it is not, the court would be stultifying itself in doing so. It is surely an elementary principle that every court should refrain from making orders which cannot be enforced. If the plaintiff asks the court for an order which cannot be enforced, that is a very good reason for refusing to grant his prayer. This principle appears to me to be so obvious that it is unnecessary to cite authority for it or to give examples of its operation."*<sup>13</sup>

[24] In this matter the Applicant avers that the terms of the agreement pertaining to the immovable property are *void ab origine* and a result of a mistake common to the parties and their legal representatives. The legal position in this regard is encapsulated in Jones and Buckle<sup>14</sup>

*'A mistake would cover the case of a judgment entered by consent where the parties consented in Justus error. It is however, not sufficient if the mistake is that of –*

*(a) **one of the parties only**; in other words if a litigant by mistake of himself or his legal advisers abandons relief to which he is entitled to, the court has no jurisdiction or power to recall or amend the order it has in consequence deliberately made, in the absence of fraud of the other party in the course of the proceedings. The court refused to set aside a consent judgment upon the defendant's allegation that, although he had been assisted by his solicitor, he did not understand what he was doing;*

*(b) **the court**; the general rule is that if the court has given judgment on mistaken facts, the judgment can be set aside only if the error was due to fraudulent misrepresentation, but if the court is in error because of innocent*

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<sup>13</sup> This is an old practice; however the 5 month provision is new. See JP's memorandum 14/7/82 , 1953 (3) SA 716 AT 712B

<sup>14</sup> Jones and Buckle 'The Civil Practice of the Magistrates' Courts in South Africa' Tenth Ed, Vol 1, The Act, Erasmus, Van Loggerenberg (Juta Law) [2016] pg 252.

*misrepresentation, the vanquished party is not entitled to have the judgment rescinded...'*

[25] The allegation that there was a mistake common to the parties is vehemently challenged by the Respondent for various reasons which included *inter alia* that the Applicant is a Senior Attorney and was legally represented. If regard has to be had to **Joseph v Joseph** (*supra*) and the aforementioned legal principals, then this court has no jurisdiction to or power to recall or amend the order which has in consequence been deliberately made.

[26] However, the question which arises is whether, on the facts placed before this court, the order made is executable. It was highlighted that there appears to be ambiguity as clause 5.2 of the agreement is phrased in such a fashion so as to suggest that it is referring to two different properties. I am also mindful of what was stated in the matter of **Coopers & Lybrand v Bryant**<sup>15</sup> wherein the “golden rule” of interpretation was defined to be given its grammatical and ordinary meaning unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument...'

[27] The court cannot consider this rule of interpretation in isolation as regard must be had to the totality of the evidence placed before me. Apart from the potential ambiguity in the wording of clause 5.2 cognisance must be taken of the underpinning genesis behind the agreement between the parties and what has since happened giving rise to this application. It is evident that the parties both have a different story to tell which

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<sup>15</sup> [1995] ZASCA64; 1995 (3) SA 761 (A).

points to a situation where there is a clear dispute of fact. Consequently, these circumstances would inevitably lend itself to the possibility that may give rise to absurdity, repugnancy or inconsistency triggering the exception to the golden rule referred to earlier.

## **Conclusion**

[28] It is clear that there was a misdirection for the court to have made an order that *‘the joint estate shall be divided as set out in Exhibit “B”* as the parties were married out of community of property. It is uncontroverted that the terms of this order is, in and of itself, *void ab origine*, and falls to be set aside.

[29] In light of the factual dispute between the parties, it is pellucid that this is not necessarily a situation where the parties are both mistaken as to the correctness of certain facts as defined earlier, although Applicant contends that it was upon the instance of the Respondent that the terms of the settlement agreement was crafted. There appears to be factual uncertainty as to what led the hand-written amendment framed in the agreement and what the intention were of the parties when the agreement was signed. Can it be said that both parties were mistaken in the absence of establishing the intention underpinning the agreement? In my view, this impasse cannot be decided on without oral evidence having been led.

[30] Furthermore, if regard is had to the prescripts defined in the Regional Court Practice Directives and the guidelines enunciated in the KZN High Court Division

referred to earlier in this judgment, then this is the very reason why Presiding Officers should be slow to make an entire settlement agreements an order of court.

[31] Following the guideline enunciated in *Mansell v Mansell*<sup>16</sup> (*supra*) the question to be asked is whether ‘...*this the sort of agreement upon which the obligee ... can proceed direct to execution?*’ The answer, in my view, is clearly no. As stated earlier, there is a clear dispute of fact as to how it came about that the agreement was entered into; what the intention was underpinning the agreement and also ownership of the property in light of the averment that the property cannot be devolved by Will or by agreement between the parties as it is governed by the Ingonyama Trust Act of 1994.

[32] It is evident that the challenge in this rescission application primarily centred around clause 5.2 yet the Applicant is requesting the entire order which reads ‘*that the settlement agreement, Exhibit “B”, is made an order of Court...*’ to be rescinded. During argument, the Respondent’s legal representative conceded that the terms of clause 5.2 are ambiguous. The parties are therefore *ad idem* that the ambiguity contained in clause 5.2 should be ventilated through oral evidence. It is also clear that the whole of clause 5.2 together with the sub-clauses are inextricably linked to clause 9 which also deals with immovable property.

[33] It is common cause that all other clauses in the agreement remain unchallenged. Consequently, for the court to declare the entire order which reads ‘... *that the settlement agreement, Exhibit “B”, is hereby made the order of Court*’ void ab

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<sup>16</sup> 1953 (3) SA 716 AT 712B

origine, would be tantamount to throwing the baby out with the bath-water, proverbially speaking. I cannot find the entire agreement voidable under the circumstances.

[34] Consequently only clauses 5.2, 5.2.1, 5.2.2, 5.2.3 and 9 of the settlement agreement marked Exhibit “B” and the order which reads ‘...*the joint estate shall be divided as set out in Exhibit “B”*’ fall to be rescinded; the matter is accordingly referred to trial for hearing, so that *viva voce* evidence can be led only insofar as it relates to the “Amanizimtoti property”. The orders dissolving the bonds of marriage as well as the remaining clauses of the settlement agreement will remain of force and effect.

### **Costs**

[35] Turning now to the issue of costs. Both parties did not ask for costs. It is an accepted legal principle that costs ordinarily follow the result and a successful party is therefore entitled to his or her costs. It is fundamental legal principal that the issue of costs is in the unfettered discretion of the court.<sup>17</sup> In view of the fact that there are many issues that should be fully ventilated in the trial, it is my view that a costs order at this stage will in any event be premature. The trial court will be in a better position to make a final pronouncement in this regard after having heard the evidence in relation to the issues in dispute. Therefore, in the exercise of my judicial discretion, I am of the view that the issue of costs should stand over for later determination.

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<sup>17</sup> *Fusion Hotel and Entertainment Centre CC v eThekweni Municipality and Another* [2015] JOL 32690 (KZD) ‘[12] It is common cause that in this matter the issues at hand remained undecided and the merits were not considered. When the issues are left undecided, the court has a discretion whether to direct each part to pay its own costs or make a specific order as to costs. A decision on costs can on its own, in my view, be made irrespective of the non-consideration of the merits. I am stating this on the basis that an award for costs is to indemnify the successful litigant for the expense to which he was put through to challenge or defend the case, as the case may be...’

## Order

[36] In the result, the Court, after hearing the submissions made by both parties and having considered the documents filed on record makes the following orders:

- (a) That the following orders granted on 20 January 2017, are hereby rescinded:
  - i. clauses 5.2, 5.2.1, 5.2.2, 5.2.3 and 9 of the Settlement Agreement marked Exhibit “B” and
  - ii. the portion of the order which reads *‘that the joint estate shall be divided as set out in Exhibit “B”*.
- (c) The matter is referred to trial for the hearing of *viva voce* evidence only insofar as it relates to the immovable property described as House Number [...], Road [...], Amanzimtoti.
- (d) Costs are to stand over for later determination.

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**P ANDREWS**  
Regional Magistrate: Durban