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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA**

Case No: 645/2020

Date Heard: 6 June 2023

Date Delivered: 13 June 2023

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED: YES/NO

In the matter between:

C[...] L[...] S[...]

Plaintiff

And

T[...] I[...] S[...]

Defendant

JUDGMENT

COLLETT AJ:

[1] I am required to determine the limited issue of a special plea relating to whether a settlement agreement has been set aside by a court order issued by the Regional Court under case no. ECPERC 2178/2017 on 23 August 2019.

The background

[2] The plaintiff and defendant were previously married to one another, which marriage was dissolved by decree of divorce on the 19 March 2018 in the Regional Court for the district of Port Elizabeth.

[3] The parties entered into a settlement agreement, the terms of which are not relevant to the determination of the present issue, which was made an order of court simultaneously with the decree of divorce.

[4] Subsequent hereto, the plaintiff for reasons that are not of consequence hereto, approached the Regional Court on application for the rescission of the order granted by the court on the 19 March 2018 in terms of Rule 49(8) of the Rules regulating the proceedings in the Magistrate's Court.

[5] Despite the defendant's opposition thereto, the learned magistrate granted the plaintiff's application for rescission in respect of the certain paragraphs of the Deed of Settlement hence, by implication, the remaining paragraphs including the decree of divorce remained intact.

[6] It deserves mention that the defendant did not appeal the order of the magistrate as aforementioned.

[7] The plaintiff, some six months thereafter, issued summons in the present matter seeking relief based on issues that had been previously contained in the Deed of Settlement, which were rescinded by the magistrate. I am not required to consider the merits or otherwise of such litigation or the reasoning of the magistrate.

[8] The defendant, in opposing the relief sought in the main action, has *inter alia*, raised four special pleas and pleaded over. Pursuant to a separation order, granted by this Court on 7 February 2023 in terms of Rule 33 (4) of the Uniform Rules of Court, the

first special plea was to be adjudicated separately. It is this special plea that serves presently before me for determination.

[9] The defendant's first special plea reads as follows:

'1. On or about 1 December 2017, and at Port Elizabeth, the Plaintiff, personally represented, and the Defendant, personally represented, concluded a written settlement agreement that finally settled all of disputes and claims which form the subject matter of the Plaintiff's present claim.

2. A copy of the said settlement agreement is attached to the Plaintiff's Amended Particulars of Claim as annexure "POC2".

3. The settlement agreement has not been set aside and is still binding upon the parties hereto.

[10] The exact nature of this special plea is not a picture of clarity and is seemingly a hybrid of *res judicata* and existing contractual obligations enforceable between the parties.

[11] Nonetheless, the defendant contends that despite the rescission order granted by the magistrate relating to certain paragraphs of the Deed of Settlement, the parties are still bound by the terms thereof as the normal requirements for the setting aside of a contract must be followed.

[12] The gist of defendant counsel's submissions is that the plaintiff only sought to have the order encompassing the terms of the Deed of Settlement rescinded. Consequently, the Deed of Settlement was not set aside and the parties are bound by the terms thereof.

[13] Conversely, the plaintiff's counsel submitted that the order granted by the magistrate on 23 August 2019 unambiguously rescinds the paragraphs of the Deed of Settlement and the parties are no longer bound by those terms.

[14] As I am not sitting as a court of appeal, there is no reason for me to analyze the reasoning or otherwise of the magistrate in granting the order. Suffice to state, that it is an order of court which is enforceable until set aside by a competent court¹.

Legal principles

[15] The mere fact that an order of court was made based on a Deed of Settlement is not of consequence as such an order has the same qualities and standing as any other order. To ignore such an order would be inconsistent with section 165(3) of the Constitution, Act 108 of 1996.

[16] In deciding upon the enforceability of a settlement agreement that had been made an order of court in *Eke v Parson*², Jafta J said:

“The parties’ agreement had been converted by the High Court into its own order when the order was issued. The parties’ settlement was novated by operation of law.”

[17] Following this reasoning, when the magistrate rescinded certain paragraphs of the court order, what remained was the balance of the Deed of Settlement which had initially been novated by operation of law.

[18] I am accordingly not persuaded that the Deed of Settlement persists in its original format as existed prior to the court order dated 19 March 2018 or that the rescission order did not rescind and/or set aside certain of the paragraphs of the Deed of Settlement.

¹¹ Moraitis Investments (Pty) LTD and Others v Montic Dairy (Pty) LTD 2017

² 2016 (3) SA 37 (CC) para 68

[19] However, even if the defendant is correct and the Deed of Settlement concluded and signed by the parties survived the rescission of the paragraphs embodied in the court order, I am not convinced that this is an issue that can validly be raised as a special plea.

[20] The plaintiff's cause of action is premised upon the rescission of the paragraphs of the court order and, by extension, the Deed of Settlement.

[21] The defendant's defence is, *inter alia*, to assert the existence of a binding Deed of Settlement between the parties thus disputing the plaintiff's cause of action.

[22] Implicit in the successful rescission application in the Regional Court was a finding of some form of fraud and/or inducement surrounding the conclusion of the Deed of Settlement.

[23] Given the defendant's current defence in the main action, this a triable issue which requires proper ventilation of the circumstances culminating in the Deed of Settlement between the parties.

[24] I am further of the view that this cannot, in any event, be couched or decided under the auspices of a special plea.

[25] For these reasons, the first special plea raised by the defendant must fail.

[26] In the circumstances, the following order will issue:

1. The defendant's first special plea is dismissed with costs.

S A COLLETT
ACTING JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv M Veldsman
Instructed by Anthony-Gooden Incorporated,
Gqeberha

For Defendant: Adv A Moorhouse
Instructed by TN & Associates,
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