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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 259/2023

In the matter between:

M[….] B[…] **APPELLANT**

And

R[…] B[…] **RESPONDENT**

Neutral citation: *B[…] v B[…]* (259/2023) [2024] ZASCA 116 (24 July 2024)

Coram: NICHOLLS, MOTHLE and MOLEFE JJA and DAWOOD and MBHELE AJJA

Heard: 10 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 24 July 2024

Summary: Leave to appeal – referred for oral argument – special leave granted – divorce – variation of a settlement agreement made a court order – whether there was a mistake common to the parties when they signed the settlement agreement.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Djaje DJP and Malowa AJ sitting as a court of appeal):

1 The application for special leave to appeal succeeds.

2 The appeal is upheld with costs.

3 The order of the high court is set aside and replaced with the following:

'3.1 The appeal is upheld with costs.

3.2 The application for variation is dismissed with costs.'

JUDGMENT

Mbhele AJA (Nicholls, Mothle and Molefe JJA and Dawood AJA concurring):

[1] This is an application for special leave to appeal in terms of s 16(1)*(b)* of the Superior Courts Act 10 of 2013 (the Act), against the judgment and order of the North West Division of the High Court, Mahikeng (Djaje DJP and Malowa AJ) (the high court) delivered on 11 November 2022. On 17 May 2023 this Court referred the application for oral argument in terms of s 17(2)*(d)*[1] of the Act.

[2] The central issue in this appeal is whether certain clauses in a settlement agreement were concluded as a result of a common mistake between the parties. The appellant and the respondent were married on 4 November 2000, out of community of property, with the inclusion of the accrual system. Subsequently divorce proceedings were launched in the Regional Court of Northwest held at Klerksdorp. A final decree

[1] Section 17(2)*(d)* reads:
'The judges considering an application referred to in paragraph (b) may dispose of the application without the hearing of oral argument, but may, if they are of the opinion that the circumstances so require, order that it be argued before them at a time and place appointed, and may, whether or not they have so ordered, grant or refuse the application or refer it to the court for consideration.'

of divorce, incorporating an agreement of settlement signed by the parties, was made an order of court on 9 March 2021.

[3] Several months later, on 1 July 2021, the respondent launched an application in the same court, seeking a variation of the settlement agreement, more particularly those clauses dealing with the patrimonial claims arising out of the accrual. The two clauses singled out by the respondent were 3.2 and 3.5 of the settlement agreement. In clause 3.2 the respondent agreed to make payment of R2 650 000 to the appellant in settlement of the accrual claim.[2] Clause 3.5 provided that each party retain as their sole property any policies, investments and pension fund interests in their respective names. The basis of the application was that the accrual amount had been incorrectly calculated and that this was a mistake common to the parties. The effect of the amendment was to reduce the amount payable to the appellant.

[4] The regional court granted the variation order without the hearing of oral argument and granted an order that:

'Paragraph 3.2 is varied by removing the words "the amount of R2 650 000,00" and replacing it with the words "to be determined by a liquidator to be appointed by the parties within 2 weeks, or if the parties cannot agree, by the court".'

The appointment of a liquidator was not an order that either party sought.

[5] The appellant approached the high court seeking the setting aside of the regional court order. A full bench of the high court dismissed the appeal on the grounds that the order of the regional court was interlocutory and therefore not appealable. It held that the appeal had been launched 'prematurely' because there was 'no final order on the pronouncement of issues between the parties'. This was because the process of appointing a liquidator had not yet been finalised at the time of the appeal

[2] Clause 3.2 of the settlement agreement provides: 'That Defendant will pay to the Plaintiff in settlement of the accrual claim the amount of R2 650 000.00, payable as follows:
3.2.1 R500 000.00 within 30 days from date of Divorce;
3.2.2 The balance is payable in 65 equal monthly instalments from 1 May 2021.
3.2.3 The amount set out in paragraph 3.2.2 above is subject to simple interest calculated monthly at 7% per annum from 1 May 2021 until the full outstanding amount is paid in full, and shall be paid simultaneously with the capital instalments.
3.2.4 In the event that Defendant fails or neglects to make one or more payments as set out in paragraph 3.2.1 to 3.2.3 the total outstanding amount plus interest will become immediately due and payable after 7 days written prior notice to Defendant to rectify the arrears.'

and therefore the order sought to be appealed against was not final in effect and was not definitive of the rights of the parties. The finding by the high court gave rise to the appeal in this Court.

[6] The basis of the respondent's claim for variation is that the calculations that were used to determine his liability to the appellant in terms of the difference in accrual, as well as the allocation of assets and liabilities, were overstated by R1 244 237.77. He attributes the incorrect calculations to a document prepared by the appellant's attorneys and the input made by his former attorneys. He contends that the calculations by the appellant's attorneys failed to properly differentiate between calculating the difference in the accrual of the parties' respective estates and the incorrect allocation of assets and liabilities between the parties including the payment of the difference in accrual. He blames his erstwhile attorneys for giving him incorrect legal advice.

[7] The appellant denies the existence of a common mistake known to the parties. She contends that the settlement agreement was reached after lengthy negotiations between the parties and was less than the amount originally calculated by her attorneys. The settlement amount included various aspects that formed the basis of their dispute, including her maintenance claim, the accrual, withdrawals made by the respondent from the bond registered over the property, the transfer and sale of the appellant's half share in the property as well as the shares in their business.

[8] Both parties are medical professionals. The respondent is a urologist and the appellant is an occupational therapist. Both were represented by attorneys and counsel during the negotiations. The appellant's legal representatives prepared a document which formed the basis of the negotiations on the accrual payable. At some stage the respondent absented himself to obtain information required by his legal representatives. Significantly, the view of the respondent's erstwhile attorneys who represented him during the negotiations is that there was no error in the calculation and the division of the accrual, as alleged by their former client. They further stated that the settlement amount did not overstate the amount due to the appellant and that 'the settlement agreement, as concluded, was in line with legal principles, fair and equitable'. The contents of this letter are not denied by the respondent whose only

comment is that there is litigation pending against his former attorneys where he intends to raise their negligence.

[9] As a general rule, a settlement agreement is concluded as a form of compromise between parties who want to avoid protracted and expensive litigation. The essence of a compromise (*transactio*) is the final settlement of disputed or uncertain rights or obligations by agreement. Save to the extent that the compromise provides otherwise, it extinguishes the disputed rights or obligations. The purpose of a compromise is to prevent or put an end to litigation. A compromise has the effect of *res iudicata*.[3] Here, the settlement agreement signed by the parties was a final agreement between the parties, putting all disputed issues to rest, including the appellant's maintenance claim as well as shares in their company.[4]

[10] There are very limited grounds on which a party can rely on a mistake to resile from a contract. A settlement agreement can be set aside if it was fraudulently obtained. It can also be set aside on the ground of *justus* error, provided that such error vitiated true consent and did not merely relate to the merits of the dispute which was the very purpose of the parties to reach a settlement.[5]

[11] It was explained in the following manner by this Court in *George v Fairmead (Pty) Ltd*:[6]

'When can an error be said to be justus for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read the decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party - the one who is trying to resile - been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself? ... If his mistake is due to a misrepresentation,

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[3] *Road Accident Fund v Taylor and other matters* [2023] ZASCA 64; 2023 (5) SA 147 (SCA) para 36 (*Taylor*). See also *Mafisa v Road Accident Fund and Another* [2024] ZACC 4; 2024 (6) BCLR 805 (CC) para 48.

[4] 'The parties hereto agree that this Deed of Settlement settles all the disputes between them and that they will have no further claims relating to this cause of action against each other, saving those contained in this Deed of Settlement. No Variation of this agreement will be in force unless done so in writing and singed by both parties hereto and furthermore the parties pledge their respective estates and executors to the fulfilment of the duties of the parties as set out in this agreement.'

[5] *Gollach and Gomperts(1967) (Pty) Ltd v Universal Mills and Produce Company (Pty) Ltd* 1978(1) SA 914 (A) at 922C-G.

[6] *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A).

whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound.'[7] (Own Emphasis.)

[12] In *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis*,[8] Harms AJA defined mistake as implying a 'misunderstanding, misrepresentation, and resultant poor judgment'. The Court further set out the test for whether a party relying on a mistake may withdraw from a resultant contract as follows: '. . . did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? . . . To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? . . . The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?'[9]

[13] On the facts of this case, there was no misrepresentation by the appellant. There were protracted negotiations between the parties which led to a settlement agreement. In consultation with his legal representatives, the respondent signed the settlement agreement which was made an order of court. The fact that several months later he had a change of heart and believed that he had overpaid his former wife does not translate into a mistake common to the parties. Even if he genuinely believed that the calculations were incorrect and that he should not have accepted the advice of his legal representatives, this does not qualify as a *justus* error. If the mistake is due to that party's own fault, the error cannot be said to be *justus* and the mistaken party cannot escape liability for the agreement that he signed. At best for the respondent, this is a unilateral error. It does not lay the basis for a claim for the variation of the settlement agreement on the grounds of a common mistake.

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[7] Ibid at 471B-D.
[8] *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 238H. (*Sonap*)
[9] Ibid at 239I-240A.

[14] The next issue to consider is whether the regional court's order is appealable. In *Zweni v Minister of Law and Order,*[10] this Court while distinguishing a judgment or order from a ruling set out the characteristics of an appealable order or judgment. Harms AJA, as he then was, held:

'"A 'judgment or order' is a decision which as a general principle, has three attributes, first the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least substantial portion of the relief claimed in the main proceedings…."'

[15] The relief sought by the respondent in the regional court was final in effect. There was no justification for that court to appoint a liquidator. Once this is so, the judgment of the high court falls to be set aside and special leave should be granted to the appellant.

[16] In the result the following order is made:

1 The application for special leave to appeal succeeds.

2 The appeal is upheld with costs.

3 The order of the high court is set aside and replaced with the following:

'3.1 The appeal is upheld with costs.

3.2 The application for variation is dismissed with costs.'

N M MBHELE
ACTING JUDGE OF APPEAL

[10] *Zweni v Minister of Law and Order* [1993] 1 All SA 365 (A); 1993 (1) SA 523 at 532I-533A.

Appearances

For appellant:	J Lubbe SC
Instructed by:	Honey Attorneys, Bloemfontein
For respondent:	S Hefer SC and C R du Plessis
Instructed by:	Diederik Oudegeest Attorneys, Johannesburg
	Symington & de Kok, Bloemfontein.