

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 93454/2015

(1) REPORTABLE: No

(2) OF INTEREST TO OTHER JUDGES: No

(3) REVISED

DATE: 23/9/24

SIGNATURE

In the matter between

T[...] R[...] (NEE M[...])

APPLICANT

and

Z[...] D[...] R[...]

1st RESPONDENT

SAAYMAN WD PROKUREURS

2nd RESPONDENT

Z[...] D[...] R[...] N.O

3rd RESPONDENT

THEMANE JEREMIAH TIBANE N.O

4th RESPONDENT

D[...] N[...] R[...] N.O

5th RESPONDENT

[In their capacities as trustees for the time being of the
R[...] Family Trust (Registration Number:IT002753/2016(T))]

JUDGMENT

RAMLAL AJ:

- [1] The events that gave rise to this application are that the Applicant and the First Respondent were married to each other out of community of property, with the exclusion of the accrual system, on 19 June 2012.
- [2] The First Respondent instituted an action for divorce against the Applicant. On 9 March 2016, the marriage was dissolved by an order of the High Court. The Settlement Agreement that was entered into between the Applicant and the First Respondent, dated 1 February 2015, was made an order of court.
- [3] The material and relevant terms of the agreement in relation to the present application, are contained in clause 7 thereof and reads as follows:

“ACCOMMODATION

- 7.1 The Plaintiff undertakes to provide housing for the Defendant in a suitable security complex while the minor child is residing with her or partially residing with her.
 - 7.2 The Defendant will be responsible to pay the levies, insurance, security and consumer account in respect of such property.
 - 7.3 This undertaking by the Plaintiff to provide housing to the Defendant while the minor child is residing with her, is subject to the condition that in the event of the Defendant getting remarried or enters into a cohabitation relationship with another person, the Plaintiff will no longer provide housing to the Defendant and she will be responsible to provide such housing to herself at own cost.”
- [4] The First Respondent complied with these obligations on 10 February 2017, by purchasing, through the Family Trust, immovable property. The Family Trust and the First Respondent permitted the Applicant to take occupation of

the property, on the basis that she was fully aware that the said right of occupation was conditional and/or subject to the express terms as set out in clause 7.3 of the Settlement Agreement mentioned above.

[5] During October 2020, the Family Trust and the First Respondent became aware that the Applicant had remarried and/or was in a co-habitation relationship with one Marcus Tshivase, and that a child was born of their relationship.

[6] On 20 October 2020, the Family Trust and the First Respondent, through their attorneys, informed the Applicant that the First Respondent was no longer obliged to provide housing to the Applicant, in terms of the Divorce Order, or at all, and that the Family Trust and the First Respondent withdrew their consent for the Applicant and/or all those claiming occupation by, through or under her to continue to reside at the property. The Applicant was given notice to vacate the property by 30 November 2020, failing which eviction proceedings would be instituted against the Applicant without delay.

[7] The First Respondent and the Family Trust received communication from the Applicant's attorneys on 18 November 2020, advising that in the absence of a court order the Applicant will continue to occupy the property.

[8] Further communication was entered into between the parties regarding the continued occupation of the property by the Applicant, which culminated in an eviction application being instituted against the Applicant, on 26 January 2021. This application is currently pending.

[9] The Applicant instituted the present application during September 2021 wherein the Applicant seeks relief from this court, in the following terms (quoted *verbatim*):

9.1 Rescinding and setting aside of the settlement agreement dated 1st day of February 2015 and the court order dated 9th day of March 2016 by the Honourable Justice Manamela AJ;

- 9.2 That the settlement agreement and the Court order be set aside on the basis that it was induced by misrepresentation, dishonest conduct and/or fraudulent conduct;
- 9.3 That the First Respondent dishonest and fraudulent conduct be referred to the National Prosecuting Authority of South Africa (NPA) for criminal prosecution;
- 9.4 That the First Respondent be interdicted from disposing any movable or immovable property and must disclose all bank statements of all banks held for the first two years preceding the divorce court order and the last five years succeeding after the divorce court order;
- 9.5 That the joint estate be liquidated and the liquidator be appointed within two weeks of the order being granted;
- 9.6 The Second Respondent's conduct be investigated by the Legal Practice Council (LPC) for any possible misconduct;
- 9.7 That costs on an attorney and own client scale be paid the First Respondent jointly and severally; with the Second Respondent paying cost *de bonis propriis* including costs consequent upon the employment of two counsel;
- 9.8 Further and/or alternative relief.

[10] The Applicants case is premised on the allegations contained in her founding affidavit, and is summarised as follows:

- 10.1 That the settlement agreement that was entered into was concluded on the advice and at the instance of the First Respondent's attorneys (Second Respondent) during the divorce proceedings, as she was not legally represented.

- 10.2 That the Second Respondent brought her under the impression that the First Respondent undertook to purchase immovable property for her, but that this was never incorporated in the settlement agreement that she signed;
- 10.3 That the property that was purchased by the First Respondent on 10 February 2017 was purchased for her sole ownership;
- 10.4 That the First and Second Respondents misrepresented to the Applicant that the property would be purchased solely for the Applicant, and that such misrepresentation is unlawful and unconstitutional;
- 10.4 That as a result of the dishonest and fraudulent conduct of the First and Second Respondents, the Applicant signed the agreement, in the absence of being legally represented and that the agreement was signed under duress;
- 10.5 That the threats that the First Respondent made to evict the Applicant from the property should be construed as duress that induced her to enter into the settlement agreement;
- 10.6 That the Applicant believes that the settlement entered into is grossly lopsided in favour of the First Respondent as once the Applicant remarries or cohabits, she will no longer enjoy the use of the property;
- 10.7 That there were other proprietary consequences relating to shares in a company, that are not mentioned in the settlement agreement, that resulted in the First Respondent offering to purchase property for the Applicant;

10.8 That the settlement agreement is unconstitutional, too onerous, unreasonable, unlawful, immoral and/or contrary to public policy and not entered into in good faith by the First Respondent and therefore falls to be set aside.

[11] The Respondent's contentions to this application are contained in the papers that have been filed as well as the submissions made to the court. The Second Respondent, was not the erstwhile attorney during the time of the divorce or at all. The First Respondent's attorney who represented him in the divorce proceedings was Ansie Smit of A C M Pieterse Smit Attorneys.

[12] The Applicant informed the First Respondent, during December 2015, after she had a consultation with her attorneys, that she had been advised that since she and the First Respondent were married out of community of property with the exclusion of the accrual, her best approach to the divorce would be to negotiate a settlement with the First Respondent. A settlement agreement was subsequently entered into between them, and the Applicant, having elected not to be legally represented, signed the settlement freely and voluntarily, without any undue influence.

[13] That the sole agreement between the Applicant and the First Respondent with regard to the procurement and occupation of the property was recorded in clause 7 of the settlement agreement, which was subsequently made an order of court. The Respondents further deny that there was any intention to purchase the property for the Applicant or that the First Respondent had an obligation to purchase a property for the Applicant in terms of the settlement agreement or at all.

[14] The First Respondent contends that the Applicant in her confirmation that the property was purchased on 10 February 2017, demonstrates that it was impossible for any alleged threat to evict the Applicant from the property to have induced the Applicant to conclude the agreement as alleged or at all, as the agreement was signed on the 1st February 2016 (although it is dated 1 February 2015).

[15] The allegations of bribery mentioned by the Applicant are denied by the First Respondent and details of the association and business dealings with the two persons mentioned by the Applicant are given by the First Respondent in his answering affidavit.

[16] The Respondents point out that at no stage prior to the Eviction Application did the Applicant raise an issue with regard to the conclusion or operation of the settlement Agreement and neither did the Applicant attempt to set aside the settlement agreement or the divorce order based on alleged fraud or misrepresentation.

EVALUATION OF APPLICATION FOR RECISSION OF THE JUDGMENT AND SETTING ASIDE OF THE SETTLEMENT AGREEMENT AND THE ALLEGATIONS OF MISREPRESENTATION, FRAUD AND DURESS

[17] Rule 42(1)(a) of the Uniform Rules of Court provides:

“(1) The court may, in addition to any other powers it may have *mero motu* or upon application of any party affected, rescind, or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of the party affected thereby”

[18] In my assessment of whether the Applicant is entitled to the relief sought in terms of the abovementioned Rule¹, the factors placed before me do not reflect that the divorce order that was granted was erroneously sought or erroneously granted. It is not in dispute that the Applicant and the First Respondent were desirous of obtaining an order for the dissolution of the marriage, and that the Applicant elected to enter into a settlement agreement, from which she ultimately benefitted. The court was legally competent to grant such order and the divorce order was not granted because of a mistake common to the Applicant and the First Respondent.

¹ Rule 42(1)(a) of the Uniform Rules of Court

- [19] In respect of the fraudulent misrepresentation on the part of the Respondent, the Applicant is required to satisfy the court that the First Respondent made a representation to the Applicant, in the full knowledge that such representation was false² and that such false representation induced the Applicant to act³. In addition, since the Applicant relies on duress, the existence of a reasonable, imminent, or inevitable threat to the person or their family must be shown to have existed, which fear, threat or intimidation was unlawful or *contra bonos mores*.
- [20] The Applicant has not placed any circumstances or instances before the court from which the court can decisively conclude that a deliberate misrepresentation or any undue influence induced the Applicant to enter into the settlement agreement in order to proceed with the dissolution of their marriage. In fact, the settlement agreement, in particular, clause 7 thereof is in plain language and does not contain any legal jargon, terminology or legal concepts that call for the interpretation of a specialist or legal expert. The claim by the Applicant that had she been legally represented she would not have signed same seems to be a deliberate attempt to allow her to re-negotiate the terms of a divorce which she readily accepted and understood over eight years ago.
- [21] I do not deem it necessary to discuss the details of the alleged unfair, unreasonable or unjust contract terms since the Applicant has failed to show that the settlement agreement and/or the court order in terms of which the settlement agreement was made an order of the court, must be rescinded or varied. In addition, there is nothing to suggest that the court was not competent to grant the order that it did when it incorporated the settlement agreement in the granting of its order. There is nothing to suggest that the court did not consider the terms of the settlement agreement before it was made an order of the court, or that the court or that the court failed to take

² Ruto Flour Mills (Pty)Ltd v Moriates 1957(3)SA113(T), Breedts v Elsie Motor (Edms)Bpk 1963(3)SA 525(A)

into consideration any factors that were placed before it at the time that the order was granted.

- [22] The application “That the First Respondent be interdicted from disposing any movable or immovable property and must disclose all bank statements of all banks held for the first two (2) years preceding the divorce court order and the last five (5) years succeeding after the divorce court order” as well as the prayer that “That the joint estate be liquidated and the liquidator be appointed within two weeks of the order being granted.” Is ill conceived, ill-advised and impractical and it does not have any basis in law when one considers the circumstances of this case. The parties were married by antenuptial contract, with the exclusion of the accrual. There is no joint estate. The disclosure of “all bank statements of all banks held” is vague and embarrassing, to say the least.
- [23] The Applicant has failed dismally in placing sufficient concrete, credible and compelling evidence before this court to substantiate her application, despite being ably represented by counsel of her choice.
- [24] In the circumstances, the relief sought by the Applicant in prayers 1 to 6 of the Notice of Motion cannot be granted.
- [25] All that remains is the determination in respect of the award of costs. It has regularly been emphasised that in awarding costs, the court has a discretion that has to be exercised judicially, upon a consideration of the facts of a case, to arrive at an award that results in fairness to both sides.⁴ A deviation from the general rule that costs follow the result requires a court to be meticulous in its assessment to arrive at a just and fair result.
- [26] The court considers whether the launching of this application for the rescission and setting aside of the settlement agreement may be regarded as frivolous, vexatious or manifestly inappropriate. The court has specific

⁴ Norwich Union Fire Insurance Society Ltd v Tut 1960(4)SA851(A)at 854D

regard to the conduct of the Applicant in so far as the time when this application was initiated. This action was instituted after the Eviction Application was instituted and some eight years after the divorce order was granted. The court further takes into consideration that the action was instituted against the Second Respondent without due consideration of whether or not the correct party had been cited. The Applicant has launched an application for a liquidator to be appointed to attend to the liquidation of a joint estate when it has full knowledge that the parties were married out of community of property without the accrual being applicable. The applicant further launched an application for an interdict to be granted in terms that are incomprehensible. Despite the shortcomings in the manner in which the relief sought is cited, the court is cognisant that the Respondent's were under an obligation to respond to each and every aspect of the application which, according to the submission made on behalf of the Applicant totals over 800 pages.

- [27] It is customary that costs awards are considered at the conclusion of legal proceedings but they are no less significant than the actual merits of the main litigation process. In *Public Protector v South African Reserve Bank*⁵ Mogoeng CJ (in a minority judgment with Goliath AJ agreeing) stated that several factors must be considered when a costs order is made:

“[41]...They are the economic realities that apply at the time of awarding costs; the capacity or predictable incapacity to pay; and whether that order serves as a constructive or corrective punishment, in addition to the inescapable wrapping (*sic*) over the knuckles that accompanies it, or whether it is in effect an instrument of destruction or irreparable damage. That would explain why, using crime as a comparator, removing people's limbs or organs is never an option and the possibility of being released on parole exists even for murderers. To this end, convicts are kept in centres for rehabilitation known as correctional facilities with programmes designed to achieve change or correction, not permanent damnation. No costs order

⁵ Public Protector v South African Reserve Bank [2019] ZACC29; 2019(9)BCLR1113(CC)2019(6)SA253(CC)

ought ever to be made regardless of its consequences or impracticability or the injustice and inequity it would yield. Costs are all about justice and equity.”

[28] The Applicant, in a gallant stride, asks the court to award costs as follows:

“7. That costs on an attorney and own client scale be paid the First Respondent jointly and severally; with the Second Respondent paying costs *de bonis propriis* including costs consequent upon the employment of two counsel;”⁶

[29] Factors that are taken into consideration to justify that the costs of the employment of two counsel be awarded are substantially detailed in *Koekemoer v Parity Insurance Co Ltd and Another*⁷:

“...if it was a wise and reasonable precaution to employ more than one counsel, the costs incurred in so doing are allowable between party and party. But they are not allowable if such employment was merely luxurious. Among the relevant considerations are:

(a) *The volume of evidence (oral or written) dealt with by counsellor which he or they could reasonably have expected to be called upon to deal with;*

(b) *The complexity of the facts or the law relevant to the case;*

(c) *The presence or absence of scientific or technical problems, and their difficulty if they were present;*

(d) *Any difficulties or obscurities in the relevant legal principles or in their application to the facts of the case;*

⁶ Prayer 7 Notice of Motion

⁷ 1964 (4) SA 138 (T) at 144G-145A

(e) The importance of the matter in issue, in so far as that importance may have added to the burden of responsibility undertaken by counsel.”

[30] A thorough evaluation and consideration of the aspects relating to the award of costs leads me to the inescapable conclusion that there is no reason to deviate from the norm that the award of costs must follow the result.

[31] In the circumstances the following order is made:

1. The application is dismissed.
2. The Applicant is ordered to pay the costs of this application on the attorney and client scale.

A.K. RAMLAL AJ

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email. The date and time for hand-down is deemed to be 14h00 on 23 September 2024.

Matter heard on: 28 May 2024
Judgment granted on: 23 September 2024

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