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**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**DELETE WHICHEVER IS NOT APPLICABLE**

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED:

**14 August 2024** .....  
DATE SIGNATURE

**CASE NO: 2021/31102**

In the matter between:

**N[...] : P[...] P[...] (Born L[...])**

Applicant

and

**N[...] : T[...] J[...]**

First Respondent

**MINISTER OF HOME AFFAIRS**

Second Respondent

**THE REGISTRAR OF DEEDS JOHANNESBURG**

Third Respondent

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**JUDGMENT**

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**SEGAL AJ:**

[1] This is an application in terms of Uniform Rule of Court 42(1) (a) and (c) for the rescission of an order granted by the Honourable Acting Justice Moorcroft on 29 April 2022 ("**the order**").

[2] The order provided that:-

2.1 the marriage between the Plaintiff and Defendant is dissolved;

2.2 the deed of settlement at Caselines 008-4 to 008-11 is hereby made an order of court.

[3] The agreement of settlement had been signed on 6 May 2021 and Summons for a decree of divorce was issued on 30 June 2021. The Summons was personally served on the Applicant on 16 August 2021 and on 25 August 2021, the Applicant instructed her erstwhile attorneys to enter an appearance to defend.

[4] The Notice of Intention to Defend was filed on 25 August 2021.

[5] On 13 September 2021, the Applicant's erstwhile attorney of record withdrew, and a Notice of Withdrawal as Attorneys of Record was delivered.

[6] On 26 October 2021, a Notice of Bar was served on the Applicant, and it appears that she failed to deliver a Plea. In all events, a Notice of Set Down of the divorce proceedings on the unopposed divorce roll was served on the Applicant on 8 April 2022.

[7] The matter came before Acting Justice Moorcroft on 29 April 2022 when he granted the decree of divorce together with an order that the settlement agreement is made an order of court.

[8] In this application the Applicant seeks an order that the order granted by Moorcroft AJ be rescinded on the basis of a failure on the part of the First Respondent, (Plaintiff in the divorce action) to disclose to the court granting the

decree of divorce that a customary marriage had been concluded between the parties on 28 March 2016.

[9] The crux of the Applicant's grievance on the papers is the fact that the First Respondent failed to disclose to the court that he was already customarily married to the Applicant on 28 March 2016.

[10] To this end, the Applicant attaches various documents in support of her contention that the parties were married in community of property. Her case is that had the court granting the decree of divorce been aware of the fact that the parties were married in community of property, the court would not have granted the decree of divorce or the order incorporating the settlement agreement.

[11] Thus, the Applicant contends that the order was erroneously sought and erroneously granted.

[12] The Applicant does not seek a rescission of the order in terms of the common law nor does she allege mistake, fraud, duress, undue influence or any other valid ground for setting aside the agreement. The high-water mark of her case is that she had been admitted to hospital and diagnosed with depression for seventeen days in February 2021 and that on 6 May 2021, after she took her medication, the First Respondent insisted that she attend with him at his lawyers where she was presented with documents to sign.

[13] The Applicant goes on to state that she later learned that this was the settlement agreement. She does not contend that she did not read the document. She states that she only knew that it confirmed that she and the First Respondent were married out of community of property, and that she did not know what the accrual system meant, or that by signing the settlement agreement the First Respondent would "take all the assets". She does not say that she didn't want to sign the agreement or that she was forced to do so.

[14] After having received the Summons together with the signed settlement agreement, the Applicant consulted an attorney who delivered a Notice of Intention

to Defend.

[15] Had the Applicant made out a case for the setting aside of the agreement on the bases set out in paragraph 12 above, such a case could have been considered. But the Applicant did not do so. She brought an application in terms of Rule 42, contending that the First Respondent misrepresented to the court that the parties were married out of community of property with the accrual system, when, according to her, the parties were actually married in community of property. She contends that this fact induced the court to commit a mistake in law thus rendering Rule 42 (1)(a) applicable to the matter.

[16] Rule 42 (1) provides the following:-

*“(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary – (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby; (b) an order or judgment in which there is an ambiguity, or patent error or omission, but only to the extent of such ambiguity, error or mission; (c) an order or judgment granted as a result of a mistake common to the parties.”*

[17] The First Respondent opposes the application on various grounds including *inter alia*:-

18.1 the Applicant's failure to institute the application within a reasonable time and her subsequent failure to apply for condonation;

18.2 a denial that the parties were married in community of property;

18.3 that the Applicant had failed to make out a case for the relief sought in this application.

[18] The First Respondent contends that the order granted by Moorcroft AJ on 29 March 2022 was not granted erroneously.

[19] The First Respondent's view is that the Applicant has failed to make out of case in support of the relief which she seeks or to satisfy the requirements to succeed on the basis of an application in terms of Rule 42.

[20] Notably, the First Respondent points out that our courts have warned against the rescission of a decree of divorce, given that such an order would have far reaching consequences and render the parties remarried.

[21] The First Respondent also argues that he was under no obligation and in no position (given that he disputes it) to disclose to the court that the parties were married in terms of customary law. There is no explanation on the Applicant's part for:-

22.1 whether she read the agreement;

22.2 whether she obtained advice from her erstwhile attorneys on her rights;

22.3 why she did not attend at court and bring to the attention of Moorcroft AJ what she considers to be the pertinent fact of the parties having been married in community of property.

[22] On this score, the Applicant admits that she received notice of the set down of the matter and she goes on to say that the link for the virtual court was not sent to her. When I asked the Applicant's counsel whether she in fact attended court on the day of the divorce, he replied in the negative.

## **THE EFFECT OF CONCLUDING A SETTLEMENT**

[23] It is common cause that the parties both signed the agreement of settlement which is attached to these papers.

[24] A settlement or "compromise" is in and of itself a contract which has as its object the prevention, avoidance or termination of litigation. It has the effect of *res iudicata* irrespective of whether it is embodied in an order of court. It is an absolute

defence to any action based on the original claim.<sup>1</sup>

[25] A compromise is a substantive contract which exists independently of the cause that gave rise to the compromise. Clearly the agreement relates directly to the *lis* between the parties and the agreement was made an order by consent between the parties. Once the agreement has been concluded the court does not consider the merits of the litigation.<sup>2</sup>

[26] In the absence of a reservation of right to proceed on the original cause of action, the compromise agreement bars any proceedings based on the original cause. In addition, the Defendant is not entitled to go behind the compromise and raise defences to the original cause of action when sued on the compromise.<sup>3</sup>

[27] The only basis upon which a compromise may be set aside is if it was obtained fraudulently or on the grounds of mistake, provided that the error vitiated true consent and did not merely relate to the motive of the parties or the merits of the dispute, which was the purpose of the parties' compromise.<sup>4</sup>

[28] Significantly, even if the Applicant had made out a case in support of the relief she seeks in this application, she would still be faced with the difficulty of the agreement of settlement having been entered into. In other words, even if the settlement agreement were not made an order of court and even if the decree of divorce were to be revoked and the parties were to be married again, it would still not release the Applicant from the fact that an agreement of settlement had been concluded.

[29] Once the agreement of settlement was signed, the court would not delve into the merits of the underlying case or lightly interfere with an agreement reached between the parties.

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<sup>1</sup> Gollach and Gomperts (1967) (Pty) Ltd v Universal Mills and Produce Company (Pty) Ltd 1978 (1) SA 914 (A) and Gbenga – Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd and Another 2016 (12) BCLR 1515 (CC)

<sup>2</sup> Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others 2017 (5) SA 508 SCA

<sup>3</sup> Van Zyl v Nieman 1964 (4) SA 661 (A)

<sup>4</sup> Champans Peak Hotel (Pty) Ltd v South Peninsula Municipality 1998 (4) All SA 619 (C) and Gollach v Gomperts supra and Wilson Bayly Holmes (Pty) Ltd v Maeyane 1995 (4) SA 340 T

[30] If the Applicant had brought this application in terms of the common law and made out a case that the agreement was obtained fraudulently, or on the grounds of mistake, or on other contractual defences such as impossibility of performance, illegality, duress or undue influence and made out a case in support of such contentions, then the position might have been different.

[31] Regrettably, on the facts before me and the relief, which is sought, I am unable to find that a case has been made out.

[32] In the circumstances the application is dismissed with costs on the party and party scale, on Scale A.

**SEGAL AJ**  
**ACTING JUDGE OF THE HIGH COURT**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

*Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 14 August 2024*

Heard on: 31 July 2024

Delivered on: 14 August 2024

**Appearances:**

Mr Malejwe: for the Applicant

A Khoza: for the First Respondent