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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

Case no.: 428/2020

In the matter between:

**MEMBER OF THE EXECUTIVE COUNCIL FOR
HEALTH, EASTERN CAPE PROVINCE**

1st Applicant

**HEAD OF DEPARTMENT FOR THE DEPARTMENT
OF HEALTH, EASTERN CAPE**

2nd Applicant

And

Y[...] B[...] OBO S[...] B[...]

Respondent

In re:

Y[...] B[...] OBO S[...] B[...]

Plaintiff

And

MEMBER OF THE EXECUTIVE COUNCIL FOR

1st Defendant

HEALTH, EASTERN CAPE PROVINCE

**HEAD OF DEPARTMENT FOR THE DEPARTMENT
OF HEALTH, EASTERN CAPE PROVINCE**

2nd Defendant

JUDGMENT

NKELE AJ:

INTRODUCTION

[1] This is an application for the rescission of an order issued by Rugunanan J on 22 March 2022 in which the defendant was held liable to pay the plaintiffs in her personal and representative capacities for the damages arising from the proven or agreed damages arising from the sub-standard care and negligent conduct of the defendant's employees at Cecilia Makiwane Hospital, which resulted in S[...] B[...] being born on 15 November 2012 suffering from spastic quadriplegia cerebral palsy.

[2] The order that is sought to be rescinded was issued by agreement between the parties.

[3] Effectively the applicant seeks a variation of the order dated 22 March 2022, in so far as the applicant's liability for the respondent's liability for respondent's damages in her personal capacity is concerned.

[4] In the main the applicants seek for an order reconsidering and varying the order dated 22 March 2022, in so far as applicants' liability for the respondent's damages in her personal capacity is concerned.

THE APPLICANTS' CASE

[5] In their founding affidavit, the applicants state that they are allowed to bring this application by virtue of the provisions of Rule 42(1)(b), of the Uniform Rules of this Court¹.

[6] They further contend that at common law a judgment can be set aside on the ground of justus error. They contend that in exceptional circumstances, the court has an inherent power to rescind orders on that ground. In exercising its discretion, the applicants argue, the court is influenced by considerations of fairness and justice and will not be inclined to do so where undesirable consequences will follow.

[7] The applicants submit that there was a patent error when the order dated 22 March 2022 was granted in that it was only intended to settle the merits in respect of the negligence claim of S[...], the child, and not that of the plaintiff, the mother, which is incidental to that of the child.

[8] Accordingly, the applicants' contention is that at the time the merits were settled on 22 March 2022, the respondent's claim had already been extinguished by prescription, and although Rule 42 does not empower the court to grant leave to amend after judgment, they argue that it has a discretion to vary an order if such variation is purely procedural or incidental and does not affect the final judgement. In substantiation of this argument, the applicants submit that there was a patent error or omission when the order sought to be impugned was granted in that only the claim of the child was intended to be settled, and not that of the respondent in her personal capacity which had already prescribed.

[9] The applicants submit that when the child's claim was settled, by means of the court order dated 22 March 2022, the right to plead prescription was not waived in respect of the respondent's personal claim and there was no intention on the part of the applicants to settle that part of the prescribed claim, as it had already been extinguished by prescription.

¹ Rule 42(1)(b) provides that the court may "*mero motu or upon the application of any party affected, rescind or vary 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 omission*".

[10] Lastly, the applicants argue that in terms of section 17(2) of the Prescription Act No. 68 of 1969 a party to litigation is entitled to raise prescription at any stage of the proceedings. To substantiate, they further argue that from the clear provisions of section 10(1) of the Prescription Act it is abundantly clear that a debt shall be extinguished on the expiry of the period prescribed for the prescription of a debt. In this regard, the applicants submit that the application of the provisions of section 17(1) is procedural in effect and yield to the invocation of section 10(1) of the Act.

[11] In this regard, the applicants strongly contend that the respondent's claim in her personal capacity had prescribed, and it had already prescribed when the order dated 22 March 2022 was granted and they are entitled to raise the special plea of prescription once the application to rescind has been granted.

RESPONDENT'S CASE.

[12] In opposing the rescission application, in a nutshell, the respondent strenuously contends that the applicants have dismally failed to meet the jurisdictional requirements of Rule 42(1)(b) in that there is no ambiguity or patent error or omission in the order sought to be rescinded. Also there is there is nothing therefrom that demonstrates that it does not reflect the intention of the parties. In any event such ambiguity or patent error or omission, if any, is not attributable to the court.

[13] The respondent acknowledges that the common law allows a party to seek an order rescinding a judgment or order on the ground of justus error in rare and exceptional circumstances. However, she argues that the applicants have failed to demonstrate exceptional circumstances that warrant a variation of the impugned order in the manner contended for by the applicants. The respondent is adamant that there was no justus error in the negotiations leading up to the conclusion of the settlement agreement, which settlement agreement culminated in the granting of the order sought to be rescinded by the applicants.

[14] In addition, the respondent submits that the applicants filed three pleas and in all of them no special plea of prescription was raised. Even if such failure to raise the

special plea of prescription were to be regarded as regrettable human error or that the attorney and counsel did not follow instructions, such is not the applicant's case. Furthermore, the respondent contends that the applicants were legally represented at all times material hereto, in particular when the compromise agreement was entered into and when an order of the court was granted. Even during the pre-trial conference held on 28 February 2023 the applicants never took issue with the validity of the respondent's claim lodged in both her personal and representative capacities.

[15] The respondent strongly argues that the matter became *res judicata* when it the court granted the order dated 22 March 2022. Accordingly, the respondent disputes that section 17(2) of the Prescription Act grants the court a discretion to allow prescription to be raised on a matter that is *res judicata*. To further substantiate that, the respondent contends that the interpretation that applicants seek to impute to section 17(2) of the Act is absurd and will lead to undesirable results.

[16] What the applicants seek to do, the respondent contends, is to resile from the compromise they voluntarily entered into and by which they are bound. They do that when such a compromise has already been made an order of the court and in that way, the issue of liability was not only settled but also rendered *res judicata*.

THE APPLICATION OF RULE 42(1)(b) OF THE UNIFORM RULES OF COURT AND/OR THE COMMON LAW.

[17] As already adumbrated, the applicants rely on the provisions of Rule 42(1)(b) of the Uniform Rules of Court or the common law in their endeavor to rescind the court order dated 22 March 2022.

[18] Rule 42(1)(b) of the Uniform Rules of Court empowers a court, in addition to other power it has, to rescind or vary an order or judgment in which there is an ambiguity or patent error omission, but only to the extent of such ambiguity error or omission.

[19] It is a well-established rule in our jurisprudence that once the court has pronounced itself by issuing an order or judgment it becomes *functus officio* and its authority regarding that matter comes to an end².

[20] The principle of finality of litigation dictates that the power of the court should come to an end as it is in the public interest that litigation be brought to finality³.

[21] Finality of judgments and orders is a fundamental principle of law and our courts, recognizing the importance of that principle, have been consistent in upholding it. In this regard, the Supreme Court of Appeal restated the law in ***Mraitis Investments (Pty) Ltd v Montic Dairy (Pty) Ltd when Wallis JA*** said:

“A judgment can be rescinded at the instance of an innocent party if it were induced by fraud on the part of the successful litigant or fraud to which the successful party was party. As the cases show, it is only where the fraud- usually in the form of perjured evidence or concealed documents- can be brought home to the successful party that restitutio in integrum is granted and the judgment is set aside. The mere fact that a wrong judgment has be given based on perjured evidence is not sufficient basis for setting the judgment aside. That is a clear indication that, once a judgment has been given, it is not lightly set aside and De Villiers JA said as much in Scheerhout, namely that;

‘Apart from fraud the only other basis recognized in our case law as empowering a court to set aside its own order is Justus error. In Childerley, where this was discussed in detail, De Villiers JP said that ‘non-fraudulent misrepresentation is not a ground for setting aside a judgment’ and that its relevance might be to explain how an alleged error came about. Although a non-fraudulent misrepresentation, if material, might provide a ground for avoiding a contract, it does not provide a ground for rescission of a judgment.

² See Van Loggerenberg, Erasmus Superior Court Practice Vol 2 service issue 18-page D1-561, *De Villiers and Another v Boe Bank LTD* 2004 (3) SA 459 (SCA) at 562H – 563F, *Tahilram v Trustees, Lukamber Trust* 2022 (2) SA 436 (SCA) at para 19

³ See *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) at para 28, Erasmus Superior Court Practice D1-562, service issue 18 2022, *Zuma v Secretary of the Judicial Commission of Inquiry into the Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC) paras 88 and 97

The scope for error as a ground for vitiating a contract is narrow and the position is the same in regard to setting aside a court order. Cases of Justus error were said to be relatively rare and exceptional'. Childerely was considered and discussed by this court in De Wet without any suggestion that the principles laid down there were incorrect.

The same issue arose indirectly before this court in Gollach & Gomperts. I say indirectly because the case was not concerned with a judgment, but with avoidance of an agreement of compromise (transactio) on the basis of non-disclosure. The judgment repays careful consideration. The matter then before court was an action to set aside a judgment delivered in a defended case. Concerning judgment entered by consent, the learned Judge-President accepted that they could, "under certain circumstances" be set aside "on ground of Justus error". It appears to me that the transaction is most closely equivalent to a consent judgment... Such a judgment could be successfully attacked on the very grounds which would justify rescission of the agreement to consent judgment. I am not aware of any reason why Justus error should not be a good ground for setting aside such a consent judgment, and therefore also an agreement of compromise, provided that such error vitiated true consent and did not merely relate to motive or the merits of a dispute which it was the very purpose of the parties to compromise⁴.

[22] A rule of fundamental importance in our law is that a court order must be effective and enforceable, and it must be formulated in a language that leaves no doubt as to what it requires to be done⁵. The order must be in clear terms and also it must be readily ascertainable from the language used⁶.

[23] An ambiguity or patent error or omission, by definition, has been described as an ambiguity or an error or omission as a result of which the judgment granted does not reflect the intention of the judicial officer pronouncing it⁷. That means the ambiguous language or the patent error or the omission must be attributable to the

⁴ 2017 (5) SA 508 (SCA) at pages 514, 515 & 516, Mangqobe judgment para 39.

⁵ *Von ABO v President of the Republic of South Africa* 2009 (50 SA 345 (CC0 at 364D, Erasmus D1-570D, *Monteiro v Diedericks* 2021 (3) SA 482 (SCA) at paras 23 -24, Service Issue 20, 2022.

⁶ *Eke v Parsons* 2016 (3) SA 37 (CC) at 65E-G, *Proxi Smart Services (Pty) Ltd v Law Society of South Africa* 2018 (1) SA 644 (GP) at 655E-F, *Monterio v Diedericks* 2021 (3) SA 482 (SCA) at para 23-24.

⁷ Erasmus Superior Court Practice page D1-570D.

court itself⁸. That means, in other words, the judgment or order must not reflect the intention of the court, and that fact must be patent⁹.

[24] The basic principles applicable to the interpretation of documents in general are applicable to construing a judgment or order¹⁰. Those principles are applicable even to settlement orders¹¹.

[25] The court has, in general, a discretionary power to correct other errors in its judgment or order, but this should be done on rare and exceptional circumstances¹².

[26] The sub-rule does not allow the court to revisit the whole of its order or judgment and in this regard its powers are limited only to the removal of the ambiguity, error or omission concerned¹³.

[27] It is trite that an order taken by agreement can be rescinded. However, that can only be done in a clear case where it is in the interest of justice to do so, depending on the facts presented before the court¹⁴.

[28] Although the facts are distinguishable, Lowe J in ***Mathimba v Nonxuba***, in a matter where a legal practitioner had settled a matter on behalf of a client and that order was sought to be rescinded, said the following:

“I can think of no reason why it would be unconscionable for parties to negotiate on the amount claimed, agree on the amount to be paid, as well as costs, and decide to exclude interest in the agreement. If, during the

⁸ *Adonis v Additional Magistrate, Bellville* 2007 (2) SA 147 9 (C) at 153G-I, *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2002 (1) SA 82 (SCA) at 86C-D, Harms Civil Practice in the Superior Courts LexisNexis issue 51 B-402 para B42.5

⁹ *Adonis v Additional Magistrate, Bellville* 2007 (2) SA 147 (C) at para17.

¹⁰ Erasmus Superior Court Practice D1-570E.

¹¹ *Eke v Parsons* ibid para 50A-C, *Moraitis Investment s (Pty)Ltd v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) at para 20.

¹² *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 308, Erasmus page D1-575.

¹³ Erasmus ibid D1-576.

¹⁴ *Mangqobe and Others v Mangqobe NO* case no.3027/2021 23 January 2024 para 39.

negotiations, Mr. West had intended to raise interest, he would have done so and ensured that it formed part of the agreement¹⁵".

THE SPECIAL PLEA OF PRESCRIPTION.

[29] In terms of section 17(2) of the Prescription Act No. 68 of 1969 a party may raise prescription in the relevant pleadings. However, the court has the discretion to allow such a plea to be raised at any stage of the proceedings.

[30] It is a well-established and consistent procedure that prescription should be raised by way of a special plea. Makgoka J in ***Living Hands v Ditz*** stated the position to be as follows:

"That prescription should be raised by way of a special plea, is time honoured and has been followed by our courts for many decades¹⁶".

[31] In ***Huisman v Lakie*** the Court held that a plea of res judicata may be used when a dispute has been terminated by a court order. In that matter the court was satisfied that the issue of prescription had already been decided and it was the same issue that was raised in the special plea. The court concluded that the requirements for res judicata in the form of estoppel had been met and further that the plea of prescription was dismissed¹⁷.

[32] It is an entrenched principle of our law that a court will not exercise its discretion in favor of allowing an amendment to introduce prescription in circumstances where to do so would cause irreparable prejudice to the plaintiff¹⁸.

[33] It is indisputable that the parties reached an agreement, and that agreement was made an order of the court. That consent order is dated 22 March 2022, and the relevant part reads as follows:-

¹⁵ Mathimba and Others v Nonxuba and Others (2946/2017) [2018] ZAECHGHC 85; [2018] 4 All SA 719 (ECG); 2019 (1) SA 550 (ECG) (18 September 2018)

¹⁶ 2013 (2) SA 368 (GSJ) at 392A.

¹⁷ [2014] 2 All SA 1175 (ECG) at para 31, J Saner SC Prescription in South African Law Issue 34 page 3-380.

¹⁸ Saner SC Prescription in SA Law page 3-387.

“(a). The defendant is held fully liable to pay the plaintiff, in her personal representative capacities, all proven or agreed damages arising from the substandard care and negligent conduct of the defendant's employees at Cecilia Makhiwane Hospital which resulted in S[...] B[...] being born on the 15 November 2012 suffering from spastic quadriplegic cerebral palsy...”¹⁹”.

[34] In my considered view it is clear from a reading of the first paragraph of the order that the parties settled the merits of the claim the plaintiff instituted against the defendant in her personal and representative capacities.

[35] What is also glaring and apparent from the court order is that the defendant was represented by counsel and also an attorney of record when the agreement to settle the matter was concluded and when the order by consent was granted. In addition, there is also an Internal departmental legal advisor. That legal advisor, Mr. Matiwane, wrote a letter dated 16 March 2022, which letter gave the Legal Representatives authority and mandate to settle the claim **“in order to save unnecessary experts and trial costs”**. The basis upon which the applicants’ case is premised seems to be that the order dated 22 March 2022 was only intended to settle the merits in so far as the child's claim is concerned. There was no intention to settle the mother's claim, which is incidental to that of her child, which had already prescribed.

[36] There is no explanation as to how the error came about or occurred. No explanatory affidavit has been filed by the applicants explaining the error relied upon here to rescind an order taken by agreement. Such an explanation would have helped shed more light perhaps on the fact that the legal representatives failed to follow clear and specific instructions from the client department when they agreed to the settlement of the merits in respect of the mother. In fact, in the replying affidavit a letter dated 16 March 2022 authorizing the settlement of the merits was attached and that letter was from the applicant's legal advisor. As already alluded to above, the letter from the legal administration Officer is to the following effect:

¹⁹ court order dated 22 March 2022 page 15-16 of the record, para 18 founding affidavit page 9-10, para 53 answering affidavit page 38-39.

“(i) we refer to the above-mentioned matter of Y[...] B[...] obo S[...] B[...] // MEC HEALTH.

(ii) kindly be advised that the HOD for Health has approved and gave instructions to concede merits in this matter. We therefore instruct your office to proceed to liaise with plaintiff attorneys and concede merits in this matter to save unnecessary experts and trial costs.

(iii) kindly be advised that the Eastern Cape Department of Health and the Eastern Cape Office of the Premier have through a Memorandum of Agreement authorized us to issue these instructions with the Department of Health remaining the institution liable for covering all litigation cos.

(iv) trust that you will find the above in order”.

[37] That letter is clear evidence of the fact that the legal representatives acted on the instructions of the applicants when they settled the matter and made the settlement agreement an order of court on 22 March 2022²⁰. Furthermore, there is nothing in that letter which suggests that only part of the claim was to be settled. In other words, that only the respondent’s claim in her representative capacity was to be settled, and not the one in her personal capacity, as the applicants would have this court believe.

[38] To further reinforce the fact that there was no mistake or Justus error when rbt the order was granted on 22 march 2022, the parties’ legal representatives prepared a statement of agreed facts in terms of Rule 33(1). At paragraph 11 of the statement of the agreed facts the parties record that *“furthermore, on the said date (22 March 2022), the defendants formally conceded liability to pay the plaintiff, in her personal and representative capacities, all of the Plaintiff’s proven or agreed damages arising from the substandard care and negligent conduct of the defendants’ employees at Cecilia Makiwane Hopital which resulted in S[...] being born on 15 November 2012*

²⁰ Para 34 page 106 of the record.

suffering from spastic quadriplegic cerebral palsy". That statement of agreed facts was signed by Ms U. Ntwanambi, on behalf of the respondent's attorney and by Ms T. Yoba on behalf of the applicants' attorney. It was signed as recently as the 15 of April 2024 and was served upon the respondent on the same day at Shared Legal Services in King Williams Town.

[39] Without an explanation from the legal representatives as to what transpired in court when the order by agreement was taken, this court is left in the dark. That explanation is of crucial importance, especially because the first applicant was represented by both an attorney and an advocate. Therefore, in my view, there was very little room for mistakes or errors. If there was such an error, it should have been properly explained in affidavit. That has not been done.

[40] There is no allegation in the founding affidavit that the legal representatives had no mandate to settle the merits of the respondent's claim. In any event, the letter dated 16 March 2022 gives them a clear mandate to settle. It is therefore not the applicants' case that the legal representatives had no authority to settle.

[41] All that the applicants rely on is that there was no intention on their part to settle the prescribed mother's claim and they did not waive the right to plead prescription. That averment is made in the face of the indisputable and common cause fact that the applicants has never, during the course of the litigation between the parties, raised prescription as a defence. The respondent even goes to the extent of contending vehemently that the applicants have had three occasions to amend their plea and have moreover never utilized any of those opportunities to raise the defence of prescription.

[42] Very strangely, the applicants have failed make reference to the statement of the agreed facts signed on 15 April 2024 and explain, in relation thereto, their case and in particular when they realised the mistake in the order sought to be rescinded.

[43] What this court has to grapple with, and answer is whether, in the circumstances, taking into account the considerations of fairness and justice, it has to exercise its discretion in favour of granting the rescission application sought by the

applicants. In circumstances where the legal representatives had failed to explain whether they had the mandate to settle the claim on behalf of their client, Jolwana J had this to say: *“Were it to be accepted, it would make a dangerous and slippery precedent which would make all the court orders which are taken by consent daily in our courts across the country by the litigants’ legal representatives vulnerable. Such orders would clearly be subject to the whims of litigants who could change their minds if they decide to do so or even change their legal representatives to achieve the desired outcome. On the applicant’s approach courts would just have to accept that. I do not think that that proposition is sound nor is it the correct legal position. It is contrary to our jurisprudence on consent orders as I understand it”*²¹.

[44] As is apparent from the founding papers, the applicant’s case is premised on the provisions of Rule 42(1)(b). There are certain jurisdictional requirements that a party has to meet if she, he or it is relying on the provisions of that Rule for relief. One such important requirement is that there must be an ambiguity or patent error or omission that must be shown to exist in the court order dated 22 March 2022. The ambiguity or patent error or omission must be that of the court. This was clearly stated in ***Mostert v Old Mutual Life Assurance Co (SA) Ltd*** that an ambiguity or patent error or omission is one as result of which the judgment granted does not reflect the real intention of the judicial officer pronouncing it; in other words, the ambiguous language or patent error or omission must be attributable to the court itself²². I am in full agreement with the sentiments expressed by the learned Judge in this regard.

[45] No doubt, from a reading of the sub-rule and the authorities, a party is entitled to relief under Rule 42(1)(b) only if the ambiguity or patent error or omission is attributable to the court itself. In the instant matter the applicants’ state in the replying affidavit that the settlement of the merits was authorized by the applicant’s legal advisor by means of a letter dated 16 March 2022. Following that authorization an agreement settling the matter was reached by the parties, which agreement resulted in the consent order dated 22 March 2022. There is no ambiguity or patent error or omission that has been demonstrated to exist in the court order sought to be

²¹ Mangqobe judgment para 34.

²² 2002 (1) SA 82 (SCA) at 86 C-D.

rescinded, which is attributable to the court. For that reason, I am not persuaded that the jurisdictional factors provided for in Rule 42(1(b)) have been met or shown to exist.

[46] The applicants also seek to rely on the common law to rescind the impugned order. Mr. Mapoma has strenuously urged the court to develop the common law taking into consideration that the proviso to section 17(2) of the Prescription Act. The section does give the court a discretion to allow an amendment to introduce the special plea of prescription **at any stage of the proceedings (emphasis provided)**. In *MEC for Health, Gauteng Provincial Government v PN* the apex court reaffirmed the principle that the High Courts have the power to develop the common law where the issue of damages has not been finalized, amend his/her pleas, in circumstances where a proper factual foundation exists thereof.²³ In terms of the common law the applicants were required to demonstrate that the order was obtained as a result of fraud or mistake. None of that has been shown in the papers. Instead, the order was granted by consent, consequent upon an agreement by the parties. That therefore means, in my respectful opinion, that no proper case has been made in terms of the common law.

CONCLUSION.

[47] If the rescission application were to be granted, by allowing the applicants to amend their plea to introduce the special plea of prescription, in circumstances where the order was obtained by consent of the parties and there is no ambiguity or patent error or omission attributable to the court that granted it on 22 March 2022, it would result into an anomaly - or absurdity.

[48] Moreover it is in the public interest that litigation should be brought to finality and the inherent jurisdiction that the court has must be exercised with due regard to that principle²⁴. If the rescission were to be granted that would indeed create a wrong

²³ [2021] ZACC 6 at para 26.

²⁴ *Zondi v MEC, Traditional and Local Government Affairs and Other* 2006 (3) SA 1 (CC) at para 28, *J.A.N v N.C.N* (2283/2023) [2022] ZAEMKHC 14 (17 May 2022) at para 22.

precedent in allowing a party to re-open its case and introduce a special plea that it never pleaded until the merits were settled by an order taken by consent.

[49] Furthermore, to allow the rescission in the present factual matrix, by giving the applicants an opportunity to introduce the special plea of prescription, that would be prejudicial to the respondent and such prejudice cannot be compensated by an order of court. It will therefore not be in the interests of justice to grant the rescission order and allow the proposed amendment. In any event a proper case has not been made for the rescission of the order taken by agreement.

[49] In the circumstances I grant the following order:

1. The application is dismissed with costs.

T.A. NKELE
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicants: *Adv. S X Mapoma SC*

Instructed by: State Attorney,
East London

Counsel for the respondent: *Adv. Nabela*

Instructed by: Msitshana Incorporated,
East London

Dates heard: 17 October 2024

Date delivered: 19 November 2024