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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Not Reportable

Case no: 20030/2024

In the matter between:

S[...] E[...] W[...]

Applicant

And

W[...] H[...] J[...] W[...] N.O.

First Respondent

NICOLE PRINSLOO N.O.

Second Respondent

R[...] W[...] N.O.

Third Respondent

REGISTRAR OF DEEDS, CAPE TOWN

Fourth Respondent

W[...] H[...] W[...]

Fifth Respondent

BAREND FERREIRA N.O.

Sixth Respondent

Coram: BARENDSE J

Heard: 3 August 2026

Delivered: 4 September 2026

Summary: Interpretation of settlement agreement-disputes arising from-whether suited to motion proceedings-attorney and client privilege-whether waived -filing of further affidavits without leave.

ORDER

1. The application is dismissed;
2. The Applicant shall pay the Respondent's costs, with counsel's fees taxable on scale B.

JUDGMENT

Barendse J:

Introduction and factual setting

[1] These are opposed motion proceedings in which the Applicant seeks the following relief:

1. Confirmation of the cancellation of a deed of sale dated 18 June 2023;
2. Cancellation of the transfer of ownership of Erf 1[...] at Stilbaai East, in the Hessequa Municipality Division Riversdale, held by deed of transfer no T[...] to the Respondent in terms of S6(1) of the Deeds Registries Act no 47 of 1937;
3. Cancellation of the transfer of ownership of the aforesaid property to the W[...] Merrie Familie Trust under Deed of Transfer number T[...];
4. An Order directing the Fourth Respondent to cancel the aforesaid Deeds of Transfer;
5. An Order for the reinstatement of Deed of Transfer number T[...] under which the Applicant previously held the said property.
6. Legal costs;
7. Alternative Relief.

[2] The Applicant was previously married to the Fifth Respondent. The marriage was concluded on 1 September 2017, out of community of property, with the exclusion of the accrual system. The remaining respondents (except for the Fourth Respondent) were cited in their capacities as trustees of the W[...] Merrie Familie Trust with registration number 4204/2007 (“the trust”). The *lis* was between Applicant and Fifth Respondent, who was the only respondent opposing these proceedings. The Fifth Respondent will therefore be referred to as “the Respondent”.

[3] During 2020 and while the marriage subsisted, the Respondent purchased a property, Erf 1[...] Stilbaai (“the property”) and the property was thereafter registered in the name of Applicant. Applicant’s case was that the property was a gift to her. Respondent averred that acquisition of the property was part of a broader estate planning exercise. This property forms the subject of this dispute.

[4] The Respondent has two adult daughters from a previous marriage. They are co-trustees of the trust and cited as Second and Third Respondents respectively.

[5] During 2019 the Respondent also purchased three properties in Albertinia, Western Cape. One of these properties was registered in the name of the Applicant and as for the remaining two properties, one was

registered in each daughter's name. During 2023 the Respondent purchased a further property in Albertinia. This property was registered in the Applicant's name.

[6] In the Founding Affidavit ("FA") the Applicant stated that during May 2020, after the acquisition of the Stilbaai property the Respondent drafted a Last Will and Testament for her. In terms thereof, and in the event of the simultaneous death of Applicant and the Respondent, the properties at Albertinia and Stilbaai, held by Applicant, would devolve upon Respondent's two daughters.

[7] Applicant was diagnosed with cancer on 25 April 2023 and commenced with chemotherapy during May that year. She stated that subsequent thereto, Respondent suggested that the Stilbaai property be transferred to the trust as the trust would in the future look after her needs.

[8] According to the Applicant the Respondent insisted on the said property being transferred to the trust and on 18 June 2023 she signed a deed of sale under duress. In terms of this deed of sale, she sold the property to the trust for R290,000.00. It appears that this was the price at which this property was acquired during 2020. It was a vacant plot which the parties intended developing. The deed of sale provided that the purchase price was payable upon registration of transfer.

[9] During July 2023, Respondent informed the Applicant that he wanted a divorce. A divorce summons was eventually issued out of the Regional Court in Riversdale. Applicant intended opposing the divorce proceedings, but through the fault of her then attorneys, a Divorce Order was granted on an unopposed basis. At that stage, the transfer of ownership of the Stilbaai property to the trust was not yet registered. In the course of the divorce proceedings the transferring attorney was instructed not to proceed with the transfer thereof, pending the divorce proceedings.

[10] In the FA the Applicant further averred that she was the victim of a misrepresentation by the Respondent. She was unaware that Respondent was conducting an extramarital affair at the time, and that Respondent intended divorcing her.

[11] The papers extensively refer to correspondence exchanged between the parties' attorneys in the divorce and with the transferring attorney. It is not necessary to repeat those references here. Importantly, the Applicant instructed her erstwhile attorneys to apply for rescission of the Divorce Order.

[12] Both parties were legally represented. The Respondent opposed the rescission application and settlement negotiations ensued. These negotiations culminated into a settlement agreement which was made an order of court. The settlement agreement was signed by Applicant on 15

March 2024 and by the Respondent on 26 March 2024. It was made an order of court on 31 July 2024.

[13] The settlement agreement contained provisions relating to rehabilitative maintenance for the Applicant, medical aid for her, movable property and immovable property. The provisions relating to immovable property confirmed that the vacant plot in Albertinia would be retained by the Applicant. This property was already registered in her name.

[14] The settlement agreement also contained express provisions concerning the Stilbaai property and it is from these provisions that this litigation ultimately arose. Clause 2.1.2.1 of the settlement agreement reads as follows:

“2.1.2.1 It is recorded that Defendant is the owner of Erf 1[...] Stilbaai, which will be transferred to the W[...] Merrie Familie Trust in terms of a deed of sale signed on 18 July (sic) 2023, as provided above (herein referred to as the Stilbaai property”

[15] As mentioned earlier, the settlement agreement also deals with movable assets, particularly two motor vehicles. It then contains a clause that provides for payment of a lumpsum of R350,000.00 by Respondent to the Applicant. Importantly, it makes payment of the lumpsum subject to five conditions, one of which was the transfer of the Stilbaai property from Applicant to the trust.

[16] It is common cause that the settlement agreement was signed and made an order of court. The Applicant declared in the FA that she was also forced to sign the settlement agreement. It is further common cause that the Applicant signed the transfer documents for the transfer of ownership of the Stilbaai property to the trust and that the R350,000.00 was thereafter paid to Applicant. The property was then transferred to the trust.

[17] The settlement agreement expressly reflects that it was concluded in settlement of the disputes in the rescission application and the divorce action. As mentioned earlier, the transfer of the Stilbaai property was previously held over, pending the divorce proceedings. This property was very much part of the dispute in the divorce too.

The disputes

[18] Shortly after the settlement agreement was concluded the Applicant changed attorneys. It appears that she was unhappy about the fees that her previous attorneys charged her and with their level of service. Her new attorney addressed a letter to the Respondent claiming the purchase price of R290,000.00 for the Stilbaai property in terms of the deed of sale dated 18 June 2023. The appointment of this attorney, Mr de Lange, became a subject of controversy in the papers. Respondent alleged that Mr de Lange is the ex-husband of the Respondent's current wife. Mr De Lange befriended the Applicant after the divorce settlement was entered into and Respondent believed that Mr de Lange was biased against him. Respondent attributes

these proceedings to this alleged bias. There was much atmosphere in the Answering Affidavit (“AA”) and the Replying Affidavit (“RA”) around this. The least said about this issue, the better.

[19] Applicant’s case is that it was not the intention behind the settlement agreement that payment of the R350,000.00 by Respondent included the purchase price for the property of R290,000.00. It was submitted on her behalf that the trust was not a party to the settlement agreement and that its obligation to pay the purchase price could not have been discharged by the settlement agreement. Respondent on the other hand contends that the divorce settlement was entered into in settlement of all the disputes between them and that the lump sum payment included the said sum of R290,000.00 plus a “sweetener” of R60,000.00.

[20] Applicant states that because the breach notice dated 28 May 2024 in which her attorney claimed payment of the amount of R290,000.00 was not complied with, she was entitled to cancel the agreement of sale. It is also clear from the FA that the fact that the property is worth substantially more than the amount of R290,000.00 materially impacted the Applicant’s decision to institute these proceedings. In fact, Applicant expressly stated that the deed of sale for the Stilbaai property was a contentious matter in the divorce proceedings from the outset.¹ This necessarily drew this property into the dispute around the proprietary consequences of the divorce.

¹ Founding Affidavit, record p17 paragraph 4.31

[21] To muddy the waters further, Respondent filed an affidavit by Mr Twigge, the attorney who represented the Applicant during the divorce proceedings, in the settlement negotiations and when the settlement agreement was concluded. He made it clear that the amount of R350,000.00 payable to Applicant was in full and final settlement of all claims that she had against the Respondent. He took exception to the allegations by Applicant that she was forced to sign the settlement agreement, as this reflected negatively on him and his law firm.

[22] The affidavit by Mr Twigge and another by Ms Strauss, a colleague of his, were filed on 28 July 2026, just days before the hearing. Applicant's counsel objected to the admission of these affidavits into the proceedings. It was denied that they were served on Applicant's attorneys, Applicant argued that Respondent did not seek leave under Rule 6(5)(e) to file them and it was claimed that attorney and client privilege attached to the disclosures made therein.

[23] In the AA, the Respondent acknowledged that the correspondence between Applicant and Mr Twigge was privileged and for that reason he was unable to obtain and attach such communications.²

Reasoning

² Record p102 paragraphs 3.7 and 3.8

[24] While the Applicant stated in her FA that she signed the deed of sale under duress³ and that she signed the settlement agreement under duress⁴ this line was not pursued during argument. Applicant's argument centered on the interpretation of the settlement agreement. The Court was referred to paragraph 2.5 thereof, which contained the conditions precedent to the R350,000.00 payment. Applicant also relied on paragraph 3 of the settlement agreement which provides that *"Except as otherwise provided in this consent paper...the parties shall each retain such assets as are presently held in his/her name..."*

[25] Applicant's case was further that the deed of sale of 18 June 2023 remained an agreement enforceable separately from the settlement agreement. This was why the settlement agreement stipulated that the Stilbaai property would be transferred to the trust in terms of the said deed of sale. The reference in the settlement agreement to the deed of sale, meant that the purchase price of R290,000.00 remained payable to Applicant, so the argument went. The difficulty with this is that clause two of the deed of sale provided that the purchase price was payable upon registration of transfer. It is common cause that the Applicant signed the transfer papers and that the transfer to the trust was registered after Respondent paid the amount of R350,000.00. Put differently, if the amount of R290,000.00 remained payable, it would have been payable upon registration of transfer. The settlement agreement, with which Applicant does not take issue

³ Record p15 paragraph 4.14

⁴ Record p20 paragraph 4.43

anymore, is therefore in direct conflict with the payment provisions of the deed of sale. To compound matters, the settlement agreement was made an order of court.

[26] It is so that the Stilbaai property featured in the divorce action and in the rescission application. This is why the transfer thereof was pended, subject to those proceedings. It is further so that the settlement agreement stated that this property must be transferred to the trust as one of the conditions precedent to payment of the amount of R350,000.00. After this property was transferred to the trust, the Respondent had it transferred to himself. It appears from the papers that the latter step angered the Applicant.

[27] The Respondent's version is that when the settlement was entered into both the rescission application and the divorce action were settled. The settlement agreement, at paragraph six thereof, recorded that the agreement *"...constitutes full and final settlement of all claims and disputes between them, and between them and any entity or trust in which either party may have any interest..."*

[28] Our law on the interpretation of documents is settled. In *Endument*⁵ it was held that this process is objective, that regard must be had to the language used, read in the context and with regard to the purpose and background of the document's production. The language used in the

⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)

settlement agreement can potentially be given the meaning contended for by either party. That said, the context of the settlement negotiations and purpose of the deed of settlement cannot readily be assessed on the papers. Oral evidence on these two elements is indispensable for an interpretation on the principles laid down in *Endumeni*.

[29] The *Plascon Evans*⁶ rule enjoins this Court to determine this matter on the Respondent's version of the disputed facts together with the facts admitted by Applicant, or facts which Applicant cannot dispute, unless Respondent's version is so improbable, far-fetched or untenable that it falls to be rejected outright on the papers. The Court considered the Respondent's version and concluded that it raised a genuine dispute of fact.

[30] Having regard to *Wightman*⁷ this is not an instance where the Respondent's version contains denials without seriously and unambiguously engaging with the disputed facts. The version put forward by the Respondent is probable and is supported by the undisputed facts.

[31] The Respondent's version of what the settlement agreement entailed is consistent with *inter alia*, the following undisputed facts:

1. It was agreed that the Stilbaai property would be transferred to the trust;

⁶ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

⁷ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA)

2. The Applicant signed the deed of sale;
3. The Applicant signed the settlement agreement fully assisted by legal representatives;
4. The settlement agreement contained a full and final settlement clause which included the parties themselves and any other entity or trust in which either of them may have an interest;
5. The Applicant signed the documents for the transfer of the Stilbaai property even though this reflected that no balance was payable to her;
6. The Applicant did not apply for the settlement agreement and court order to be set aside;
7. The settlement agreement provided for the retention as Applicant's sole property, the Albertinia property which Respondent purchased.
8. On Applicant's own version, Respondent had a Will drawn up for her in the same year when the Stilbaai property was acquired. The Will included provisions around this property, fortifying Respondent's version that the acquisition was part of estate planning.

[32] As mentioned earlier, the text of the settlement agreement can potentially sustain the interpretation contended for by either party. A legally correct interpretation must be informed by the context of the settlement negotiations, the agreements reached and the purpose of the impugned provisions of the settlement agreement. Given the finding that the Respondent raised a genuine dispute of fact and upon application of the *Plascon Evans* rule the Court cannot grant the relief being sought by the applicant.

[33] On behalf of the Applicant it was argued, in the alternative, that this Court could refer the matter for oral evidence. While the Court has the discretion to do so, it may dismiss an application if it was reasonably foreseeable to the Applicant that a serious dispute of fact, incapable of resolution on the papers may develop.⁸ In my view, this is such a matter. The FA contained allegations of misrepresentations and that Applicant signed at least two documents central to the dispute under duress. These are hardly allegations that can be proven or decided on papers if challenged. Although Applicant eventually abandoned the above allegations, this does not augur well for the manner in which she conducted this litigation. Also, after the AA was filed the Applicant had a further opportunity to reconsider whether to persist with the application. At that stage it should have become clear that oral evidence around the settlement negotiations would be compelling.

[34] It is necessary to briefly deal with the contentious filing of affidavits deposed to by two of Applicant's previous attorneys and the submissions made by the parties around that. First, I will deal with the Applicant's submission that the affidavits by Mr Twigge and Ms Strauss violated the attorney and client privilege. I do not agree with this supposition. In *Peacock v SA Eagle Insurance Company Ltd*⁹ and in *Harksen v Attorney-General, Cape and Others*¹⁰ the courts drew a distinction between implied

⁸ See *Gounder v Top Spec Investments (Pty) Ltd* 2008 (5) SA 151 (SCA) at para [11]

⁹ 1991 (1) SA 589 (C) at 591-592

¹⁰ 1998 (2) SACR 681 (C); (1999 (1) SA 718)

and imputed waiver of legal professional privilege. Implied waiver occurs where a party so behaves that it can objectively be concluded that the privilege was intentionally abandoned. Imputed waiver occurs where, regardless of intention, fairness requires that the court concludes that the privilege was abandoned. *Wigmore*¹¹ concluded that it is a ‘fair canon of decision’ that when a client alleges a breach of duty by the attorney, the privilege is waived as to all communications relevant to that issue. The attorney will have a right to defend himself/herself against such allegations. The Applicant made allegations of impropriety against her previous attorneys. For that reason, she cannot rely on attorney and client privilege when the attorneys address the allegations levelled against them and matters pertaining to the breaches alleged by her.

[35] It is common cause that the Respondent did not formally seek leave in terms of Rule 6(5)(e) from this Court to file the additional affidavits. Leave was sought from the bar only during argument. Given the nature of the findings made earlier herein, it is in any event not necessary to have regard to the contents of these affidavits. The Court therefore holds that the two affidavits are inadmissible.

[36] There is no reason why costs should not follow the result. Both parties argued for punitive costs. The atmosphere in this matter is not uncommon in litigation between previous spouses. In this matter, the fact that Mr de Lange entered the fray only inflamed matters more. In this Court’s view, he should

¹¹ John Henry Wigmore *Evidence in Trials at Common Law* Volume 8 at para 2328

not have accepted a mandate to represent the Applicant, more so given his previous marriage to Respondent's current spouse. The ultimate reasons for the dismissal of the application are such that punitive costs are not warranted.

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

1. The application is dismissed with costs;
2. The Applicant shall pay the Respondent's costs, with counsel's fees taxable on scale B.

RD BARENDSE
JUDGE OF THE HIGH COURT

Appearances

For Applicant: L Bolt

Instructed by: Martins De Lange Attorneys

c/o Michalowsky Geldenhuys Attorneys

For Respondent:

A De Wet

Instructed by:

De Klerk and Van Gend Attorneys