

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

CASE NO: 9232/20

A[...] F[...] E[...]

First Plaintiff

LANA BEZUIDENHOUT NO

Second Plaintiff

v

M[...] C[...] E[...]

Defendant

JUDGEMENT DELIVERED ON THIS 7th DAY OF MARCH 2022

FORTUIN, J:

Introduction

[1] The defendant raised an exception to the plaintiffs' Particulars of Claim that it fails to disclose a cause of action. In the main matter, the plaintiffs seek an order rescinding the consent judgement granted by this court on 13 May 2015, being a decree of divorce incorporating a deed of settlement between the first plaintiff and the defendant. In addition, following the rescission, the plaintiffs seek an order rectifying the settlement agreement.

[2] The first plaintiff is A[...] E[...], the ex-husband of the defendant, M[...] E[...]. The second plaintiff is Lana Bezuidenhout NO, the curator *ad litum* for their son, who is mentally impaired.

[3] The first plaintiff and the defendant were married to each other out of community of property on 11 July 1981. E[...] issued divorce proceedings in 2015, and prepared a settlement agreement with the assistance of his attorneys at the time. On 19 March 2015, the defendant signed the settlement agreement.

[4] The settlement agreement comprehensively details the first plaintiff's obligations towards the defendant (his ex-wife), as well as the propriety consequences of the divorce. The settlement agreement reflects that no amendments thereto could be made unless reduced to writing and signed by both parties. In the particulars of claim in the divorce proceedings, the first plaintiff alleged that there were three major sons born of their marriage. The divorce particulars of claim made no further mention of the medical disorder of one of the sons, the patient.

[5] During the divorce hearing, the first plaintiff testified, and a decree of divorce was granted incorporating the settlement agreement. E[...] was legally represented at all times.

[6] On 25 June 2020, a curator *ad litem* was appointed to the patient. On 21 July 2020, more than five years after the divorce, the plaintiffs instituted the current proceedings seeking rectification of the settlement agreement and thereafter rescission of the consent judgement.

[7] The plaintiffs seek the following orders:

1. Rectifying the deed of settlement concluded between the first plaintiff and the defendant dealing with the propriety consequences of the divorce;

2. Rescinding the divorce order, taken by agreement between the first plaintiff and the defendant, incorporating the settlement agreement; and

3. Joinder of the second plaintiff to the divorce proceedings.

[8] The defendant excepts to the plaintiff's particulars of claim on the basis that:

1. The claim lacks the averments necessary to sustain a cause of action;

2. E[...] did not plead that a judgement was obtained as a result of fraud or duress; and

3. The first plaintiff did not plead that the parties consented to the judgment in *justus* error, labouring under a common mistake or material fact.

[9] It is therefore the defendant's contention that the plaintiffs have not complied with the requirements of rule 42 or the common law, and as a result, the first plaintiff has not made allegations, which, if proven, would entitle the plaintiffs to an order for rescission.

Relevant Legal principles

[10] It is trite that an excipient must show that on every interpretation that can usually be attached to the particulars, it does not disclose the cause of action¹. It is further trite that the purpose of an exception is to dispose of a matter (or a portion thereof) in an expeditious manner. In determining whether a cause of action has been disclosed, the pleadings must be read as a whole. The plaintiffs are enjoined to plead every material fact necessary to prove the relief sought. It is a well-established rule that those facts must contain at least the outline of a triable case. In this regard see **Levitan v New Haven Holifday Enterprises CC**².

¹ **First National Bank of Southern Africa v Perry NO** 2001 (3) SA 960 (SCA).

² 1991(2) SA 297 (C).

[11] An application for the rescission of a judgment can be made in terms of rule 31, 42 or the Common Law.

[12] 12.1 Rule 31 applies where a judgment was granted, as a result of a defendant's default;

12.2 Rule 42(1) provides as follows:

(1) *"The court may , in addition to any other power 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 a patent error or omission, but only to the extent of such ambiguity, error or mission;

(c) An order or judgment granted as the result of a mistake common to the parties."

12.3 At common law a judgement can be set aside on the grounds of fraud, *justus* error, default judgment, in exceptional circumstances when new documents are discovered, or where there is no valid agreement between the parties to support the judgment.

Common cause

[13] It is common cause that the second plaintiff, the patient, as a result of his mental state, needs to be maintained. It is further common cause that the first plaintiff initiated the divorce proceedings, was legally represented, and testified in court. The facts placed before the court were in his personal knowledge.

Discussion

[14] It is common cause that the parties entered into a settlement agreement which was made an order of court. This settlement agreement was prepared by the first plaintiff's legal representative. This agreement was made an order of court approximately two months after it was signed; two months within which the first plaintiff could have rectified any mistake or error.

[15] Instead of doing this, the first plaintiff testified in court and confirmed the contents of the settlement agreement. The defendant did not testify in court. This court searched in vain for an averment that he or the defendant had laboured under a material mistake when the decree of divorce was granted. The settlement agreement is silent on any details of the children. It does not even mention the patient's name. The defendant did not lead evidence regarding the patient. This, in my view, does not amount to an error on the part of the court nor on the part of the parties. This is, in any event, was not pleaded. The order was therefore not erroneously sought nor granted, nor is it not a common mistake or a mistake by the court as required in rule 42.

[16] In respect of the claim for rescission, I would like to emphasise that, as indicated to counsel for the plaintiffs during argument, this may be a case for rectification of the settlement agreement to provide for the patient's care and maintenance, in addition to that of the defendant. The plaintiffs, however, selected the rescission procedure, and even after the court expressed its *prima facie* view on the merits of this claim, persisted with the application.

[17] The requirements for a successful application for rescission is trite. In my view, these particulars of claim do not contain the necessary averments to sustain a claim for rescission.

[18] It is further trite that, when relying on an error when rescission is sought, that error had to be the cause of the judgment being granted. Nowhere on these papers is there any indication that the divorce would not have been granted if the patient's mental disorder was disclosed. Differently put, that in the event that the court was made aware of the patient's mental state, the decree of divorce would not have been granted. In *casu*, the particulars of claim did not mention any dependent child. In this regard see the decision in **K v K** ³.

[19] A claim by the plaintiff that the divorce was wrongly granted, would have entitled him to appeal the decision. On these facts, plaintiff was entitled to a decree of divorce and the order was accordingly not erroneously granted.

[20] In respect of joining of the patient to the divorce proceedings, it is clear that he not have intervened in the divorce proceedings without the assistance of a curator, as he lacked the necessary legal capacity to do so. The appointment of a curator at this late stage was the correct procedure whereby the rights of the second plaintiff can be protected. These rights remain intact.

[21] This is evidently a maintenance claim. The patient, appropriately now assisted by a curator, should be instituting a maintenance claim against his natural parents as they have a common law duty to maintain him, irrespective of what the terms of the divorce order are.

[22] In my view therefore, the plaintiffs' particulars of claim does not disclose a cause of action for rectification of the deed of settlement or rescinding the divorce order taken by agreement, nor joining the second plaintiff to the divorce proceedings.

³ 2008 (5) SA 431 (W).

[23] In the result, I make the following order:

23.1 The exception is upheld with costs;

23.2 Plaintiffs' claim for rescission is struck out; and

23.3 Plaintiffs are granted leave to amend their particulars of claim within 15 days of service of this order.

FORTUIN, J

Date of hearing: 15 November 2021

Date of judgment: 7 March 2022

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