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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 65757/2012

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

.....
SIGNATURE

.....25/5/2020.....
DATE

In the matter between:

R[....] E[....] M[....]

Applicant

and

E[....] J[....] N[....] M[....]

First Respondent

VAN DER BILT ATTORNEYS

Second Respondent

JUDGMENT

MALUNGANA AJ:

[1] One of the main issues to be determined in this opposed application is whether it is competent for the court to rescind a settlement agreement incorporated in the divorce order on the basis of misrepresentation. In this connection the applicant brought an application for rescission and setting aside of the settlement agreement which was incorporated in the order granted by Raulinga ADJP, in a divorce action on 30 January 2019.

[2] The applicant further seeks the following relief:

[2.1] That the joint estate be liquidated and the liquidator be appointed within two weeks of the order being granted;

[2.2] That the first respondent dishonest and fraudulent conduct be referred to the National Prosecuting Authority of South Africa (NPA) for criminal prosecution;

[2.3] The first respondent be interdicted from disposing any movable or immovable property and must disclose all bank statements of all banks held for the last 12 months;

[2.4] The second respondent's conduct be investigated by the Legal Practice Council (LPC) for any possible misconduct;

[2.5] That both respondents be ordered to pay costs at the punitive scale, with the second respondent paying costs *de bonis prorils*.

[3] The applicant, who was the defendant in the divorce action, and the respondent, who was the plaintiff, were married to each other in community of property on 03 September 1980. On 30 January 2019 a decree of divorce incorporating a settlement agreement was granted by Raulinga ADJP. The salient terms of the settlement agreement were *inter alia* that:

"2.1 The parties record that the Plaintiff is a member of the GOVERNMENT EMPLOYEES PENSION FUND with member's number [....].

2.2 The parties agree that it be ordered that the Plaintiff's (member) pension fund interests held at the GOVERNMENT EMPLOYEES PENSION FUND (member's number: [...]) be endorsed by the Administrators of such pension fund or its successor in title to the effect that the court has ordered a division of joint estate subsisting between the parties and that such endorsement reflect that the Defendant (non-member) of such be entitled to 50% of the Plaintiff's (member) pension interest in such fund, calculated as at the date of divorce (30 January 2019), payable by the fund within 60 days after receiving written notification from Defendant in which such Defendant specifies whether the Defendant elects to receive a cash benefit or to have the benefit transferred to another pension fund.

2.3 This order is issued pursuant to the provisions of Section 7(8)(a)(i)(ii) and 7(8)(b) of the Divorce Act, no 70 of 1979 as amended as well as Section 24A(1) of the Government Employees Pension Law Amendment Act, Act 19 of 2011.

2.4 Save and except for the above and 2.5 *infra* each party shall retain the assets in his or her possession and neither party shall have any further claim against the other.

2.5 The Plaintiff shall pay to the Defendant a cash amount of R60 000-00 by February 2019."

[4] It bears mentioning at the outset that according to the applicant, the first respondent initially obtained a forfeiture decree of divorce against him which was rescinded after it was found to have been obtained without his prior knowledge. The said order is attached to the founding papers as annexure "M1".

[5] Subsequent to the rescission of the above order the parties proceeded with the divorce proceedings which culminated in the order against which this application lies. Pursuant to the settlement agreement, which is at the heart of this proceedings, the applicant's attorneys addressed a letter to the respondent's pension fund notifying them of the applicant's claim of half of the pension fund's benefits in terms of the order. The pension fund

(GEPF) advised the applicant that the first respondent had already terminated her membership and withdrew all funds as at 31 October 2018. The relevant portion of the letter dated 26 March 2019 from GEPF reads as follows:

“ You are informed that the Final Decree of Divorce has been received in this office and does not comply with section 7(8)(a)(i)and(ii) of the Divorce Act, 1979, as amended, no endorsement has been made against the Fund.

For the GEPF to comply with section 7(8) of the Divorce Act of 1979, the following requirements must be adhered to:

MEMBERSHIP TERMINATION 2018/1031 – EX-MEMBER PAID

Payment of the pension interest is therefore regarded as a personal agreement between the two parties and must be dealt with as any asset in the estate of the parties.”

[6] The applicant avers that the first respondent agreed to the settlement terms in terms of which the GEPF would pay out money to the applicant, with full knowledge that she had withdrawn all monies held with GEPF.

[7] The applicant also contends that the second respondent was privy to the fact that the funds had in fact been withdrawn at the time of the conclusion of the settlement agreement, and has failed to take steps to distance himself from the unlawful and fraudulent conduct of the first respondent after being informed of the serious allegations. In this regard the applicant contends that his conduct should be referred to the Legal Practice Council for possible investigation.

[8] The first respondent filed her answering affidavit resisting the relief sought by the applicant. She denies the allegations of fraud and misrepresentation levelled against her by the applicant. In defence she contends that the initial decree of divorce was lawfully obtained after the sheriff had issued her with a return of service stating that there was a

personal service upon the applicant. The settlement agreement in question, was concluded with full knowledge that her membership with GEPF was terminated and that all the funds had been withdrawn. She is, however, still a member of GEPF, and receives a monthly pension. The only difference is that she has now retired having reached the age of 65 years. She maintains that she fulfilled her contractual obligations by paying the applicant R60 000,00 pursuant to the settlement agreement.

[9] In the present case the benefits of the settlement agreement for the applicant is manifest. In a written heads of argument, counsel for the applicant submitted that the applicant agreed that the applicant would benefit from the pension fund corresponding to their matrimonial party regime, viz in community of property. He argued that applicant was induced into believing that the first respondent had sufficient money in the fund to transfer to the applicant within the stipulated time period. Even if the court order was based on the false premise, the applicant would still be entitled to the money according to the Reliance theory explained in the matter of *Smith v Hughes* (1871) LR 6 QB 597 at 607.

[10] On behalf of the respondents it was submitted that the relief sought by the applicant is not competent. According to the applicant the thrust of the applicant application is for rescission based on the alleged fraud of the order made by the Court, and not for setting aside the settlement agreement. Moreover, the applicant also had to establish in terms of the common law that the Court was misled into making a judgment which, but for fraud, it would not have done. (See *Robinson v Kingswell* 1915 AD 277 at 285). In the context of this case I find myself in disagreement with the respondent's counsel as would be shown later in this judgment.

[11] The respondent's counsel further argued that the applicant has not made out a case for the interdictory relief, in that he fell short of complying with requirements of interdict, namely *prima facie* right, a

reasonable apprehension of irreparable harm, the absence of an alternative remedy and a balance of convenience.

[12] The fundamental dispute in my view is not whether the applicant has established a clear right, but more pertinently the issue that is germane is whether the applicant has established legally, and factually the basis upon which an order for rescission can be granted in the context of contractual misrepresentation.

[13] In his replying affidavit the applicant contends that the respondent's contention that she did not give it some thought that she was about to retire should be disregarded. Furthermore the applicant contends that the first respondent acted *mala fide* when finalising this matter in that she could have disclosed that she was due to retire, and the fact that the funds held with GEPI had been paid to her. According to applicant, the second respondent assisted the first respondent to enter into a binding agreement which was made an order of court, and failed to ensure that she did not misrepresent herself.

[14] As far as can be gathered from the allegations made in the applicant's founding papers, he would not have entered into the agreement in its current format if he knew that the applicant had already cashed in her pension funds.

[15] In order to succeed on a claim that a particular judgment or order be set aside on the basis of fraud it is necessary for the applicant to allege and prove: (a) that the successful litigant was a party to the fraud (b) that the evidence was in fact incorrect (c) that it was made fraudulently and with intent to mislead; and (d) that it diverged to such an extent from the true facts that the Court would, if the true facts had been placed before it, have given a judgment other than what it was induced by the incorrect evidence to give. See *Swart v Wessels*, 1924 O.P.D. 187 at pp.189-190. It follows that a bold allegation that a judgment was obtained by fraud is entirely insufficient.

[16] Fraud is not limited to perjured evidence but includes a case where the successful party misled the other party in a step leading up to the judgement. See *Rowe v Rowe* [1997] 3 All SA 503 (A) 507, 1997 (4) SA 160 (SCA).

[17] The late discovery of a document, which disproves the correctness of a judgment, will only be a ground for setting aside a final judgment aside if the successful litigant fraudulently suppressed the document and the other party only became aware of it after judgment. See *Clark v Van Rensburg* 1964 (4) SA 153 (O).

[18] Insofar as misrepresentation is concerned, the Court in *SPF and Another v LBCCT/A LB and Another* (26492/13) [2016] ZAGPPHC (20 April 2016), held in para.1 that: "*The general effect of misrepresentation and fraud on a contract can shortly be stated: A party who has been induced to enter into a contract by misrepresentation of an existing fact is entitled to rescind the contract provided the misrepresentation was material, was intended to induce him to enter into the contract and did so induce him.*"

[19] It is evident on the circumstances of this case that the applicant in concluding the agreement was induced into believing that the pension fund benefits were still held with the GEPPF. This is even more apparent from the wording of the settlement agreement to the effect that he stood to receive 50% benefit fund interest, but for the misrepresentation, payable to him within 60 days after receiving written notification from 'the defendant in which such Defendant specifies whether the Defendant elects to receive a cash benefit or to have the benefit transferred to another pension fund.' His attorneys, acting on that misrepresentation addressed a letter to the pension fund only to be informed that the first respondent has terminated her membership and withdrew the funds.

[20] In *Bowditch v Peelmond Magill* 1921 AD 561 at page 572, also quoted in *SPF* case *supra*, Innes CJ dealt with the election which

concerned misrepresentation in a contract. The Court held in that case that:

“A person who has been induced to a contract by a material and fraudulent misrepresentation of the other party, may either stand by the contract or claim rescission.(Voet, 4.3 see 3,4,7). It follows that he must make his election between those two inconsistent remedies within a reasonable time after knowledge of the deception. And the choice of one necessary involves the abandonment of the other. He cannot both approve and reprobate.” (My emphasis).

[21] The general principle in our law is that the court must take a factual or historical psychological approach to interpretation which seeks to establish the intention of the parties at the time of the agreement. The subjective intentions of the parties must be established with reference to certain objective factors. If there is a mistake it is not an agreement. See *Thutha v Thutha* 2008 (3) SA 494 (TkH); *Mondorp Eindomagegenskap (Edms)Bpk v Kemp en De Beer* 179 (4) SA 74 (A); *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A).

[22] In our modern law, in which all contracts are *bonae fidei*,¹ it is no longer necessary to prove that misrepresentation was fraudulent in order to invalidate the contract, and the innocent party is equally entitled to rescind whether the misrepresentation was fraudulent , negligent, or innocent.²

[23] What emerges from the circumstances of this case, is that the first respondent led the applicant to labour under the impression that the pension fund benefits were still in existence during the conclusion of the agreement. Her argument that she is still receiving monthly pension from the GPEF is, in my view, an attempt to escape the consequences of her misrepresentation the true facts. As all contracts in our law are *bonae*

¹ Tuckers Land and Development Corpn (Pty) Ltd v Hovis [1980] 1 All SA 358, 1980 (1) SA 645 (A) 651G-652G

² Harper v Webster [1956] 1 All SA 213, 1956(2) SA 495 (FC) 501; Christie' Law of Contract in SA, Seventh Edition pp 316

fidei, it is required of contractual parties to act in utmost good faith. Therefore the law imposes a duty of disclosure of a material fact upon the contracting parties.

[24] To my mind the silence of the first respondent in not revealing that she received payment from GEPP demonstrates the lack of good faith on her part. Even the absence of a dishonest motive has the effect of misleading impression.³ Her apparent misrepresentation would have persuaded the applicant to enter into a settlement agreement.

[25] This Court should not concern itself with the issue of intent with which the misrepresentation is made, as this is not a delictual claim based on fraud. I am fortified in this regard by the method of reasoning described by De Villiers CJ in *Woodstock, Claremont, Monkbray and Rondebosch Councils v Smith* (1909) 26 SC 681 701 when he said:

"The person deceived may not be able to state with certainty that he would have refrained from entering into the contract if he had known the truth, but if the circumstances are such that the knowledge of the truth would have been calculated to induce a reasonable man acting with ordinary prudence and discretion not to enter into the contract, the Court or jury, as the case might be, is justified in drawing the inference that the representation did in fact form an inducement to contract."

[26] The first respondent further argued that the applicant was aware or ought to have been aware that she was retiring from her employment and her pension benefits would be paid as a result thereof. In this regard, it is not reasonably expected of the applicant to ascertain whether the first respondent was making a misrepresentation, even if the ascertainment of the truth would be a simple matter. See *Wiley v African Realty Trust* 1908 TH 104 111-12. The mere fact that the contract has been incorporated in an order of court makes no difference, because rescission and

³ *Waller v Pienaar* 2004 (6) SA 303 (c); *Cloete v Smithfield Hotel (Pty) Ltd* 1955 (2) SA 622 (O) 626-7

enforcement are mutually exclusive. See *Faulkner v Freeman* [1985] 4 All SA 224, 1985 (3) SA 555(C).

[27] As regards the applicant's allegations that the second respondent was a party to the alleged misrepresentation, I could not find any evidence which establishes dishonesty on his part. In my judgment there is no basis upon which I can order that his conduct should be investigated by the Legal Practice Council. Similarly there is also no merits that I should refer the matter to the NPA on the facts placed before me.

[28] In view of the conclusion that I reached with regard to the issue of misrepresentation, and having regard to the fact that the parties were married in community of property, it is appropriate that the receiver and liquidator be appointed to deal with the parties' joint estate.

[29] In the result, I grant the following order:

1. The deed of settlement marked "X" is set aside and rescinded;
2. That the Receiver and Liquidator be appointed of the joint estate which exists between the parties.
3. The first respondent is directed to pay the costs of this application on party and party scale.

P H Malungana

Acting Judge of The High Court
Gauteng Division, Pretoria

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