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

**Of interest**
Case no: 2283/2021

In the matter between:

**J A N** **Applicant**

and

**N C N** **Respondent**

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**JUDGMENT**

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**Govindjee J**

**Background**

[1] The parties were married out of community of property with the inclusion of the accrual system during 1996. They were divorced on 18 June 2019, having entered into a settlement agreement which was made an order of court ('the order').

[2] That agreement included a non-variation clause, confirming, inter alia, that the agreement contained all the terms and conditions of the agreement between the

parties, that neither party would have any further claims against the other and that both parties waived and abandoned all and any such claims. The parties further agreed to retain any and all movable property in their respective possession at the time, that the respondent would retain sole ownership of a farm owned by him and that he would be solely responsible for the payment of the outstanding bond on the property.

[3] The notice of motion prays, inter alia, for the following relief:[1]

'That the order of this Honourable Court in paragraph 2 … be rescinded and set aside, alternatively that paragraphs 2, 3 and 4 of the settlement agreement that was made an order in paragraph 2 of the said judgment be expunged from the said agreement …'

[4] The applicant's founding affidavit frames the relief differently:[2] 'This is an application for variation of this order as contemplated in Rule 42(1)(*c)* of the Uniform Rules of Court, alternatively in terms of the common law for the variation, alternatively the setting aside of certain paragraphs of the settlement agreement that was made an order of court.'

**The facts**

[5] It is common cause that the reason for the breakdown of the marriage was that the applicant engaged in an extramarital affair. The parties jointly sought the advice of an attorney ('Marais'), chosen by the respondent. The applicant indicates that she was under the impression, both prior to the consultation and at all relevant times thereafter, that she was not entitled to any part of the respondent's estate, which she estimated to be worth approximately R10 million at the time. This was based on her erroneous belief that the parties had been married out of community of property.

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[1] The notice of motion also seeks the appointment of a receiver in the event of the parties not reaching agreement on the patrimonial aspects of their marriage, and, alternatively, that the settlement be rectified to include payment of R500 000 to the applicant.

[2] Para 5 of the founding affidavit. The notice of motion refers to paragraph 2 of the order, dealing with the settlement agreement, being 'rescinded and set aside, alternatively that paragraphs 2, 3 and 4 of the settlement agreement that was made an order in paragraph 2 of the said judgment be expunged from the said agreement', together with additional relief.

[6] There is a dispute of fact as to what transpired at the single meeting held between the parties and Marais. The applicant says that she had expressed her erroneous belief during that meeting. Marais failed to correct her error and did not explain the accrual system.[3] The respondent, on the other hand, avers that Marais not only explained how the accrual system worked, but he also enquired whether he should calculate the accrual. It was the applicant, he says, who made the conscious decision not to claim anything. The applicant also raises the possibility that the respondent may have misunderstood the marital regime, suggesting fraudulent conduct on his part if he had known the true position and had acted to prevent the applicant from claiming what she was entitled to. The respondent denies this.

[7] The applicant indicates that the settlement agreement was signed as a result of this mistake. As to the farm, she knew that there was no bond but believed that this reference in the settlement agreement may have referred to an overdraft facility, and did not question the matter.

[8] The particulars of claim to the divorce summons reflected that 'neither the estates of the defendant or the plaintiff have exhibited any accrual during the subsistence of the marriage'. The applicant avers that she did not understand this statement when she read it, and that the statement was completely incorrect in respect of the respondent's estate.

[9] The applicant expected to receive R100 000 immediately, and R400 000 once an insurance claim had been paid, from the respondent, in lieu of maintenance. Those amounts were never paid. The respondent says that the former amount had been paid in kind, and there is a dispute about the latter. The applicant first sought independent legal advice during January 2020, initially hoping only to receive payment of R500 000. She contends that she became aware of a potential accrual claim during September 2020, and that it would be just and equitable that the settlement agreement be set aside, or rectified to include the implementation of the

[3] It appears to be common cause that Marais also never suggested to the applicant that she should obtain independent legal advice. It is also suggested, on the papers that he failed to inform the applicant of her right to have access to spousal / rehabilitative maintenance from the time of separation.

accrual system, alternatively to include reference to payment to the applicant of R500 000, but without the divorce order itself being rescinded.[4]

[10] The respondent raised various points in limine in opposing the application, to which I will return. In particular, it was argued that the application had not been brought within a reasonable period of time of the judgment coming to the attention of the applicant. On the merits, the respondent said that 'it was the applicant's desire that she wanted an amicable divorce settlement without any need to litigate … she repeatedly advised me that she wanted "nothing" out of the marriage as she wished to get divorced as soon as possible and wanted to move to Port Elizabeth.' The respondent contended that this was the basis of the instructions issued to Marais. It was the applicant who brought the ante-nuptial contract to that meeting and Marais 'then explained to us how the accrual system worked and that the one party may have to pay the other an accrual after considering all the assets and liabilities of both parties. I then advised him that it was the applicant's wish not to claim anything in terms of the accrual and that I would retain my assets and she would retain hers. This included the fact that I would retain Grove Hill Farm, where we lived at the time, and where I presently live.' The applicant did not wish to be saddled with the respondent's mortgage bond debt in respect of the farm and was in a rush to join her lover in Gqeberha.

[11] Marais' handwritten notes from the meeting were attached to the answering affidavit, together with a confirmatory affidavit. The respondent signed the settlement agreement with some reluctance, and ten days after the applicant's signature. Three months later, the divorce order, incorporating the settlement agreement, was granted.

[12] The respondent contended that the applicant had taken a conscious decision not to claim anything, without any pressure on his part. The crux of his case is that there was no mistake, or error, in the deed of settlement. The applicant was aware of her rights and any suggestion of fraud on his part, or that of Marais, was denied.

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[4] The respondent has remarried since the divorce, and the applicant is living as husband and wife with the person with whom she had entered into the extramarital relationship.

**Does the *Plascon-Evans* rule apply?**

[13] The so-called '*Plascon-Evans*' rule applies to applications in which final relief is sought.[5] Where there is a dispute as to the facts a final order should only be granted in motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify such an order.[6] Counsel for the parties disagree as to the application of the rule. Ms Crouse SC submitted, mainly on the strength of *Gangat*, that the rule was inapplicable in rescission applications.[7] This was because the order to be made would not be 'a final order on the legal aspects', as the patrimonial aspects would still be decided in future.[8] Mr Brown argued, with support from *Jansen van Rensburg*,[9] that a different approach had to be adopted in cases where the envisaged rescission would not have the result of allowing the parties to present their case before another court or to establish their case at trial. In that instance the relief in the rescission application would amount to 'final relief', so that the *Plascon-Evans* rule should apply.

[14] This is the distinction to be drawn when considering rescission of default judgment cases such as *Gangat* (based on Uniform Rule 31(2)*(b)*) and the present matter. Rescinding the judgment in *Gangat* was not 'final' because the result would be the (original) issues and the defence of the applicant for rescission being considered and decided by another court during a trial.[10] This is confirmed by *Storti*:[11]

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[5] *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (AD) ('*Plascon-Evans*') at 634E-G.
[6] *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G. In *Plascon-Evans*, the court added that in certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact: *Plascon-Evans* supra fn 5 at 634I-635A.
[7] *Gangat v Akoon* [2021] ZAGPJHC 828 ('*Gangat*').
[8] Paras 12 and 16 of the applicant's supplementary heads of argument.
[9] *Jansen van Rensburg v Beynon* [2003] JOL 10630 (SE) para 10.
[10] This is the reason that one of the requirements for rescission is demonstration of a bona fide defence with prima facie prospects of success. This is a matter to established at the subsequent trial, so that the rescission application itself is not a 'final judgment'.
[11] *Storti v Nugent and Others* 2001 (3) SA 783 (W) at 806G-J. It might be added that the suggestion that the present circumstance is not equivalent to 'the exception' referred to in this passage loses sight of the illustrative nature of the example cited. That example is considered in further detail, below. On whether or not there is any difference between default orders and other orders, see *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others* [2017] ZASCA 54; 2017 (5) SA 508 (SCA) ('*Moraitis*') at 517.

'If the application involves a rescission of an order which should not have been granted, an application for a rescission under the common law need only make out a prima facie case … The effect of the order is interim only, and not final, and therefore factual disputes are ordinarily not a bar to success. If on the other hand the order was correctly made, but is to be set aside (permanently) because of, for instance, a composition with creditors, the order of setting aside is expected to have final effect and factual disputes would then become an obstacle to the applicant.'

[15] Is the relief in the present application final in nature? The applicant concludes as follows in her founding affidavit:

'The result of this common mistaken belief between the respondent and I, alternatively as a result my unilateral mistake (which must be regarded as reasonable in the circumstances where I expressed the view and the attorney and respondent had not corrected this view) is that after a marriage of 23 years I am without any assets, a fair settlement and without any maintenance whatsoever … It would be just and equitable that the settlement agreement be set aside or rectified.'

[16] Read with the notice of motion, the position is that the applicant seeks a partial rescission and setting aside of the order, alternatively a variation of the settlement agreement that forms part of the order, based mainly on common or unilateral mistake, or in the interests of justice. The essence of these proceedings is the determination of whether the applicant's mistake warrants this relief, or whether the relief should be granted for another reason. The answer to these questions will be a final determination of whether *the order* should remain unchanged, be partially rescinded and set aside, or varied. Finding in favour of the applicant would be a final answer to the question whether the order and underlying agreement stand as the basis for the division of the parties' estates at the time of the divorce.[12] The matter would then veer towards a different direction, to consider the patrimonial

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[12] See *Storti v Nugent and Others* supra fn 11 at 805H-806J. In the context of s 149(2) of the Insolvency Act, 1936 (Act 24 of 1936), the court drew a distinction between rescissions in cases where the order should not have been granted, and where it was properly made but supervening factors made its rescission or variation necessary or desirable. It is in the case of the former that a prima facie case for rescission would suffice and the effect of the order would be interim and not final. As a result, 'factual disputes are ordinarily not a bar to success'. But if supervening factors, such as an alleged composition with creditors, had come to light, the position was different. The order had in fact been correctly made but was to be set aside because of supervening factors, 'the order of setting aside is expected to have final effect and factual disputes would then become an obstacle to the applicant'. See *Storti v Nugent and Others* supra fn 11 at 806H-J.

consequences of the dissolution of the marriage afresh and without reference to the terms of the settlement agreement that was incorporated into the order. The divorce proceedings having been unopposed and based on the terms of the settlement agreement, this would effectively be a new dispute. The applicant suggests that the parties be given a month to reach agreement on the patrimonial aspects of their marriage, as at the date of divorce, failing which the court will be approached for the appointment of a Receiver to assist with implementation of the accrual system, or the applicant will issue summons for its implementation.

[17] In other words, this court is being asked to finally set aside an order incorporating a settlement agreement as an order of court. The effect of that order will be to undo the pecuniary consequences of the settlement agreement. The question whether the settlement agreement was concluded with proper understanding, or based on mistake, or some other reason justifying it being set aside, will not be reconsidered and is to be finally determined. If the order is partially rescinded, or varied as requested, the issue that may return to court will have nothing to do with the manner in which settlement was reached. It will be concerned with the proper application of the accrual system as if settlement on the financial aspects of the divorce had never been reached.[13] As a result, the relief sought in the present rescission application must be considered to be final relief, relating squarely to the settlement agreement and court order. These being motion proceedings, the *Plascon-Evans* rule stands to be applied.

[18] This approach is fully supported by the judgment of the SCA in *Slabbert*.[14] In that matter, a compromise agreement had been made an order of court. An application to rescind that court order was brought, relying on an allegation of new evidence. The court a quo accepted that there was new evidence that had only come to light after the compromise agreement had been concluded. The SCA, after summarising the limited grounds for rescinding such agreements, held that the court

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[13] See *S A v J A and Others* [2020] ZAWCHC 155 para 16: the settlement agreement and the resultant consent order disposes of the underlying dispute. Any rescission, variation or a suspension of the (maintenance) order granted earlier becomes a new dispute between the parties where the original order granted may form the basis of any new contemplated action.

[14] *Slabbert v MEC for Health and Social Development, Gauteng* [2016] ZASCA 157 (‘*Slabbert*’).

a quo had erred. It should have applied the *Plascon-Evans* rule and accepted the version of the respondent in so far as there was any dispute of fact.[15] As would be the case if rescission were to be ordered in the present matter, the SCA concluded that the rescission of the compromise agreement was final 'in substance and effect'.[16]

**Application of the *Plascon-Evans* rule**

[19] Applying the *Plascon-Evans* rule, the affidavits reveal the following factual matrix. The marriage broke down as a result of an adulterous relationship on the part of the applicant. The parties agreed to consult Marais. The applicant wanted 'nothing' out of the marriage and wanted a speedy divorce. This was the basis of the instructions given to Marais. He nevertheless explained how the accrual system worked, and that one party may have to pay the other after consideration of all the assets and liabilities of both parties. The applicant understood this explanation and the respondent's advice to Marais that they would each retain their assets and that the applicant did not wish to claim anything in terms of the accrual, or any maintenance. She wanted nothing to do with the respondent's estate at the time, and was concerned about the possibility of being saddled with his debts. The applicant was in a rush to relocate to Gqeberha to join her new partner.

[20] This version of events is supported by the messages between the parties between 4 and 14 March 2019. On 5 March 2019 the applicant, angered by alleged correspondence between the respondent and her new partner's ex-wife, messaged: 'It is over. Sign the papers.' On 14 March 2019, in response to the respondent refusing permission for her to stay on the farm, she messaged: 'Are you serious. Your decision. I want you to sign the papers if you are not going to I am going to change to the plaintiff and ask for what I should get.' Copies of the applicant's direct correspondence to Marais also reflect her eagerness for the matter to be finalised. She sought an update on the divorce proceedings on 24 April 2019 and followed up again on 29 April 2019, indicating that a month had passed and that she would seek

[15] *Slabbert* ibid para 10.
[16] *Slabbert* ibid para 19.

(independent) legal advice and continue the proceedings if a response was not forthcoming by the end of that week.

[21] It is supported by Marais' confirmatory affidavit. The accrual system was fully discussed and 'the applicant took a conscious decision not to claim anything from the respondents' estate'.[17] In these circumstances, the respondent's denials of the key facts averred by the applicant raise real, genuine and bona fide disputes. These are not far-fetched or clearly untenable denials and averments that must be rejected merely on the papers.[18] It might be added that there was no application for referral of the matter to oral evidence, and that it was argued on behalf of the applicant, in supplementary heads filed, that there is no dispute of fact which needs to be referred to oral evidence.[19] Needless to say, the respondent is in agreement with this view. In all the circumstances, there is no need or basis for such a referral in my view.

**The legal position**

[22] The inherent jurisdiction of the High Court does not include the right to tamper with the principle of finality of judgments, other than in specific circumstances provided for in the rules or the common law. This is because of the importance of litigation being brought to finality, and because a court becomes functus officio once it has pronounced a final judgment.[20]

[23] There are two basic requirements to be met when a court considers a request to grant a judgment in accordance with the terms of a settlement agreement.[21] The first, relevant for present purposes, is that the court must be satisfied that the parties

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[17] Marais also confirms that he understood the reference to R100 000 to relate to expenses the applicant would pay over a period of time, with R400 000 to be payable upon the sale of the farm, if the respondent should decide to sell same.
[18] *Plascon-Evans* supra fn 5 at 634H-635C.
[19] On the duty of the applicant to seek a referral to oral evidence if of the reasonable opinion that a dispute of fact merited this, see *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20 para 94. On the applicant's risk in proceeding by way of motion proceedings, see *Gounder v Topspec Investments (Pty) Ltd* [2008] ZASCA 52 at para 10. Cf *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (ECD) ('*Bakoven*') at 475A-E.
[20] *Freedom Stationery (Pty) Ltd and Others v Hassam and Others* 2019 (4) SA 459 (SCA) para 16. Also see s 165(5) of the Constitution of the Republic of South Africa, 1996.
[21] See s 7(1) of the Divorce Act, 1979 (Act 70 of 1979), confirming that a court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.

to the agreement have freely and voluntarily concluded the agreement and that they are ad idem as to its terms.[22] Once a court has made a consent judgment, it is functus officio and the matter becomes res judicata.[23] The effect of this, in the context of divorce proceedings, has been described as follows by Van Zyl DJP:[24]

'This means *inter alia* that as a general rule the court has no authority to correct, alter or supplement its own order that has been accurately drawn up. Subject to what is said hereinunder, in divorce matters this is in practice effectively only limited to those terms of the order which deal with the proprietary rights of the parties and the payment of maintenance to one of the spouses where there is a non-variation clause. The reason for this is that the general rule is subject to a number of exceptions, in terms of the Divorce Act, the rules of court and at common law … Save for the aforegoing, the effect of the consent order is otherwise that it renders the issues between the parties in relation to their proprietary rights and the payment of maintenance to a former spouse, where the agreement includes a non-variation clause, *res judicata*, and thus effectively achieves a "clean break" as envisaged by the scheme of the Divorce Act.'

[24] Put differently, the effect of a 'settlement order' or 'consent order' is to change the status of the rights and obligations between the parties:[25]

'Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties; the *lis* becomes *res judicata* (literally, "a matter judged"). [The principle is that generally parties may not again litigate on the same matter once it has been determined on the merits.] It changes the terms of a settlement agreement to an enforceable court order.'

[25] Litigation after a consent order typically, therefore, relates to non-compliance with the consent order itself, and not the underlying dispute.[26] In *Moraitis*,[27] the SCA

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[22] *Ex Parte Le Grange and Another In re: Le Grange v Le Grange* [2013] ECGHC 75 ('*Le Grange*'), also reported as *PL v YL* 2013 (6) SA 28 (ECG) para 15.
[23] See the judgment of Eksteen J in *Van der Linde NO obo Robiyana v Road Accident Fund* (unreported) (Eastern Cape Local Division, Gqeberha) (case no. 1453/2021) para 11. Litigation after the consent order will typically relate to non-compliance with the consent order and not the underlying dispute: *Slabbert* supra fn 14 para 7.
[24] *Le Grange* supra fn 22 paras 45, 46.
[25] *Eke v Parsons* [2015] ZACC 30 para 31 (footnote included). For a detailed analysis of settlement agreements in the context of divorce proceedings where the parties have agreed that the terms of their agreement be made an order of court, see the judgment of Van Zyl DJP in *Le Grange* supra fn 22. Also see *Slabbert* supra fn 14 para 7 on the purpose of a compromise and the effect when a compromise is embodied in an order of court.
[26] *Slabbert* supra fn 14 para 7.
[27] *Moraitis* supra fn 11 para 10.

held that in determining whether a consent order may be rescinded, the correct starting point is the order itself rather than the underlying settlement agreement.[28] There is, in general, no difference in law between an order granted in the case of a default judgment, an order pursuant to a settlement prior to the conclusion of opposed proceedings (or in unopposed proceedings where there is no default), or the order in a judgment pronounced at the end of a trial or opposed application.[29] A judgment, once given, is not lightly set aside.

[26] Considering that the judgment was not taken by default, the test to be applied is stringent, as elucidated in *Moraitis*:[30]

'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 litigant 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 been given on the basis of perjured evidence is not a sufficient basis for setting aside the judgment. 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 *Schierhout*. …

Apart from fraud the only other basis recognised 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

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[28] The judgment operates as res judicata and precludes a claim based on the underlying agreement. Unless and until the judgment is set aside the compromise agreement remains intact: *Moraitis* supra fn 11 para 16. Cf *Slabbert* supra fn 14 para 17, seemingly linking the setting aside of a consent order with the underlying agreement: 'A court also does not have a discretion to set aside a consent order where there are no grounds for setting aside the underlying agreement of compromise pursuant to which the consent order was made.'

[29] See *Moraitis* supra fn 11 para 16. Once a settlement agreement is made an order of court, it is an order like any other and will be interpreted like all court orders: *Eke v Parsons* supra fn 25 paras 29, 30.

[30] *Moraitis* supra fn 11 para 12. The reference to '*Schierhout*' relates to *Schierhout v Union Government* 1927 AD 94 ('*Schierhout*'). The reference to '*Childerley*' is to *Childerley Estate Stores v Standard Bank* of SA Ltd 1924 OPD 163 ('*Childerley*') Also see *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (AD) ('*De Wet*') at 1041B-E, which dealt with a wider discretion for rescission in cases of procedural defaults and default judgments. See the remarks of Erasmus J in *Bakoven* supra fn 19 at 473C-E. *De Wet* referred specifically to the distinction between judgments granted 'without going into the merits of the dispute between the parties, and the rescission of final and definitive judgments, whether by default or not, after evidence had been adduced on the merits of the dispute. In the present case, the consent order would have been granted after the respondent testified and the documentary evidence of the settlement agreement considered by the court. It cannot be akin to a situation of 'default'. In the context of rescission of a consent order taken by default, see *Oppressed ACSA Minority 1 (Pty) Ltd and Another v Government of the Republic of South Africa and Others* [2022] ZASCA 50 ('*Oppressed ACSA Minority*') para 24: 'At common law a final judgment may be set aside for fraud, justus error (in exceptional circumstances) and justa causa.'

Villiers JP said that "non-fraudulent misrepresentation is not a ground for setting aside a judgment" and that its only 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. 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".'

**Analysis**

[27] This case is concerned with a consent order, deriving its existence from a settlement agreement. That agreement makes it clear that the parties 'have established consensus in settlement … The Plaintiff undertakes to seek an Order compatible with the provisions of this agreement (and further agrees that the said Court shall be asked to incorporate this agreement in the Order of Divorce, so that this agreement will operate as an Order of Court).' The agreement reached was intended to be final and not subject to any variation, both parties waiving and abandoning any claims against the other.

[28] There is authority for treating property orders in divorce proceedings as severable from the decree of divorce decrees itself, for the purposes of enabling a 'part rescission'.[31] This is important in cases where an irretrievable breakdown of the marital relationship is admitted, where neither party wishes the marriage to resume and where it would be highly undesirable for this to occur.[32] In this case one of the parties has already remarried and it must, therefore, be accepted that it is permissible for the court to leave the decree of divorce intact while rescinding, or varying, the order (in terms of the settlement agreement) relating to the division of property.

[29] Are there grounds advanced by the applicant to justify this?[33] Applicants must typically stand or fall by the alleged basis for their applications.[34] The main basis

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[31] See *S.S v H.P* [2019] ZAGPJHC 486 paras 67-71 and the authorities cited there. Cf *Faulkner v Freeman* 1985 (3) SA 555 (C) at 559A-D.
[32] Ibid.
[33] It has been held that to be of little practical significance whether a judgment is based on a compromise or an agreement to consent to judgment: *MEC for Economic Affairs, Environment and Tourism v Kruisenga* ('*Kruisenga*') 2008 (6) SA 264 (CkHC) para 53.
[34] See *Zwane v Zwane* [2013] ZAGPPHC 339 para 9.

relied upon is rescission or variation in terms of rule 42(1)*(c)*.[35] To succeed on this basis, it must be established that the order or judgment was granted as a result of a mistake common to the parties.[36] Both parties must be mistaken as to the correctness of certain facts, sharing the same mistake. A litigant who is herself mistaken about the relief to which she may be entitled, so that this is abandoned, or who is mistaken due to the advice of a legal representative, cannot succeed on the basis of 'common mistake' in terms of this rule.[37] It is readily apparent from the papers that no mistake common to both parties resulted in the order that was obtained.[38] The respondent knew he was married out of community of property with the incorporation of the accrual system. The applicant 'knew that the respondent's assets far outweighed [a] small overdraft'.[39] She was not mistaken or misled as to the growth in the respondent's estate. In any event, that is not her case. Uniform Rule 42 being inapplicable, the question remains whether there is common law basis for the relief.

[30] As indicated in *Moraitis*, a judgment may be set aside, at common law, on the grounds of fraud and justus error. There is good reason for this. A judgment procured by the fraud of one of the parties,[40] whether by forgery, perjury or in any other way such as fraudulently withholding material documents, cannot be allowed to stand.[41]

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[35] Para 5 of the founding affidavit, p 6 of the index.

[36] The court does not have a discretion to set aside an order in terms of the subrule where one of the jurisdictional facts contained in paragraphs (a) to (c) of the subrule does not exist. Court have typically not given a more extended application to the rule to include all kinds of mistakes or irregularities: *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 7E.

[37] See DE van Loggerenberg *Erasmus: Superior Court Practice* (RS 17) (2021) D1-576A and the authorities cited at fn 167. The general rule is that if the court has given judgment on mistaken facts, the judgment can be set aside only if the error was due to fraudulent misrepresentation. If the court is in error because of innocent misrepresentation, the vanquished party is not entitled to have the judgment rescinded even if the error was justus, except in rare and exceptional cases: *Childerley* supra fn 30 at 163. On unilateral mistake resulting in a contract made an order of court, and confirming that this is not a basis for rescission in terms of Uniform Rule 42(1)*(c)*, see *Botha v Road Accident Fund* [2016] ZASCA 97 para 9.

[38] See para 51.8 of the answering affidavit. Also see *Tshivhase Royal Council and Another v Tshivhase and Another; Tshivhase and Another v Tshivhase and Another* 1992 (4) SA 852 ('*Tshivhase*') at 863A-B.

[39] Para 13.7 of the replying affidavit.

[40] The successful party must have been privy to the fraud: *Fraai Uitzicht 1798 Farm (Pty) Ltd v McCullough and Others* [2020] ZASCA 60 para 17.

[41] *Schierhout* supra fn 30 at 98. Also see *Fraai Uitzicht* ibid 16, confirming that *Childerley* supra fn 30 remains good authority regarding the circumstances under which a court can grant restitutio in integrum against a judgment. In order to succeed on this ground in the context of a trial, the plaintiff must prove: (1) the defendant gave incorrect evidence at the initial trial; (2) that the defendant did so fraudulently with the intention to mislead the court; and (3) that such false evidence diverged from the true facts to

*Childerley*, despite being a 1924 decision, remains good authority regarding the circumstances under which a court can grant *restitutio in integrum* against a judgment.[42] To succeed on the ground of fraud, it is for the applicant to prove that the respondent gave incorrect evidence during the initial proceedings, that he did so fraudulently with the intention to mislead the court and that this false evidence diverged from the truth to such an extent that the court would have given a different judgment had it been aware of the true position.[43]

[31] It has been suggested that it is, as a general rule, practically impossible to establish fraud using motion proceedings.[44] Leaving that aside, the accepted requirements for rescission based on fraud have not been established. It has not been alleged or proved that the respondent was privy to a fraud based on incorrect evidence presented to the court. The statement that 'neither the estates of the defendant or the plaintiff have exhibited any accrual during the subsistence of the marriage' was contained only in the particulars of claim. It has not been alleged, or proved, that this statement was placed before the court fraudulently. Applying *Plascon-Evans*, both parties knew that the respondent's estate had shown a healthy accrual. The respondent as plaintiff, presumably acting on the advice of Marais, misrepresented the true position in the particulars of claim, and the applicant, also presumably relying on Marais to finalise the matter as agreed, took no issue with this. The applicant's case is not based on this misrepresentation, to which she was a silent party. In fact this was a consequence of the agreement reached between the parties to move towards a swift divorce and the applicant's decision not to claim anything from the respondent. It has also not been shown that the court would have granted a different order in the face of the clear terms of the settlement agreement, had it known that there was an accrual on the part of the respondent's estate.[45]

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such an extent that the court, had it been aware thereof, would have given a different judgment: *Childerley* supra fn 30 at 169 as cited in *Fraai Uitzicht* supra fn 40 para 16. It has also been suggested that it must be alleged and proved that, but for the fraud, the court would not have granted the judgment: *Robinson v Kingswell* 1915 AD 277 at 285.

[42] See *Fraai Uitzicht* supra fn 40 para 16.

[43] *Childerley* supra fn 30 at 169.

[44] See *Shomang v Moamogoe and Others* [2021] ZAGPJHC 772 para 10. Cf *Santos Ereq v Cheque Discounting Co (Pty) Ltd* 1986 (4) SA 752 (W).

[45] It might be added that there is similarly no basis for setting aside the settlement agreement itself based on fraud on the part of the respondent. On the accepted facts, the applicant knew that she was married in terms of the accrual system. This had been explained to her by Marais. She further knew that the respondent owned immovable property worth millions of rand: See para 18 of the founding

[32] Courts have set an exceedingly high threshold before countenancing an allegation of fraud. In *Schierhout*, the court said:[46]

'[B]aseless charges of fraud are not encouraged by courts of law. Involving as they do the honour and liberty of the person charged they are in their nature of the greatest gravity and should not be lightly made, and when made should not only be made expressly but should be formulated with a precision and fulness which is demanded in a criminal case. In the application now before the Court, it is a matter of the utmost difficulty to ascertain the exact charges of fraud against the Minister.'

[33] The hint of fraud in this instance has been formulated in precisely the manner deprecated by the court in *Schierhout*, with lack of precision and fulness. The applicant framed it as follows her founding affidavit: 'It is my hope that the respondent also held this wrong belief, as it would otherwise mean that he was defrauding me from what I was legally entitled to.' Fraud on the part of the respondent cannot be inferred on the strength of this statement. The allegation has not been expressly made and it lacks a factual foundation.[47]

[34] As to the possibility of rescission based on justus error, the first point to be made is that such a claim does not feature on the papers.[48] Secondly, it is clear in law that an application to set aside a judgment on the ground of justus error on the part of the court induced by non-fraudulent misrepresentations made by the other party, cannot succeed.[49] To the extent that this is implicit in the papers, perhaps based on the statement in the particulars of claim about the lack of accrual, the application must fail on the strength of *Childerley*. Thirdly, there is a soft suggestion on the papers of an alternative claim based on an alleged reasonable unilateral mistake on the part of the applicant in entering into the settlement agreement, but that is a different matter, and not one that entitles the applicant to rescission or

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affidavit. The applicant's case is that the concept of accrual was not explained to her and not understood, not that she was unaware that the respondent's assets exceeded his liabilities so that his estate reflected 'an accrual' at the time of the divorce.

[46] *Schierhout* supra fn 30 at 98.

[47] See *Gwayi v MEC for Local Government and Traditional Affairs and Others* [2015] ZAECBHC 37 para 31, citing *Gates v Gates* 1939 AD 150 at 155 and *Kelleher v Minister of Defence* 1983 (1) SA 71 (E) at 75D-E. Also see *Hulse-Reutter and Others v Godde* [2001] ZASCA 102 para 14.

[48] There is reference to this, citing *De Wet* supra fn 30, in applicant's counsel's heads of argument.

[49] *Childerley* supra fn 30 at 169, read with 165.

variation of the consent order.[50] Fourthly, cases in which a judgment will be set aside because of justus error are 'relatively rare and exceptional' and the applicant has, in all the circumstances, not demonstrated an exceptional basis for setting aside or varying the order on this basis.[51] A unilateral mistake, even if material, does not, on its own, amount to a justus error sufficient to grant the relief sought. The SCA has, in the context of considering the setting aside of a compromise agreement based on a unilateral mistake, held as follows:[52]

'The compromise agreement thus cannot be set aside on the basis of a mutual error as there was no mutual error. The MEC cannot rely on her own mistake to avoid a contract which was in any event initiated by her. This unilateral mistake accordingly did not amount to a justus error. As stated by Christie: "However material the mistake, the mistaken party will not be able to escape from the contract if [their] mistake was due to [their] own fault. This principle will apply whether [the] fault lies in not carrying out the reasonably necessary investigations before committing [themselves] to the contract that is, failing to do [their] homework"; [in not bothering to read the contract before signing; in carelessly misreading one of the terms … in misinterpreting a clear and unambiguous term, and in fact in any circumstances in which the mistake is due to [their] own carelessness or inattention …]' (Footnotes omitted)

[35] The applicant's negligence, flowing from her haste to finalise the divorce, cannot be overlooked and she would be unable to claim rescission based on negligence, if any, on the part of Marais, purporting to represent both her interests and that of the respondent. This was confirmed in *Bakoven*[53] where Erasmus J, considering rescission in the context of a default judgment, held:

'The negligence of the applicant is relevant … the applicant who was negligent and the author of [their] own problem will not succeed with an application to have the judgment set aside. I respectfully agree, but do not see this to mean that the applicant can hide behind the fault of another. In *De Wet* (3) the applicants were refused relief where the default was

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[50] As was the case in *Childerley* supra fn 30, the applicant does not seek to make out a case of instrumentum noviter repertum, or suggest that a document had been discovered or had been fraudulently concealed from her, as the basis for the application: *Childerley* supra fn 30 at 169.
[51] *Childerley* supra fn 30 at 166. In cases of default, applicants may, for example, be able to show a 'supremely just cause of ignorance, free from all blame whatsoever'.
[52] *Slabbert* supra fn 14 para 15; *Botha v Road Accident Fund* supra fn 37, containing the complete quotation from GB Bradfield *Christie's The Law of Contract in South Africa* (2011) 6ed at 329-330.
[53] *Bakoven* supra fn 19 at 474A-C.

brought about by the inexcusable negligence and ineptitude of their attorney, but the applicants too could not be absolved from blame.'

[36] Unfortunate as this may appear, a litigant who, by mistake of herself or her legal adviser, abandons relief to which she is, or may be, entitled, cannot easily succeed in claiming that relief. This strict approach is confirmed by *Joseph v Joseph*, the court confirming that it had no jurisdiction or power to recall or amend an order it had deliberately made consequent to a mistake, in the absence of fraud of the other party in the course of the proceedings.[54]

[37] Counsel for the applicant also referred to *Oppressed ACSA Minority*,[55] which deals briefly with the common law basis for setting aside a final judgment. For the sake of completeness, it must be noted that the reference in that case to 'justa causa', as distinct from 'justus error', is directly linked to Uniform Rule 31(2)*(b)*, dealing with default judgments, and is accordingly inapplicable.[56] In addition, that decision follows *Moraitis*, which forms the basis for the approach adopted.[57] Its focus is on a principle pertaining to lack of authority, again distinguishing it from the present matter.

[38] The issue that remains is whether it is nevertheless in the 'interests of justice' to grant the relief sought. The applicant argued that the settlement agreement made an order of court is 'morally reprehensible' so that the court must come to its assistance. It was, so the argument goes, unconscionable for the respondent and Marais not to have informed the applicant of her right to claim in terms of the accrual calculation. *De Wet*, referred to by Erasmus J in *Bakoven*, is authority for the proposition that there may be other circumstances, based on justice and fairness, that may justify rescission.[58] As I have said, that authority emerged in cases of a default judgement. I am alive to the SCA decision in *ST*[59] dealing with the

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[54] *Joseph v Joseph* 1951 (3) SA 776 (N) at 780.
[55] *Oppressed ACSA Minority* supra fn 30 para 24.
[56] Ibid.
[57] Ibid paras 24, 27. It must be noted that the decision in *Moraitis* appears not to have considered the earlier decision of a differently constituted SCA in *Slabbert*, which appears to have adopted a slightly different approach to the enquiry, focusing firstly on the *transactio*, rather than the order: *Slabbert* supra fn 14 paras 8, 16 and 17.
[58] *De Wet* supra fn 30 at 1042H.
[59] *ST v CT* [2018] ZASCA 73 paras 170-182.

unenforceability of a waiver of maintenance, the majority holding that the waiver clause in question offended legal policy in the form of s 7 of the Divorce Act, 1979.[60]

[39] But that is a different matter altogether, pertaining to a prenuptial waiver of the right to maintenance upon dissolution of marriage.[61] More pertinently, the SCA has expressed itself clearly on the limits of rescission based on the 'interests of justice' in the context of consent orders:[62]

'Although a High Court has inherent discretion, it can never exercise it against recognised principles of substantive law. Our constitutional dispensation does not afford courts a carte blanche to ignore substantive law and grant orders couched as being in the "interests of justice". Moreover, certainty and finality are key elements of justice. Parties to a compromise agreement accept an element of risk that their bargain might not be as advantageous to them as litigation might have been. This element of risk is inherent in the very concept of compromise. It, however, does not afford parties the right to go back on the bargain for unilateral mistakes. Settlement agreements have as their underlying foundation the benefit of orderly and effective administration of justice. Courts cannot allow for consent orders to be set aside for reasons not sanctioned by applicable legal principles.'

[40] Similar sentiments have been expressed in this division:[63]

'I do not believe that this is what the court intended to convey [that a consent judgment may be set aside simply on a consideration of whether it is in the interests of justice to do so]. This proposition is too widely stated and there is no authority for it. Although the remedy of *restitutio* is founded on considerations of equity, in that it comes to the assistance of a party to a contract or other juristic act where the law does not provide for any appropriate remedy, it has retained its character as an extraordinary remedy that is only available on limited grounds. A ground that is recognised in law to be relevant (*iusta causa*) is an essential element that must exist before *restitutio* is granted. Huber says, for example, that the fifth ground, the so-called "general clause", does not give the court an unlimited power to grant restitution for all kinds of reasons "so that under the cloak of this general equity restitution could be granted for a reason which the laws exclude and hold insufficient". For this reason

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[60] Act 70 of 1979.
[61] The court, in any event, relying on *Schutte v Schutte* 1986 (1) SA 872 (A), drew a distinction between waiver upon divorce and a prenuptial waiver, noting that at the time of the divorce both spouses have full knowledge of their respective financial means and needs: *ST v CT* supra fn 59 para 174. Also see *Claassens v Claassens* 1981 (1) SA 360 (N), holding that the waiver of a right to apply for an increase in maintenance, contained in a divorce settlement, does not offend public policy.
[62] *Slabbert* supra fn 14 para 16.
[63] *Kruisenga* supra fn 33 para 74 (references omitted).

a display of “idle threats” that may have induced a compromise cannot establish a just cause for *restitutio* because it is “rejected by the laws”.’

[41] Accordingly, I am of the view that there is no basis for granting the relief claimed ‘in the interests of justice’ in this instance. Even assuming that a consent order may be rescinded on this basis, the facts of this matter do not warrant this outcome. The alleged unconscionable conduct on the part of the respondent and Marais fails on the application of *Plascon-Evans*. The meaning of the accrual system was explained to the applicant and she knew that there were assets in the respondent’s name. She understood that she could obtain independent legal advice and, when matters were stalling, indicated that she might do so. She nevertheless decided to proceed on the basis of an unopposed divorce, sharing the same legal representative as her husband, and based on a settlement agreement that she signed freely and voluntarily. There is nothing inherently repugnant about the arrangement concluded and, on my reading, it is not contrary to public policy. On the approach I take to the matter, the various authorities cited in support of setting aside the settlement agreement based on unfairness or a contravention of public policy take the matter no further. This is because, as confirmed by *Moraitis*, unless and until the judgment has been set aside, there can be no question of attacking the compromise agreement. As there are no grounds upon which to seek rescission (or variation) of the court order on these facts, there can be no issue regarding the rescission of the settlement agreement.[64]

**Remaining issues**

[42] The respondent admitted offering to pay the applicant R100 000 by paying her expenses and debts. Applying *Plascon-Evans*, the offer to pay the applicant R400 000 was tied to a possible future sale of his farm, and not to receipt of an

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[64] *Moraitis* supra fn 11 para 16. It might be added, obiter, that consideration of the underlying agreement, the reasonableness of the applicant’s explanation of the circumstances that resulted in the consent judgment, the bona fides of the application for rescission and the ‘defence’ on the merits and prospects of success would result in the same outcome. The applicant has failed to convince that any error vitiated true consent to the settlement agreement. See *Ntlabezo v MEC for Education, Culture and Sport, Eastern Cape* 2001 (2) SA 1073 (Tk) at 1081B-E.

insurance payment for damages caused to a guesthouse on the farm. Accordingly, there is no basis for granting the applicant the alternative relief claimed.

[43] As regards the delay in bringing the application for rescission, it is difficult to contemplate a scenario where the setting aside of a judgment on the grounds of fraud by the successful litigant would be refused on the basis that the application was not brought timeously. However, following *Fraai Uitzicht*, in light of the conclusion that the judgment cannot be set aside either on the grounds of fraud or justus error, no finding in this regard is necessary.[65]

[44] The respondent persisted, during argument, only with selected aspects of an application to strike certain portions of the replying affidavit, alleging vexatious and irrelevant statements pertaining to the respondent and Marais. Even interpreting the word 'case' as used in Uniform Rule 6(15) widely, the averments relating to Marais cannot prejudice the respondent in his case. In my view, the factual disputes having been resolved in favour of the respondent applying *Plascon-Evans*, there is also no prejudice in much of what remains if the application is not granted. Other than the reference to 'blatant' lies and untruths, in paras 20.2 and 26.2 of the replying affidavit, the application to strike must be refused.

[45] The consequence of this judgment is that the applicant fails to set aside, rescind or vary the order. Even though she may have been entitled to obtain a far better financial outcome had she enforced her claim for accrual prior to the divorce, the settlement agreement reached and made an order of court cannot be unravelled as claimed, for the reasons given. Unfortunate as this is for the applicant, the judgment should also serve as a salutary reminder to legal practitioners of the possible dire consequences for their clients in cases where they choose or attempt to represent both parties in proceedings where money or rights are involved. While these joint consultations may commence in a spirit of goodwill, or in an attempt to expedite matters and save costs, once the shoe pinches, it is inevitable that the legal practitioner, and by extension the profession, lands in the crosshairs.

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[65] *Fraai Uitzicht* supra fn 40 para 23.

[46] Finally, as to costs, there is no reason to depart from the usual principle that costs should follow the result. The applicant has been unsuccessful and the application stands to be dismissed with costs, the costs to exclude costs associated with the application to strike.

**Order**

[47] The following order will issue:

1. The application is dismissed with costs, excluding the costs of the application to strike.

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**A. GOVINDJEE**

**JUDGE OF THE HIGH COURT**

Heard: 24 March 2022

Delivered: 17 May 2022

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