

SOUTH AFRICA / JUDGMENT

T.R v Z.D.R and Others (93454/2015)

[2024] ZAGPPHC 1343 (20 December 2024)

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COURT

North Gauteng High Court, Pretoria

BEFORE

A.K. Ramlal

CASE / FILE NUMBER

93454/2015

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

CASE NUMBER: 93454/2015

In the matter between

T[...] R[...] (NEE M[...]) APPLICANT and Z[...] D[...] R[...] 1st RESPONDENT SAAYMAN WD PROKUREURS 2nd RESPONDENT Z[...] D[...] R[...] N.O 3rd RESPONDENT THEMANE JEREMIAH TIBANE N.O 4th RESPONDENT D[...] N[...] R[...] N.O [In their capacities as trustees for the time being of the Ranta Family Trust (Registration Number:IT002753/2016(T))] 5th RESPONDENT

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

RAMLAL AJ:

- [1] This application for leave to appeal against the order granted by this court on 23 September 2024 was uploaded by the Applicant on 25 September 2024.

- [2] Since the Applicant did nothing further to proceed with the application for leave to appeal, the attorneys of record for the First, Third, Fourth and Fifth Respondents, took the necessary initiative to have this application enrolled for hearing.
- [3] A brief background to the application for rescission of the divorce order and the relief that the Applicant sought, is contained in paragraphs 1 to 9 of the judgment:
- [1] The events that gave rise to this application are that the Applicant and the First Respondent were married to each other out of community of property, with the exclusion of the accrual system, on 19 June 2012.
- [2] The First Respondent instituted an action for divorce against the Applicant. On 9 March 2016, the marriage was dissolved by an order of the High Court. The Settlement Agreement that was entered into between the Applicant and the First Respondent, dated 1 February 2015, was made an order of court.
- [3] The material and relevant terms of the agreement in relation to the present application, are contained in clause 7 thereof and reads as follows:

“ACCOMMODATION

7.1 The Plaintiff undertakes to provide housing for the Defendant in a suitable security complex while the minor child is residing with her or partially residing with her.

7.2 The Defendant will be responsible to pay the levies, insurance, security and consumer account in respect of such property.

7.3 This undertaking by the Plaintiff to provide housing to the Defendant while the minor child is residing with her, is subject to the condition that in the event of the Defendant getting remarried or enters into a cohabitation relationship with another person, the Plaintiff will no longer provide housing to the Defendant and she will be responsible to provide such housing to herself at own cost.”

- [4] The First Respondent complied with these obligations on 10 February 2017, by purchasing, through the Family Trust, immovable property. The Family Trust and the First Respondent permitted the Applicant to take occupation of the property, on the basis that she was fully aware that the said right of occupation was conditional and/or subject to the express terms as set out in clause 7.3 of the Settlement Agreement mentioned above.
- [5] During October 2020, the Family Trust and the First Respondent became aware that the Applicant had remarried and/or was in a co-habitation relationship with one M[...] T[...], and that a child was born of their relationship.
- [6] On 20 October 2020, the Family Trust and the First Respondent, through their attorneys, informed the Applicant that the First Respondent was no longer obliged to provide housing to the Applicant, in terms of the Divorce Order, or at all, and that the Family Trust and the First Respondent withdrew their consent for the Applicant and/or all those claiming

occupation by, through or under her to continue to reside at the property. The Applicant was given notice to vacate the property by 30 November 2020, failing which eviction proceedings would be instituted against the Applicant without delay.

- [7] The First Respondent and the Family Trust received communication from the Applicant's attorneys on 18 November 2020, advising that in the absence of a court order the Applicant will continue to occupy the property.
- [8] Further communication was entered into between the parties regarding the continued occupation of the property by the Applicant, which culminated in an eviction application being instituted against the Applicant, on 26 January 2021. This application is currently pending.
- [9] The Applicant instituted the present application during September 2021 wherein the Applicant seeks relief from this court, in the following terms

(quoted verbatim):

9.1 Rescinding and setting aside of the settlement agreement dated 1st day of February 2015 and the court order dated 9th day of March 2016 by the Honourable Justice Manamela AJ;

9.2 That the settlement agreement and the Court order be set aside on the basis that it was induced by misrepresentation, dishonest conduct and/or fraudulent conduct;

9.3 That the First Respondent dishonest and fraudulent conduct be referred to the National Prosecuting Authority of South Africa (NPA) for criminal prosecution;

9.4 That the First Respondent be interdicted from disposing any movable or immovable property and must disclose all bank statements of all banks held for the first two years preceding the divorce court order and the last five years succeeding after the divorce court order;

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

9.6 The Second Respondent's conduct be investigated by the Legal Practice Council (LPC) for any possible misconduct;

9.7 That costs on an attorney and own client scale be paid the First Respondent jointly and severally; with the Second Respondent paying cost de bonis propriis including costs consequent upon the employment of two counsel;

9.8 Further and/or alternative relief.

[4] The application was dismissed. The Applicant was ordered to pay the costs of the application on the attorney and client scale.

[5] The Applicant lists the following six instances which it considers the court to have erred in its dismissal of the application of the rescission of the divorce order:

5.1 That the court erred in finding that Rule 42(1)(a) was applicable and that the Applicant failed to meet the threshold of rescission based on that Rule;

5.2 That the court made an error when “refusing to interpret clause 7 wholesale”[1];

5.3 That “the gender discrimination issue was approached and argued on the common cause basis that certain provisions in clause 7 of the (sic) will unfairly discriminated against the female gender. The Court a Quo (sic) by refusing to evaluate the impugned clause, missed the opportunity to examine the unconstitutional fairness thereof.”;

5.4 That the “Learned Judge overlooked the Applicant’s pleadings and arguments that she sought rescission based not only on the Uniform Rules of court but also the Constitution”;

5.5 That the court erred when it incorrectly characterised the freedom of contracting in the context of the impugned settlement agreement, in that the court failed to understand that even if the language was plain and intelligible to the Applicant the clause 7 was nevertheless contra bono (sic) mores and susceptible to be set aside as abhorrent and inimical to the Constitution in particular section 1(c); 9 and 34 thereof; and

5.6 That the exercise of the court’s discretion in awarding punitive costs was based upon a wrong principle, a wrong view of the facts and/or was in violation of the well-recognised principle that costs should have been directed at the Applicant given the strident Constitutional issues raised by the Applicant.

[6] The Second Respondent filed Heads of Arguments[2] and made oral submissions at the hearing of this application for leave to appeal. In essence the Second Respondent argued that “the entire application for leave to appeal is premised on a plight to constitutional values, divorced from the merits of the main application insofar as it relates to the second respondent. The applicant also lost sight of the legal consequences of the settlement agreement.[3]”

[7] In addition, it was submitted that the application for leave to appeal does not relate to any finding that this court made in respect of the second respondent, that there are no reasonable prospects that any court of appeal will find that this court erred in not granting an order as claimed in paragraphs 6 and 7 of the notice of motion and that the application for leave to appeal should be dismissed, with costs.

[8] Comprehensive Heads of Argument were also filed by the First, Third, Fourth and Fifth Respondents,[4] wherein it was submitted that the issues raised by the Applicant do not amount to an “arguable point of law of general public

importance which ought to be considered by the next appellate court on appeal”[5]

[9] In its consideration of the application for leave to appeal, it is imperative that this court has an awareness of the threshold that needs to be met before leave to appeal may be granted.

[10] In *Shinga v The State & another (Society of Advocates (Pietermaritzburg Bar intervening as Amicus Curiae); S v O'Connell*

& others[6] it was held that applications for leave to appeal is a judicial task of some delicacy and expertise. This task requires a careful analysis of both the facts and the law that provided the basis for the judgement. Presiding officers should approach the question whether another court may reach a different conclusion with “intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor overanxiously referring decisions that are indubitably correct to an appellate Court.”

[11] At paragraph 7, in *Smith v S* 2012 (1) SACR 567 (SCA), the court considered what constituted ‘reasonable prospects of success in section 17(1)(a)(i)’ and held that:

“What the test of reasonable prospects of success postulates is a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion than there are prospects of success on appeal”.

[12] I have considered the submissions contained in the Heads of Arguments by counsel for the Applicant and the Respondents as well as the oral submissions made during the virtual hearing on 12th December 2024, in respect of the grounds on which the applicant believes the application for leave to appeal must succeed.

[13] The reasons for the dismissal of the application for the rescission of the judgment are clearly stated in the judgement dated 23 September 2024[7]. It is not necessary to repeat those reasons at this juncture as they will unnecessarily lengthen an already repetitive and voluminous record. The reasons therein contained provide adequate motivation for the dismissal of the application and the resultant costs order.

[14] In respect of the Applicant’s argument that this court failed to entertain the Constitutional issue of gender discrimination raised by the Applicant and in so doing the court missed the opportunity to develop the common law and decide a point of law that is of general public importance, there is no indication of any compliance with Rule 16 (a) of the Uniform Rules of Court[8].

[15] Apart from the non-compliance with the abovementioned Rule, it is unlikely, that another court would not agree with the finding by this court that there was no misrepresentation, undue influence and/or duress that induced the Applicant to conclude the Settlement Agreement, and that the Applicant failed to make out a proper case for the rescission of the judgment or order in terms of Rule 42 of the Uniform Rules of Court or in terms of the common law.

- [16] I stand by the reasons for the costs order that was granted when the application was dismissed as they are fully detailed in the judgment.
- [17] Upon a thorough reflection of the grounds cited in the application for leave to appeal, and in light of the reasons given in my judgment I am not persuaded that another court would arrive at a different decision.
- [18] I accordingly find that the Applicant has not satisfied me that she has a reasonable prospect of success on appeal.
- [19] In the result, the following order is made:

The application for leave to appeal is dismissed, with costs.

A.K. RAMLAL AJ

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email. The date and time for hand-down is deemed to be 11h00 on 20 December 2024.

Matter heard on: 12 December 2024

Judgment granted on: 20 December 2024

Appearances:

For the Applicant Adv MacGregor T Kufa and Luck Ndou macgregorkufa@yahoo.co.uk Instructed by: ME Machaba of Machaba Attorneys lawpractice@machabaattorneys.co.za Counsel for the First, Third, Fourth and Fifth Respondents: Adv AJ Reyneke adriaanreyneke@law.co.za Instructed by: Fasken Attorneys jrajpal@fasken.com Counsel for the Second Respondent: Adv JM Killian jmk@law.co.za Instructed by: Attorney: C Botha of Botha & Human Inc cecile@bothahuman.co.za

- [1] Case lines 58-6
- [2] Case Lines 59-1 to 59-9
- [3] Paragraph 5 of the Heads of Argument (Case Lines 59-3)
- [4] Case Lines 61-1 to 61-27
- [5] Paragraph 45 Heads of Argument (Case Lines 61-22)
- [6] 2007(2) SACR28 (CC) at [53]
- [7] See Paragraphs 17 -24 of the Judgment
- [8] Uniform Rule 16A requires a party raising a constitutional issue to prepare a notice (a Rule 16A Notice) containing a clear and succinct description of the constitutional issue raised. The notice, after being stamped by the Registrar must be posted by the Registrar on a dedicated notice-board at the relevant High Court for a period of 20 days

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Prepared on 13 October 2026 · Esheria