FORM A
FILING SHEET FOR EASTERN CAPE JUDGMENT

ECJ NO: 100

PARTIES:
CINDY EDWARDS **Applicant**

and

NEIL ANDREW ARNOLD **Respondent**

- Registrar CASE NO: **2723/2006**
- Magistrate:
- Supreme Court of Appeal/Constitutional Court: **ECD**

DATE HEARD: **15/2/07**

DATE DELIVERED: **22/2/07**

JUDGE(S): **PLASKET**

REVELAS

LEGAL REPRESENTATIVES -
Appearances:

- for the State/Plaintiff(s)/Applicant(s)/Appellant(s): **Adv. DH De La Harpe**
- for the accused/defendant(s)/respondent(s): **Adv. R Quinn (SC)**

Instructing attorneys:

- Plaintiff(s)/Applicant(s)/Appellant(s): **Wheeldon Rushmere & Cole**
- Respondent(s)/Defendant(s): **Neville Borman & Botha**
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CASE INFORMATION -

- *Nature of proceedings* : **Application to set aside settlement agreement**
- *Topic*:

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

CASE NO: 2723/2006

DATE HEARD: 15/2/07

DATE DELIVERED: 22/2/07
NOT REPORTABLE

In the matter between

CINDY EDWARDS **Applicant**

a nd

NEIL ANDREW ARNOLD **Respondent**

Application to set aside a settlement agreement that had been made an order of court – No irregularity in the proceedings was alleged and so no basis existed for the setting aside of the order by way of review – As the order could not be set aside, the setting aside of the settlement agreement was academic and would have no practical effect – The application was dismissed with costs (save costs that had been reserved on an earlier occasion).

JUDGMENT

PLASKET J :

[1] The applicant has applied for an order 'that the settlement and order of the Magistrate's Court for the district of Komga dated the 27th day of July 2006 in

case number 27/2006 is set aside'. She also applies for a costs order in her favour.

[2] I do not intend burdening this judgment with a detailed exposition of the facts that give rise to this application. Suffice it to say that at one stage the applicant worked for the respondent at his business, Club Wild Coast at Pullins Bay near Haga Haga. They were also involved in a more personal relationship.

[3] Their relationship soured and the applicant was dismissed from her employment. This gave rise to a wide-ranging set of disputes between the parties which culminated in the applicant launching an application in the Komga Magistrate's Court for an order, *inter alia*, interdicting the respondent from interfering with her right to occupy her premises on the respondent's property pending the outcome of proceedings for her eviction. An interim order in the terms sought by the applicant was granted *ex parte* but was opposed by the respondent on the return day.

[4] On the return day, the attorney representing the applicant (on the instructions of her East London attorney) and counsel representing the respondent reached an agreement in terms of which they settled the entire set of disputes between the applicant and the respondent. That agreement was made an order by the presiding magistrate.

[5] The applicant avers in these proceedings that she never gave instructions to her East London attorney to settle her disputes with the respondent and that she consequently never agreed to the settlement that was made an order. All of this is denied by her East London attorney, the attorney who appeared for her, counsel for the respondent and the respondent.

[6] Two principal issues arise on these facts. The first is whether the relief

sought by the applicant is competent in the circumstances. The second, if the first issue is decided in favour of the applicant, is whether the application ought to be referred to oral evidence or be dismissed with costs.

[7] In my view, the first issue is decisive. The applicant seeks the setting aside of the settlement and the magistrate's order. In substance this is an application for the review of the magistrate's order, even though the word 'review' is not used in the Notice of Motion.

[8] The jurisdiction to review and set aside the decisions of lower courts is statutory in nature. Section 24(1) of the Supreme Court Act 59 of 1959 provides:

> 'The grounds upon which the proceedings of any inferior court may be brought under review before a provincial division, or before a local division having review jurisdiction, are
> (a) absence of jurisdiction on the part of the court;
> (b) interest in the cause, bias, malice or the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 … of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, on the part of the presiding judicial offer;
> (c) gross irregularity in the proceedings; and
> (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.'

[9] It is not suggested that any of the grounds listed in s 24(1)(a), (b) or (d) apply. The only possible basis upon which the review must have been brought is s 24(1)(c), that a gross irregularity in the proceedings was committed.

[10] The papers do not allege any form of irregularity on the part of the magistrate (or on the part of the attorney who appeared for the applicant on the instructions of her East London attorney). It simply cannot be found on the papers that a gross irregularity in the proceedings had occurred: that term, in

the context of s 24(1)(c) means 'an irregular act or omission by the magistrate (or possibly some other officer or official of the court) in respect of the proceedings of so gross a nature that it was calculated to prejudice the aggrieved litigant …' (*Geidel v Bosman N.O. and another* 1963 (4) SA 253 (T), 255C-D). In the light of this definition, it cannot be said that the concluding of a settlement agreement without instructions was a gross irregularity in the proceedings: it may ground an application for rescission, but not for review.

[11] The applicant has, consequently, not made out a case for the setting aside of the order.

[12] In my view, there is also no basis – even if the dispute of fact was wished away for the moment – for this court to declare the settlement agreement invalid. In the absence of an order setting aside the order which the settlement agreement became, the setting aside of the settlement agreement would have no practical effect: it would be entirely academic.

[13] Finally it is necessary to determine the question of liability for the costs of 23 November 2006, when the matter was postponed *sine die* and the costs were reserved. I was informed from the bar – and there was no dispute as to these facts – that the notice of opposition was filed by the respondent on 9 October 2006, but when the time period for the filing of answering papers had expired, the matter was set down by the applicant for 23 November 2006. It was only thereafter -- on 13 November 2006 – that the answering papers were filed. This meant that the matter had to be postponed on 23 November 2006 to enable the applicant to reply and for it to be otherwise made ready for hearing.

[14] In these circumstances, and in the absence of any acceptable explanation on the part of the respondent as to why his answering papers were filed late, it appears to me that it would be unfair to deny the applicant

the costs of the postponement.

[15] In the result, the following order is made:

(a) The application is dismissed with costs.

(b) The respondent is directed to pay the applicant's costs of the postponement granted on 23 November 2006.

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C. PLASKET

JUDGE OF THE HIGH COURT

I agree,

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E. REVELAS

JUDGE OF THE HIGH COURT