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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

CASE NO: 17335/2022

In the matter between:

L[...] A[...] C[...]

Plaintiff / Respondent

And

J[...] C[...]

First Defendant

FREDERICK PAULSE STEYN INC

Second Defendant

FREDERICK PAULE STEYN

Third Defendant

INSITU CONSTRUCTION (PTY) LTD

Fourth Defendant

PROPERTY FUTURES CC

Fifth Defendant

THE RETAIL MAGAZINE CC

Sixth Defendant

MOIGYN (PTY) LTD

Seventh Defendant

Before the Honourable Ms Acting Justice Mthimunye

Date of hearing: 22 August 2024

Delivered Electronically: 9 September 2024

JUDGMENT

MTHIMUNYE, AJ

Introduction

[1] This is an exception application in which the First to Seventh Defendants except to the Plaintiff's particulars of claim on the basis that it lacks averments to sustain a cause of action and that the matter is *res judicata*.

[2] Initially, the two issues in dispute were whether the plaintiff failed to disclose a cause of action and whether the matter was *res judicata*. On 18 July, the plaintiff filed a notice to amend her particulars of claim, setting out in detail her claim for damages and a prayer for a proper accounting to determine the true and correct value of the joint estate of the plaintiff and the first defendant at the time of divorce. The Defendants did not object to the amendment of the Plaintiff's particulars of claim and by agreement between the parties, the court granted the Plaintiff's application to amend her particulars of claim.

[3] Accordingly, the defendants' complaint regarding the failure of the Plaintiff's particulars of claim to disclose a cause of action was then removed and the court was only seized in determining whether the action of the Plaintiff was *res iudicata*.

[4] For convenience, I will refer to the parties as they are cited in convention.

Background

[5] The Plaintiff and the First Defendant concluded and signed a divorce settlement agreement on 16 October 2019, which was subsequently made an order of the court. On 14 October 2022, the Plaintiff instituted a claim for damages arising from an alleged fraudulent misrepresentation of the First, Second or Third Defendant during the negotiations and signing of the settlement agreement.

[6] The Fourth Defendant (Insitu Construction (Pty) Ltd, Fifth Defendant (Property Futures CC, Sixth Defendant (The Retail Magazine) and Seventh Defendant (Moigyn (Pty) Ltd) were financial entities in which the First Defendant had either directly or indirectly profitable interest which, according to the Plaintiff, formed part of the joint estate. The First to the Seventh Defendants then entered an appearance to defend the action. The First, Fourth, Fifth, Sixth and Seventh Defendants raised an exception on the grounds that the particulars of claim of the Plaintiff failed to disclose a cause of action and that the matter was *res iudicata*. This exception was electronically served on the Plaintiff on 15 February 2023.

[7] Similarly, the Second and Third Defendants also raised an exception on the grounds that particulars of claim of the Plaintiff lacks averments which are necessary to sustain the cause of action. They served their notice of exception on the Plaintiff on February 2023 to remove the cause of the complaint.

[8] As a result of the Plaintiff's failure to remove the cause of the complaint, the Defendants set the matter down for hearing. Subsequent thereto, the Plaintiff filed a notice of opposition in relation to both exceptions. The exception brought by the Second and Third Defendants for a lack of critical averments were subsequently withdrawn.

[9] On the day the exception was to be heard, the parties agreed to the amendment of the Plaintiff's particulars of claim being made an order of court. Consequently, the complaint that the Plaintiff's particulars of claim failed to disclose a cause of action was removed and the issue of *res iudicata* remained to be determined. I now turn to deal with the averments made in the Plaintiff's amended particulars of claim.

Plaintiff's Amended Particulars of Claim

[10] It is common cause that the Plaintiff and the First Defendant were married in community of property. They entered into a settlement agreement on 16 October 2019 which was made an order of court on 14 October 2022. The Plaintiff in her

amended particulars of claim pleaded that the misrepresentations made by the First, and /or Second (as the agent of the First Defendant) and/or Third Defendant were false and intended to mislead the Plaintiff into entering into a divorce settlement agreement. The Plaintiff further avers that as a result of the Defendants' false misrepresentations, she was coerced into accepting the terms of the said settlement agreement reflecting the incorrect total gross assets of the joint estate of the First Defendant and herself.

[11] Furthermore, that at the time these fraudulent misrepresentations were made by the First and Third Defendant, she was unaware that the First Defendant owned undisclosed immovable property and other assets.

[12] The Plaintiff asserts that if she had known the real and current status of the joint estate, she would not have agreed to the settlement as it is. She believed that the joint estate only included the following:

12.1 An immovable property known as [...] **O[...] Grove, V[...] Heights, Brackenfell**, of which, in terms of the settlement agreement, she was to remain a joint owner and continue to reside on the property. Furthermore, in terms of the suspensive condition of the settlement agreement, if the Plaintiff should remarry or become involved in a co-habitive relationship, the property is to be sold and the proceeds of the sale to be divided equally between the Plaintiff and the First Defendant. In addition, the Plaintiff was to be liable for the municipal rates, homeowner's insurance, general and major repairs of the said property.

12.2 An immovable property situated at [...] **S[...] Close, V[...] Heights, Brackenfell**, of which in terms of the settlement agreement the First Defendant were to retain sole and exclusive ownership of the said property. The Third Defendant, (FPS Attorneys) were appointed to effect transfer of the Plaintiff's undivided quarter share of said property to the First Defendant.

12.3 An amount of **R400 000.00** (Four hundred thousand rand) that was in the joint bank account of the parties, which were to be withdrawn and retained by the First Defendant.

12.4 Furthermore, a **Suzuki Ignis motor vehicle** which would remain in her possession and in terms of the settlement agreement the outstanding amount of the instalment sale agreement were to be settled by the First Defendant upon the divorce between the parties.

[13] The following paragraphs of the Plaintiff's amended particulars of claim sums up the basis for her claim as follows:

“9. At the time that the misrepresentations were made the First Defendant owned undisclosed immovable property and other assets of value either directly or indirectly via and in various entities, including but not limited to Insitu Construction (Pty) Ltd, Property Futures CC, The Retail Magazine CC and Moigyn (Pty) Ltd. Plaintiff was by virtue of her marriage in community of property with the First Defendant a fifty percent owner of these assets or the value of the assets.

10. If the Plaintiff was aware of the true and correct position she would never have entered into the settlement agreement. Accordingly, the Plaintiff has suffered damages arising from the fraudulent misrepresentations of the First Fourth, Second and or Third Defendants the quantum of which is unknown to the Plaintiff.

Wherefore Plaintiff prays for an order against the First Defendant on the following terms:

(a) *That the First Defendant personally and in his capacity as the controlling interest in the entities referred to in clause 9 above, account to the Plaintiff for the assets, liabilities and financial records of his*

personal estate and those entities referred to in clause 9 above as 16 October 2019 within a time as determined by the honourable court.

- (b) *That there be a proper debatement of accounts to determine the true and correct value of the joint estate of Plaintiff and the First Defendant at the time of divorce.”*

[14] The Plaintiff further sought relief in her amended particulars of claim in terms of the following prayers:

- “(a) *That the First Defendant personally and in his capacity as the controlling interest in Fourth, Fifth, Sixth and Seventh Defendants account to the Plaintiff for the assets, liabilities and financial records of his personal estate and those the Fourth, fifth, Sixth and Seventh Defendants as 16 October 2019, within a time determined by the honourable court.*

- (b) *That there be a proper debatement of account to determine the true and correct value of the joint estate of Plaintiff and First Defendant at the time of divorce.*

[15] As a result, the plaintiff prayed for an order against the First, Second and / or Third Defendant, jointly and severally or on such terms as the Honourable court deems fit for payment of the outstanding balance together with costs and interest.:

Submissions by the parties

Defendants’ submissions

[16] The Defendants submitted that the allegations of fraud made by the Plaintiff was vague and unsubstantial. Further that the Plaintiff cannot use these allegations to launch an action for damages as the matter had already been adjudicated on by another court when the divorce settlement agreement was made an order of court. In other words, meaning that the matter is *res iudicata*. The Defendants referred the

court to paragraph 10 of the Supreme Court of Appeal judgment of ***Moraitis Investments (Pty) Ltd v Montic Diary (Pty) Ltd (799/2016) [2017] ZASCA 54 (18 May 2017)***, where the court was seized with deciding whether the grounds advanced by the applicant justified the rescission of the consent judgment.

“[10] In my view that was not the correct starting point for the enquiry, because it ignored the existence of the order making the agreement an order of court. Whilst terse the order was clear. It read:

‘The Agreement of Settlement signed and dated 05 September 2013 is made an order of court.’

For so long as that order stood it should not be regarded. The fact that it was a consent order, is neither here nor there. Such an order has exactly the same standing and qualities as any other court order. It is res judicata as between the parties in regard to the matters covered thereby. [3] The Constitutional Court has repeatedly said that court orders may not be ignored. To do so is inconsistent with s 165(5) of the Constitution, which provides that an order issued by the court binds all people to whom it applies. [4] The necessary starting point in this case was therefore whether the grounds advanced by the applicants justified the rescission of the consent judgment. If they did not then it had to stand and questions of the enforceability of the settlement agreement became academic.”

[17] The Defendants contended that, akin to the current case, a settlement agreement was signed by the First Defendant and the Plaintiff and subsequently made an order of the court on 04 November 2019 by Hlophe JP, as he then was. In addition, they argued that the settlement agreement, which formed the basis of the plaintiff's claim, is not just an ordinary contractual agreement, but rather a legitimate standing order of the court.

[18] The Defendants further submitted that the Plaintiff must have a right to claim in order to be able to seek the following relief, that:

(a) The First Defendant renders the accounts of the Fourth, Fifth, Sixth and Seventh to the Plaintiff in order for the Plaintiff to determine the Defendants assets, liabilities and financial records which they held in the First Defendants personal estate; and

(b) There be a proper debatement of these accounts in order to determine the true and correct value of the joint estate as at the time of divorce.

[19] Additionally, the Defendants submitted that the Plaintiff should have applied to court to have the court order of 4 November 2019 set aside, varied or amended on the alleged grounds of fraud claimed by the Plaintiff. However, the defendants admitted that this is not the relief sought by the plaintiff from this court.

[20] In conclusion, the Defendants submitted that the case made out by the Plaintiff in her amended Particulars of Claim is fatally flawed while the original dispute between the parties remains *res iudicata*. Furthermore, they submitted based on their submissions made to this court, their exception on behalf of the First, Fourth, Fifth, Sixth and Seventh Defendant should be upheld with costs.

Plaintiff's submissions

[21] Counsel for the Plaintiff submitted that firstly the court in considering whether the exception should be upheld or dismissed, the court need to take cognisance of the fact that we are dealing with a matter where the parties were married in community of property and that the joint estate was not divided equally due to a misrepresentation perpetuated by the First Defendant and / or the Third Defendant.

[22] Further that the Plaintiff in paragraphs 11.1 to 11.9 of her amended Particulars of claim succinctly sets out on what her claim is based. Counsel further submitted that it is clear by looking at the Deed of Settlement that was made an order of court on 4 November 2019, no mention is made of the other shares or entities owned by both Plaintiff and the First Defendant at the time of the dissolution of the joint estate.

[23] Counsel further submitted that this was as a result of the misrepresentation of the attorney, the Third Defendant who had a vested interest in the outcome of the case.

[24] Counsel referred the court to *Eke v Parsons (CCT214/14) [2015] ZACC 30*, where Mr Parsons sought an order directing Mr Eke to pay a fixed sum of money which was a debt owing in terms of the parties' sale agreement. He submitted that the Constitutional Court held that a settlement agreement is like any order once it has been made an order of court.

[25] Counsel for the Plaintiff submitted that contrary to what the Defendants have argued, the Plaintiff in this matter is not seeking to set aside or rescind the court order granted on 4 November 2019, but instead seeks damages on new facts that came to light after the settlement agreement between the parties had been made an order of court. He passionately submitted that as a result of the information that was previously withheld from the Plaintiff, she did not receive her full fifty percent of the joint estate as per their marriage regime of in community of property.

[26] He further submitted that the reason they are seeking the relief for a debatement of the assets is because the Plaintiff is unaware what the correct value of the assets were in 2019 and this has to be established in order to quantify their claim for damages.

[27] In conclusion, counsel submitted that the relief sought by the Plaintiff is that the First, Fourth, Fifth, Sixth and Seventh Defendants be held liable jointly and severally, the one absolving the other. He requested that the exception be dismissed with costs, including all costs of previous occasions on a scale C.

Issues to be determined

[28] The issue to be determined by this court is *res iudicata*.

Applicable Legal Principles:

[29] The principles applicable in the adjudication of exceptions are well established.

“An exception is a pleading in which a party states his objection to the contents of a pleading of the opposite party on the grounds that the contents are vague and embarrassing or lack averments which are necessary to sustain the specific cause of action or the specific defence relied upon.

(Herbstein and Van Winsen – The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa 5th Ed, 2009 Chapter 22 p630)

“An exception is a legal objection to the opponent’s pleading. It complains of a defect inherent in the pleading: admitting for the moment that all the allegations in a summons or plea are true, it asserts that even with such admission the pleading does not disclose either a cause of action or a defence, as the case may be. It follows that where an exception is taken, the court must look at the pleading excepted to as it stands” **(Erasmus Superior Court Practice D1- 293).**

[30] An exception is a process where the court weeds out claims without legal merits. Furthermore, it is to prevent a claim or defence being persisted with on pleadings that are vague and embarrassing. Ponnar, JA observed in ***Luke M Tembani and Others v President of the Republic of South Africa and Another* [2022] ZASCA 70, 2023 (1) SA 432 (SCA) (20 may 2022)** at para 14 that:

“[14] Whilst exceptions provide a useful mechanism ‘to weed out cases without legal merit’, it is nonetheless necessary that they be dealt with sensibly. 8. It is where pleadings are so vague that it is impossible to determine the nature of the claim or where pleadings are bad in law in that their contents do not support a discernible and legally recognised cause of action, that an exception is competent. 9. The burden rests on an excipient, who must establish that on every interpretation that can reasonably be attached to it, the pleading is excipiable.10 The test is whether on all possible readings of the facts no cause of action may be made out; it being for the excipient to satisfy the court that the

conclusion of law for which the plaintiff contends cannot be supported on every interpretation that can be put upon the facts.”

[31] When a special plea of exception is raised by a Defendant relying on *res iudicata*, the onus is on the Defendant to prove (a) that a final and definitive prior judgment or order; has been, (b) given in litigation to which the current parties or their privies were parties; and (c) the cause of action in both cases must be the same, and the same relief must, or may, have been in both cases. ***Technical Systems (Pty) Ltd and RTS Industries and Others (5288/2020) WCHC (1 March 2021) at para 15.***

[32] I pause to point out, that the inherent jurisdiction of the High Court does not include the right to tamper with the finality of judgments, other than in specific circumstances provided for in the rules or 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. It is however a trite principle of our law that the privity and sanctity of a contract should prevail. Parties are to observe and perform in terms of their agreements and should only be allowed to deviate therefrom if it can be demonstrated that the contract is tainted with fraud or a particular clause in the agreement is unreasonable and or so prejudicial to a party that it is against public policy. Against this background I will now turn to deal with the issue of *res iudicata*.

Analysis

[33] In the instant case, *ex facie* the amended particulars of claim, it is clear that the relief sought by the Plaintiff is not the same when the settlement order was made an order of court. Furthermore, the parties in the claim for damages, is not the same parties as they appeared in the divorce proceedings. Previously, the divorce case was between the Plaintiff and the First Defendant. Before the court now it is different parties. This is diametrically opposed to the requirements of *res iudicata*. We are dealing in the present matter with a claim for damages as a result of a fraudulent misrepresentation, whereas the previous matter on which the court adjudicated were the patrimonial consequences of the parties' marriage. It is apparent that certain

entities which were part of the Plaintiff and the First Defendant joint estate was not included in the original settlement agreement that was made an order of court on 4 November 2019.

[34] The Plaintiff's amended particulars of claim clearly contain averments alleging all the material facts that give rise to an enforceable claim for damages that is based on misrepresentation or conduct of the Defendants that resulted in the Plaintiff not being aware of the full gross value of the joint estate at the time she entered into the settlement agreement. The plaintiff clearly sets out that she was made to believe that the assets mentioned in the settlement agreement was the only assets in the joint estate. It cannot therefore be said that the cause of action raised by the Plaintiff is *res iudicata* under the circumstances. It is completely predicated on a different cause of action.

[35] It is trite that a misrepresentation is a false statement of a material fact by one party which affects the other party's decision in agreeing to a contract. If the misrepresentation is discovered, the contract can be declared void. The Plaintiff has raised all the facts in her amended particulars of claim, and I am satisfied that a cause of action has been made out.

[36] For the excipient to be successful in his defence, he needs to show that even if evidence was presented sufficient to prove the facts set out in the pleadings, no cause of action or defence would be disclosed. I do not agree with the argument raised by the Defendants that the plaintiff's action for damages against the defendants is *res iudicata*.

[37] I am more inclined to agree with counsel for the Plaintiff that this is a new action for damages due to a misrepresentation made by the First Defendant and / or the Third Defendant as his agent. It must be emphasised that the First Defendant and the Plaintiff were married in community of property and that the entities mentioned at paragraph 7.5 to 7.9 in the amended particulars of claim was never part of the settlement agreement that was made an order of court on 4 November 2019. In **MD v ND (A176/2023) [2023] ZAWCHC 304 (29 November 2023)**, para 32 were I said:

“It bears emphasis that the consequences of the marriage in community of property entered into by the appellant and the respondent was that they became co-owners in undivided and indivisible half shares of all the assets and liabilities they had at the time of their marriage as well as the assets and liabilities they acquired during the marriage. (See Heaton J and Kruger H South African Family Law 4ed (2017) at 62.) Expressed differently, upon marriage, the parties' separate estates automatically merged into one joint estate. Upon dissolution of the marriage, all liabilities had to be settled from the joint estate, and the balance of the joint estate, including their respective pension interests, had to be distributed equally between them or as they otherwise agree”

[38] Taking into consideration that this is a considerable large part of the joint estate that was excluded at the time the settlement agreement was entered into by the parties.

[39] I find no merit in the Defendants' argument that this matter has already been adjudicated by this court. Even though the parties are the same and the Plaintiff's claim for damages is a result of the settlement agreement that was made a court order on 4 November 2019, the relief sought in the damages action is different. This was explained in the matter of *Technical Systems (Pty) Ltd* (supra) From the pleadings and all the documents attached thereto placed before this court is not in dispute that the disputed financial entities were not incorporated in the settlement agreement that was incorporated into the final divorce order.

[41] It is evident from the Plaintiff's amended particulars of claim that if the Plaintiff had known the true and exact facts about the status of the joint estate, she would not have entered into the settlement agreement.

[42] Our law is clear that in terms of the law of contract, the Plaintiff only has to prove the existence of the fraudulent misrepresentation, once she has done so she can elect whether to resile from the agreement or to continue with the agreement. It

is clear from the submissions of counsel for the Plaintiff that the Plaintiff do not intend to vary or rescind the original court order dated 4 November but merely intends to sue the Defendants for damages by defrauding her of her full and correct half share of the joint estate.

[43] In *Namasthethu Electrical (Pty) Ltd v City of Cape Town and Another (201/2019) [2020] ZASCA 74 (29 June 2020)* at para 29, the Supreme Court of Appeal made the following observation:

“29 It is trite that fraud is conduct which vitiates every transaction known to the law. In affirming this principle, this court, in Esorfranki Pipelines (Pty) Ltd, referred with approval to Lord Denning’s dicta in Lazarus Estates Ltd v Beasley, when he said:

‘No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it has been proved it vitiates judgments, contracts and all transactions whatsoever...’

[44] I am of the view that the present case falls into the realm of the circumstances described in *Namasthethu [supra]* mentioned above. It is apparent that the Plaintiff had suffered loss as she alleged she acted on the basis of a fraudulent misrepresentation by the Defendants when she entered into the settlement agreement that was made an order of court. I, further find that the averments made by the Plaintiff in her amended particulars of claim is sufficient for the purposes of instituting a claim for damages and is raising a bona fide cause of action against the exception raised by the Defendants’.

[45] A court has a statutory power and discretion to override any agreement when it is contrary to public policy. Public Policy requires that this court afford the Plaintiff an opportunity to be placed in possession of the financial documents requested in order for her to establish what the true and correct value of the joint estate was on

the date of divorce, in order for her to be able to quantify her claim for damages. That being the case the Defendants' exception that the matter is *res iudicata* is misconceived. The Defendants have failed to establish that the particulars in support of a claim for damages were excipiable. I am inclined to agree with the Plaintiff this is a new action based on a fraudulent misrepresentation by the First and / or Third Defendant as his legal representative at the time settlement agreement was entered into. It is on this basis that the exception of the Defendants is dismissed.

[46] Counsel for the Plaintiff correctly pointed out that neither of the cases referred to by him or the Defendants related to any of the circumstances as before this court as the Constitutional Court in *Eke [supra]* did not concern an action for damages on a settlement agreement that had been fraudulently concluded and subsequently made an order of court , but rather on whether the parties contracting outside of the context of litigation may approach the court via a rescission application and request the court that their agreement be made an order of court.

[47] The issue of whether the Plaintiff can claim damages arising form a fraudulent misrepresentation based on a settlement agreement that was made an order of court is not for this court to decide and will be dealt with by the court seized with the trial.

[48] Therefore, for the reasons alluded to about and the principles laid down in the authorities mentioned above, it follows that the exception must be dismissed. The Plaintiff seeks a punitive cost order. In the exercise of my discretion I do not believe that such an order is appropriate.

The following order is made:

[49] The Defendant's exception is dismissed with costs on the scale as between party and party as taxed or agreed, including costs of previous occasions and including cost to counsel on scale B.

MTHIMUNYE, AJ