THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 896/2021

In the matter between:

RUTH EUNICE SECHOARO **APPLICANT**

and

PATIENCE KGWADI **RESPONDENT**

Neutral citation: *Ruth Eunice Sechoaro v Patience Kgwadi* (896/2021) [2023] ZASCA 46 (4 April 2023)

Coram: DAMBUZA AP, SCHIPPERS and NICHOLLS JJA and KATHREE-SETILOANE and SIWENDU AJJA

Heard: 1 March 2023

Delivered: 4 April 2023

Summary: Application for leave to appeal – whether respondent's unilateral mistake in signing agreement is reasonable – under misapprehension as to its contents - agreement wholly inconsistent with prior agreement with ex-husband – mistake reasonable and excusable - proposed appeal enjoying no prospects of success.

ORDER

Application for leave to appeal from: Gauteng Division of the High Court, Pretoria (Vorster AJ sitting as court of first instance):

1 Paragraph 2 of the order of the high court is set aside and replaced with the following order:

'The first respondent, Rorich Wolmarans Luderitz, is directed to pay the applicant 50% of the proceeds of the sale of the property held in its trust account within 30 days of finalisation of the deceased's estate.'

2 Save as aforesaid, the application for leave to appeal is dismissed with costs.

JUDGMENT

Kathree-Setiloane AJA (Dambuza AP, Schippers and Nicholls JJA and Siwendu AJA concurring):

[1] This is an application for leave to appeal the decision of the Gauteng Division of the High Court, Pretoria (the high court), in terms of which it declared that the agreement signed by the respondent, Ms Patience Kgwadi, and her ex-husband, Mr Israel Kgwadi, on 18 July 2012 (the 2012 agreement) is unenforceable. The application was referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act.[1]

[2] The respondent married the deceased on 14 May 1987 in community of property. Their marriage was dissolved on 25 October 1991. They concluded a settlement agreement which was made an order of court on the same day. The court order afforded Mr Kgwadi a period of 14 days to apply to court for variation of the settlement agreement.

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[1] 10 of 2013.

[3] At the time of their divorce, the respondent and the deceased were joint owners of an immovable property in Boksburg (the property). Since the settlement agreement did not deal with the division of the property, they verbally agreed that each of them would be entitled to half of the value of the property. It was specifically agreed that Mr Kgwadi would pay the respondent half the value of the property. He, however, never did.

[4] On 25 September 2010, Mr Kgwadi married the applicant, Ms Ruth Eunice Sechoaro. Thereafter, on 2 October 2010, he made a will in which he, inter alia, bequeathed 50% of his estate to his fiancée, the applicant at the time, provided she survived him by a period of seven days, and they were still married at the date of his death. Mr Kgwadi appointed First National Bank Trust Services (Pty) Ltd (FNB) as the executor of his estate.

[5] On 28 March 2012, the respondent was seriously injured in a motor vehicle accident and was admitted to Charlotte Maxeke Hospital in Johannesburg (the hospital). She remained in hospital until September 2012. On 18 July 2012, a messenger from the law firm Denoon Sampson Ndlovu Inc, whom she assumed to be representing Mr Kgwadi, called at the hospital to get the respondent to sign a document, entitled 'variation agreement', in terms of which she would award the joint property solely to Mr Kgwadi, which she did. The applicable provisions of the agreement are these:

'2. The parties have now agreed to amend the settlement agreement in so far as it relates to the Property.

3. The parties hereby agree that:

3.1 The Property shall be awarded solely to [Mr Kgwadi].

…

3.5 They shall cooperate with each other and shall sign all and any necessary documents as may be required by the conveyancers appointed by [Mr Kgwadi] to attend to the transfer of the Property into his name, as and when called upon to do so.'

[6] Mr Kgwadi passed away on 29 September 2014. The Master of the High Court, Johannesburg (the Master) appointed Ms Prishania Naidoo, FNB's nominee, as the executor of the estate. On 31 May 2017, the respondent as a seller, and Ms Naidoo,

on behalf of FNB, signed an offer to purchase the property by a third party in the sum of R550 000. On 22 January 2018, Rorich Wolmarans Luderitz Inc, the attorneys attending to the transfer of the property, informed the respondent by email that she was not entitled to 50% of the proceeds of the sale of the property, because the variation agreement stated that the property was awarded solely to the deceased.

[7] On 19 February 2018, the respondent launched an application in the high court challenging the enforceability of the 2012 agreement on two grounds. The first was that it was entered into more than 20 years after the settlement agreement had been made an order of court and not within the 14-day period stipulated in the order, and that Mr Kwgadi did not apply to court for an order varying the settlement agreement. The second ground was that she signed the agreement without any intention to be bound by its terms. She alleged that she had been injured in a serious motor vehicle accident and was admitted to hospital, where she spent six months. She was diagnosed with an acetabulum hip fracture dislocation and had to undergo a skin traction and surgery to her hip. She was ‘constantly in extreme pain’ and ‘was normally sedated to minimise the pain’ she experienced. She signed the agreement without reading it, as she did not have the strength to do so in the state that she was in. She assumed that the agreement dealt with what she and the deceased had agreed upon, ie, that he would pay her 50% of the value of property.

[8] The respondent furthermore alleged that the attorneys’ messenger did not inform her of the nature and contents of the agreement, save to tell her that the agreement dealt with the property which she and the deceased jointly owned. She accepted that the messenger was not bound to inform her of the terms of the agreement before she signed it. She, however, contended that given her condition at the time, he should at least have explained them to her. The reason being that there were terms she ‘could not have reasonably expected in the agreement, specifically the term that [she] was giving [her] 50% share in the property to the [Mr Kgwadi] without any payment of the value of [her] half share in the property’. In the circumstances, she contended that her mistake in signing the agreement without reading it was reasonable and that she should not be bound by it.

[9] The applicant disputed these allegations in her answering affidavit on the basis that the respondent suffered a hip fracture dislocation, which did not affect her mental functioning. She contended that the respondent was of 'sound and sober senses' when she signed the variation agreement and was neither under duress nor unconscious.

[10] The high court found that the 'factual dispute whether the [respondent] knew and intended to forfeit the undivided share in the immovable property by the signature of the amendment agreement… is not a real dispute', and 'can be resolved without oral evidence, looking purely at the evidence as a whole'. The high court held that '[t]aking into account the surrounding common cause facts', the inference that the respondent signed the agreement with the intention to be bound did not pass the probability test as:

(a) The document was presented for signature to the respondent 20 years after their divorce;

(b) There was no evidence that the nature and importance of the document, which was a binding agreement in terms of which she forfeited her 50% undivided share in the property, was explained to the respondent or ever discussed with her;

(c) Had the nature and importance of the document been explained to the respondent, then it would have been a simple matter for the applicant to have adduced that evidence;

(d) Had she been told of the import and effect of the document, the respondent would not have signed it;

(e) On the crucial aspect of whether she knew what she was signing, there is no evidence apart from the respondent's evidence that she was unaware of it; and

(f) It was improbable that the respondent would have disposed of her 50% undivided share in the property without any apparent reason for doing so.

[11] The high court consequently found that the application must succeed and made the following order:

'1. That the Agreement signed by the [respondent] and her deceased husband [Mr Kgwadi] on the 18th of July 2012 is not enforceable against the [respondent] and also not enforceable against the deceased estate of [Mr Kgwadi].

2. That the First Respondent Rorich Wolmarans Luderitz Inc be compelled to pay to the [respondent] 50% [of the proceeds of the sale of the property held in its trust account within 30 days of finalisation of the deceased's estate].[2]
3. That the [Master] be interdicted from approving and confirming the amendment of the Liquidation and Distribution Account under Estate Number 034807/2014 to the effect that it should be in accordance with the last will and testament of [Mr Kgwadi].
4. That, alternatively in the event that the [Master] has already amended the Liquidation and Distribution Account to effect the contents of the last Will and Testament, an Order interdicting [Rorich Wolmarans Luderitz Inc] from finalising the Estate of [Mr Kgwadi] in accordance with the contents of the last Will and Testament of [Mr Kgwadi];
5. The [applicant] is ordered to pay the [respondent's] costs of suit.'

[12] The applicant, who is the deceased's surviving spouse, applied to the high court for leave to appeal, which was dismissed. She subsequently applied to this Court for leave to appeal.

[13] It is essential to deal with nature of the 2012 agreement. This is because the parties adopt the erroneous view that it is a variation agreement, which varied the settlement agreement that was made an order of court on the date of the divorce of the respondent and Mr Kgwadi. Despite its title, the 2012 agreement is not a variation agreement as it does not vary the settlement agreement. The settlement agreement did not deal with the division of the joint property of the respondent and Mr Kgwadi. As is apparent from its terms, the 2012 agreement is simply one in terms of which the respondent purportedly disposed of her half share in the property to Mr Kgwadi, for no value.

[14] The applicant's primary ground in support of its application for leave to appeal against the judgment and order of the high court, is that it failed to have regard to the dispute of fact. The applicant contended, in this regard, that when the respondent signed the 2012 agreement there was nothing wrong with her psychologically, hence she was aware of, and intended to be bound by its terms. As correctly held by the high court, the dispute concerning whether the applicant knew and intended to forfeit the undivided share in the movable property by signing the 2012 agreement, is not a

[2] Paragraph 2 of the high court's order is incomplete.

real dispute of fact as it could be resolved on the common cause facts on the papers. It is significant, in this regard, that the applicant did not challenge the respondent's version that she signed the 2012 agreement because it was reasonable to expect that it would not contain a term that would require her to give up her 50% share in the property to Mr Kgwadi for no value.

[15] The applicant merely contended, in her answering affidavit, that the injuries sustained by the respondent were not psychologically related and that she did not sign the 2012 agreement under duress. The applicant's contentions are unsurprising as she has no personal knowledge of the circumstances under which the agreement was signed by the respondent. On this crucial aspect, there is no other evidence apart from the respondent's that she signed the 2012 agreement because she could not have reasonably expected it to contain a term whereby, she would forfeit her 50% share in the joint property. Besides, this is entirely consistent with her allegation of a verbal agreement between her and the deceased that each of them would be entitled to half of the value of the property, which remains unchallenged.

[16] The only question remaining is whether, on the objective facts, by signing the 2012 agreement the respondent had bound herself to parting with her 50% share in the property to Mr Kgwadi, for no value. Put differently, was her unilateral mistake (*error*) in signing the agreement without reading it reasonable (*justus*)? In *George v Fairmead (Pty) Ltd*,[3] this Court held that:

'When can an *error* be said to be *justus* for the purpose of entitling a man to repudiate his apparent assent to a contractual term? As I read the decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party – the one who is trying to resile – been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself? … If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound.'[4]

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[3] *George v Fairmead (Pty) Ltd* [1958] 3 All SA 1 (A); 1958 (2) SA 465 (A) at 471B-C; See also *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA); [2005] 2 All SA 343 (SCA).
[4] Ibid.

[17] In *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board*, Schreiner JA stated the position thus:

'Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (*error*) would have to be reasonable (*justus*), and it would have to be pleaded.'[5]

[18] The respondent's unchallenged evidence is that the settlement agreement which was concluded in 1991 and made an order of court, did not deal with the division of the property, because both she and Mr Kgwadi were under the impression, consequent upon their marital regime, that each of them would be entitled to half of the value of the property. They agreed that Mr Kgwadi would pay the respondent the value of her share in the property. He, however, never did so.

[19] More than two decades later, knowing full well that the respondent was in hospital recovering from serious injuries, Mr Kgwadi caused his attorney to present the 2012 agreement, containing entirely different terms to those they had agreed upon over 20 years earlier, to the respondent for her signature. It is clear on the objective facts that Mr Kgwadi did so deliberately, and with intent to deceive the respondent into forfeiting her half share in the joint property. This explains why the applicant chose to adduce no evidence on how it came about that the respondent and Mr Kgwadi decided to amend their prior agreement. These facts were peculiarly within the knowledge of Mr Kgwadi and the applicant, who married him shortly thereafter, and stood to inherit 50% of his estate on his death. Bearing in mind that the respondent already had an agreement with Mr Kgwadi concerning her share of the property, she had no reason to expect that she would be asked to sign an agreement containing terms to the contrary.

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[5] *National and Overseas Corporation (Pty) Ltd v Potato Board* [1958] 3 All SA 13 (A); 1958 (2) SA 473 (A) at 479G-H.

[20] Mr Kgwadi knew, or must have known, contrary to what is stated in the agreement presented to the respondent for signature, that she had not consented to amend their prior agreement that he would pay her 50% of the value of the property; that he was not entitled to sole ownership of the property; and that there was no basis for depriving the respondent of her share of the property. Consequently, when he received the agreement after the respondent had signed it, Mr Kgwadi knew of her mistake as he was the cause of it.[6] In these circumstances, it cannot be suggested that by signing the agreement, the respondent misled Mr Kgwadi, as a reasonable person, to believe that she was binding herself to its terms and that he was solely entitled to the property, for no value.[7]

[21] It is important to keep in mind that the respondent acted consistently with her belief that the agreement did not contain a term to the effect that she gave up her 50% share in the property to Mr Kgwadi for no value. In May 2017, in her capacity as a seller, she signed an offer by a third party to purchase the property for R550 000. On enquiring with the transferring attorneys about payment of her 50% share of the proceeds of the sale, they informed her that she was not entitled to any proceeds as the 'variation agreement' stated that Mr Kgwadi was the sole owner of the property. Shortly thereafter, she instituted the application in the high court claiming payment of 50% of the proceeds of the sale of the property.

[22] In the circumstances, I consider the respondent's unilateral mistake to be reasonable and excusable. Accordingly, the proposed appeal has no reasonable prospects of success. The application for leave to appeal must, therefore, be dismissed with costs. Paragraph 2 of the high court's order is incomplete and must be corrected.

[23] The following order is made:

1 Paragraph 2 of the order of the high court is set aside and replaced with the following order:

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[6] GB Bradfield *Christie's Law of Contract in South Africa* 8 ed (2022) at 385.
[7] *George v Fairmead* fn 1 at 471B-C.

‘The first respondent, Rorich Wolmarans Luderitz, is directed to pay the applicant 50% of the proceeds of the sale of the property held in its trust account within 30 days of finalisation of the deceased’s estate.’

2 Save as aforesaid, the application for leave to appeal is dismissed with costs.

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F KATHREE-SETILOANE

ACTING JUDGE OF APPEAL

Appearances

For the applicant:	D Z Kela
Instructed by:	Ndumiso Voyi Inc, Midrand Webber Attorneys, Bloemfontein
For the respondent:	W Smit
Instructed by:	Schoeman Sejwane Grobler Inc, Roodepoort Lovius Block Attorneys, Bloemfontein.