IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

SIGNATURE DATE: 24 February 2025

Case No. A2024-076119

In the matter between:

FREDRICH ERNST VAN DYK First Appellant

CHRIS AVRIL STUART Second Appellant

and

TERESA MAY RHODES Respondent

Summary

The common law doctrine of nullity is not applicable to court orders, which derive their validity from section 165 (5) of the Constitution, 1996. A court order can no longer be ignored or rescinded merely upon proof that it would have been regarded as a common law nullity. The ordinary principles of rescission or appeal will always apply to court orders wrongly granted, no matter what error led to their issuance.

JUDGMENT

WILSON J (with whom CRUTCHFIELD J and NOKO J agree):

1 The central question in this appeal is whether a court order can be rescinded merely upon proof that the common law would have regarded it as a nullity.

We hold that, in light of section 165 (5) of the Constitution, 1996, and of the decisions of the Constitutional Court in *Department of Transport v Tasima* 2017 (2) SA 622 (CC) ("*Tasima*") and *City of Ekurhuleni City v Rohlandt Holdings CC* 2025 (1) SA A (CC) ("*Rohlandt*"), a court order can no longer be ignored or rescinded merely upon proof that it would have been regarded as a common law nullity. The ordinary principles of rescission or appeal will always apply to court orders wrongly granted, no matter what error led to their issuance.

The dispute

2 The first appellant, Mr. van Dyk, met the respondent, Ms. Rhodes, in 2010, while participating in an online poker tournament. At the time, Mr. van Dyk lived in South Africa and Ms. Rhodes lived in the United Kingdom. A friendship blossomed online. Ms. Rhodes referred to Mr. van Dyk in deeply affectionate terms. Adopting a South African colloquialism, Ms. Rhodes referred to Mr. van Dyk as her "boytjie", and to herself as Mr. van Dyk's "mom". The emails that passed between them show that Ms. Rhodes was alienated from her family and friends in the UK, and that she felt a closeness with Mr. van Dyk, even though he lived on the other side of the world.

3 Eventually, Ms. Rhodes visited Mr. van Dyk and his husband, Mr. Stuart, who is the second appellant in these proceedings. Ms. Rhodes enjoyed her holidays with the appellants, and eventually developed a plan to relocate to South Africa and to live with them on a farm near Krugersdorp. To give effect to this plan, Ms. Rhodes advanced the appellants money towards the purchase of a farm, which was registered in the appellants' names.

4 Between 2013 and 2019 Ms. Rhodes lived on the farm with the appellants. However, she ultimately fell out with the appellants, and decided to move back to the UK. Ms. Rhodes then sought the repayment of what she said was a loan to the appellants to allow them to buy the Krugersdorp farm.

5 Initially, the appellants denied that Ms. Rhodes had loaned them the money. They claimed the money was a gift. However, no doubt partly as a result of assurances from Ms. Rhodes' attorney, a Mr. Badenhorst, that Ms. Rhodes intended to sue for the repayment of the money she advanced, the appellants signed an undertaking to pay R1.735 million to Ms. Rhodes, plus interest, on the terms and conditions set out in a self-described "agreement of settlement" entered into on 13 May 2019.

6 Clause 1 of the agreement records that the appellants had "disputed [Ms. Rhodes'] right to be repaid in respect of the amounts of money advanced to them by [Ms. Rhodes]", and that, but for the agreement, Ms. Rhodes "was about to institute action against" the appellants for the recovery of what she claimed was a loan. Clause 2 of the agreement provided for payment of the capital amount due by no later than 31 May 2022, preferably, but not necessarily, out of the proceeds of the sale of the Krugersdorp farm. Interest at the rate of 5% per annum on the capital amount was to run from 1 June 2020, unless the appellants defaulted, in which case the legally prescribed rate of *mora* interest would apply. Clause 4 of the agreement records the parties' consent to have the agreement made an order of this court.

7 On 27 June 2019, Ms. Rhodes instituted an application, on notice to the appellants, to have the agreement made an order of court. Matsemela AJ made the settlement agreement an order of court on 2 September 2019.

8 The appellants did not abide by the terms of the agreement. Ms. Rhodes then applied to sequestrate them, which prompted the appellants to seek legal advice of their own. It was, however, not until 14 August 2023, almost four years after Matsemela AJ made his order, that the appellants finally launched a rescission application. In the rescission application, the appellants revived their contention that the money Ms. Rhodes advanced to them was a gift rather than a loan. The appellants then advanced three grounds for the rescission of Matsemela AJ's order, which were set out at paragraph 41 of the appellants' founding affidavit.

9 The first ground was that because Ms. Rhodes had never actually issued summons claiming repayment of the loan she alleged, Matsemela AJ lacked the jurisdiction necessary to make the settlement agreement an order of court. The second ground was that the claim for repayment of the loan had prescribed by the time the settlement agreement was signed. The appellants' third ground was that Mr. Badenhorst had used his position as an attorney to unduly influence them into signing the settlement agreement in circumstances where they had no idea what their rights really were.

The judgment of the court below

10 The rescission application was opposed and in due course came before Wright J in the court below. Wright J dismissed the application on 4 June 2024. He did so on the basis that the appellants' explanation for their four-year delay

in bringing the rescission application was “hopelessly inadequate”. Wright J also held that the defences the appellants said they had to the application to make the settlement agreement an order of court were so “weak” that they could not “save the [appellants] on the question of condonation” (paragraph 8 of the judgment *a quo*).

11 The appellants then sought, and Wright J granted, leave to appeal to a Full Court of this division. The grounds of appeal identified in the notice of application for leave to appeal, and in the notice of appeal itself, constituted a significant narrowing of the appellants’ case. On appeal, the appellants advanced only one contention: that Matsemela AJ had no power to make the settlement agreement an order of court because there was no litigation on the settled issues between the parties at the time the agreement was made. The question of whether, to what extent, and with what level of remissness or culpability the appellants had delayed bringing the rescission application was, the appellants said, entirely irrelevant. The appellants contended that Matsemela AJ’s order was a nullity, and should be set aside on that basis alone.

12 Accordingly, we can safely determine the matter on the basis that the appellants no longer persist in their undue influence and prescription arguments. Nor do they seek to persuade us that their delay in bringing the rescission application was excusable. The appellants’ case is rather that Matsemela AJ’s order must be set aside because, and only because, he had no power to make it.

The appeal

13 The narrow scope of the case on appeal means that there are really only two questions before us. The first is whether Matsemela AJ ought to have made the settlement agreement an order of court notwithstanding the absence of preceding litigation. The second is whether, if Matsemela AJ ought not to have done so, the rescission of his order must automatically follow.

The power to make a settlement agreement an order of court

14 A court's power to make a consent order was dealt with comprehensively in *Eke v Parsons* 2016 (3) SA 37 (CC) ("*Eke*"). *Eke* set three requirements for a valid consent order. The first is that the order "relate directly or indirectly to an issue or *lis* between the parties. Parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of court" (*Eke*, paragraph 25). The second is that the terms of the order must be consistent with the Constitution, the law and public policy, and capable of being practically implemented. The third is that the settlement agreement must hold "some practical and legitimate advantage" to at least one of the parties (*Eke*, paragraph 26).

15 The appellants rely on the first of these requirements. They say that for a settlement agreement to relate to a *lis* or issue between the parties, there must have been preceding litigation on the settled issues. The Constitutional Court would not otherwise have ruled out agreements made outside "the context of litigation".

16 This is also the approach taken in *Avnet South Africa (Pty) Limited v Lesira Manufacturing (Pty) Limited* 2019 (4) SA 541 (GJ) ("*Avnet*"). In *Avnet,* the court held that it could not make an acknowledgement of debt an order of court because there was no litigation preceding the agreement placed before it. Indeed, it appears from the judgment in *Avnet* that there was never a justiciable issue between the parties at all. There was a debt, which the respondent acknowledged. There was never any prospect of contested litigation on whether the respondents in that case really did owe the applicant a debt that was due and payable.

17 I have given some thought to whether the appeal before us might fall within a penumbra of cases in which a court could grant a consent order without litigation having been instituted. Such a power might be available to settle a clearly defined justiciable dispute between the parties on which, but for the settlement agreement, litigation would be inevitable. However, like the court in *Avnet*, and for the reasons given there, I do not think that the decision in *Eke* can reasonably be interpreted to allow a court to make a consent order in the absence of preceding litigation.

18 *Eke* draws a distinction between a "*lis*" and an "issue" (see *Eke* paragraph 25). *Eke* holds that a consent order must relate either to an issue or to a *lis*. It was suggested in argument before us that this distinction empowers a court to make a consent order relating to an "issue" that arises between parties not engaged in litigation. I do not think that is correct. *Eke* uses the word "*lis*" to refer to the lawsuit or litigation as pleaded. *Eke* deploys the word "issue" to refer to a dispute between litigating parties which may not relate directly to the

pleaded case. *Eke* says that settlement agreements that cover unpleaded issues can be made orders of court so long as the settlement agreement disposes of the main pleaded case - the "*lis*". The upshot is that an "issue" is a dispute between parties already locked in litigation. It is not merely a justiciable dispute that has not yet been sued on.

19 Moreover, in *Road Accident Fund v Taylor* 2023 (5) SA 147 (SCA), at paragraph 41, the Supreme Court of Appeal confirmed that consent orders must relate to settled litigation: "an agreement that is unrelated to litigation, should not be made an order of court". In *Rohlandt* at paragraph 50, the Constitutional Court confirmed that, although the requirement that a consent order relates to litigation should be applied flexibly and "generously", a "legal agreement reached entirely outside the context of litigation cannot be made an order of court".

20 It follows that consent orders should only be made where litigation has been instituted. It is not enough that the parties have a justiciable dispute on which litigation is inevitable.

<u>The power to rescind an order wrongly granted</u>

21 Accordingly, Matsemela AJ should not have made the settlement agreement between the appellants and Ms. Rhodes an order of court, because the agreement did not settle pending litigation. The appellants argue that Matsemela AJ's order is, as a result, a nullity, and that it should be rescinded on that ground alone.

22 The doctrine of nullity has traditionally been relied upon to allow litigants to ignore an order that a court had no power to grant. The idea is that "a thing done contrary to a direct prohibition of the law is void and of no force and effect", and can safely be ignored. There need be no pronouncement that an order granted without jurisdiction or contrary to statute is void. Nor need such an order formally be set aside (see, for example, *Master of the High Court v Motala* 2012 (3) SA 325 (SCA), paragraphs 14 and 15, and the cases cited there).

23 However, in *Tasima*, a majority of the Constitutional Court made clear that the doctrine of nullity no longer applies to court orders. This is because the Constitution gives court orders a life of their own. Section 165 (5) of the Constitution, 1996, states in unqualified terms that "an order or decision issued by a court binds all persons to whom and organs of state to which it applies". Accordingly, a court order derives its validity from the Constitution itself rather than from any specific antecedent power to make it. The Constitution provides that it is enough that there was a court, and that the court issued an order. Once that is established, any order so issued is valid and binding until set aside, even if it is grossly wrong (see *Tasima*, paragraphs 180 to 182 and 190 to 197).

24 In *Tasima*, the Constitutional Court recognised one minor qualification to this rule. That qualification applies where a court makes an order enforcing an administrative decision which is later set aside. When the administrative decision is set aside, the court order enforcing it also falls away, even though the court setting aside the administrative decision might not also have

explicitly set aside the earlier court order (*Tasima*, paragraph 198). But that makes no difference to the general rule: once a court order is made, it is binding unless and until another court intervenes.

25 Of course, in this case, the appellants do not seek to persuade us that the order of Matsemela AJ is a nullity in the sense that it can be completely disregarded. They say that it should be rescinded as a nullity, because it was issued in circumstances where the court had no power to make it.

26 The next question is accordingly whether, even though a court order cannot be ignored as a nullity, a court order may nevertheless be rescinded merely upon proof of the absence of a specific antecedent power to make it. This seems to have been the approach in *Travelex Limited v Maloney* 2016 JDR 1776 (SCA). In *Travelex*, the Supreme Court of Appeal that held a court order granted without jurisdiction should be rescinded rather than ignored, but that "the usual requirements for a rescission application" do not apply to such an application, presumably because mere proof of absence of jurisdiction would be enough to set the order aside.

27 However, in *Rohlandt*, the Constitutional Court took a different approach. The court held that "the fact that an order may be incorrect or in conflict with the Constitution is not, on its own, a reason for its rescission" (*Rohlandt*, paragraph 87). The ordinary requirements for a rescission of judgment must be met. In a common law rescission application, that generally means that any delay in bringing the application must be explained satisfactorily; that the application be brought in good faith; that any default of appearance must be explained; and that there be a defence to the claim on which the order was

issued which stands some prospect of success (*Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765B-C). A weak explanation for being in default of appearance can be "cancelled out" by a strong defence on the merits (*Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA), paragraph 12). Moreover, even where all the requirements for rescission are met, a court retains a wide discretion to refuse rescission "if justice and equity demand it" (*Rohlandt*, paragraph 100).

28 It follows from all this that Matsemela AJ's order need not have been set aside purely on the basis of the absence of antecedent litigation between the parties, and that the court below was correct to apply the ordinary requirements for a common law rescission. And because the appellants have chosen not to appeal against the way that the court below applied those requirements, there is no basis on which we can second-guess the way the court below did so. The question before us was limited to whether the order of Matsemela AJ ought to have been set aside merely upon proof of the absence of antecedent litigation. I have held that the absence of such litigation was not enough, on its own, to justify the rescission of Matsemela AJ's order. The ordinary requirements for rescinding Matsemela AJ's order still had to be met.

The merits of the rescission application

29 Strictly speaking, that is the end of the appeal. However, even if I were inclined to entertain the appeal on the basis that we are entitled to consider the merits of the rescission application, I would still have dismissed it, because the appellants had not met the ordinary requirements for the rescission of Matsemela AJ's order. The absence of pending litigation was not such a

strong defence to the application to make the settlement agreement an order of court as to make up for the four-year delay in bringing the rescission application. Nor would it have made up for the fact that the appellants signed the agreement and then let it be made an order of court despite having had adequate notice of Ms. Rhodes' intention to do so, and of the date on which Matsemela AJ made the order.

30 The absence of preceding litigation is, after all, a purely technical defence to the application to have the settlement agreement made an order of court. Even if it were not embodied in a consent order, the settlement agreement would still have prevented further litigation on the issue of whether the amount Ms. Rhodes advanced to the appellants was a gift or a loan. Matsemela AJ's order in itself made no difference to the nature of the appellants' obligations to Ms. Rhodes (see *Cachalia v Harberer & Co* 1905 AD 437 at 464). The consent order did change the manner in which the appellants' obligations under the settlement agreement could be enforced, but the appellants' papers have nothing to say about why enforcing the settlement agreement as a court order would be inherently unfair or unlawful.

31 The other defences raised in the court below are very weak indeed. The prescription argument is a red herring. Whether or not Ms. Rhodes' claim prescribed, the agreement to repay the loan embodied in the settlement agreement constitutes a separate and free-standing basis on which the appellants are liable to her.

32 The undue influence point is likewise stillborn. The mere fact that the appellants may subjectively have felt intimidated by Mr. Badenhorst does not

mean that they signed the agreement under undue influence. Even if the appellants' founding affidavit is taken at face value, it is clear that Mr. Badenhorst did not use his position as an attorney to mislead the appellants or to supplant their decision-making power. He did what any attorney in his position would have done: he told the appellants that Ms. Rhodes would sue the appellants if they did not settle on the terms embodied in the agreement. The very generous terms as to interest in the agreement and the extended periods the appellants were given to meet their obligations belie the suggestion that they were improperly influenced in any way. Ultimately, the appellants were always free to obtain legal advice of their own.

33 The appellants did not rely on Rule 42 (1) (a) of the Uniform Rules of Court in their founding papers, but I should point out that the Rule would not, in any event, have helped them. Rule 42 (1) (a) permits the rescission of an order "erroneously sought or erroneously granted in the absence of any party affected thereby". "Absent" for the purpose of the rule means absent and unaware that the matter is proceeding or in some other way precluded from participating in the hearing. The rule does not apply to parties who, like the appellants in this case, were given notice of the proceedings to make the settlement agreement an order of court and who then chose to be absent because they had consented to the order (see *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC), paragraphs 60 and 61).

34 Finally, and even if the ordinary requirements for the rescission of Matsemela AJ's judgment had been met, I think that this would have been a proper case in which to exercise our discretion to refuse rescission. The effect of rescinding Matsemela AJ's order would be that the settlement agreement would then have to be complied with or undone. The absence of any reasonable prospect that the underlying settlement agreement is open to challenge means that it can only be complied with. Ultimately, the rescission of Matsemela AJ's order would make no difference to the parties' underlying obligations, but it may spawn further litigation to undo the agreement. On the facts before us, that litigation would be a waste of time.

Order

35 For all these reasons, this appeal is dismissed with costs, including the costs of counsel, which may be taxed on the "B" scale.

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 24 February 2025.

HEARD ON:	12 February 2025
DECIDED ON:	24 February 2025
For the Appellants:	A van Wyk (Heads of argument drawn by S McTurk) Instructed by WA Opperman Attorneys
For the Respondent:	JW Kloek Instructed by JJ Badenhorst & Associates