IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: A3047/2019

COURT *A QUO* CASE NO: 330/2013
DATE: 30th January 2023
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: Yes

In the matter between:

L[....], V[....] K[....] Appellant

and

L[....], D[....] Z[....] Respondent

Heard: 24 January 2023

Delivered: 30 January 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 12:30 on 30 January 2023.

Summary: Appeal – practice – s 36 of the Magistrates Court Act – Magistrates Court Rule 49 – Judgments and orders – variation of – divorce order, incorporating settlement agreement – does not deal with respondent's Pension Fund – respondent contended that intention was to award to her a share of appellant's pension Fund – she applied in terms of Rules for judgment to be varied so that judgment accord with the law relating to the division of a joint estate – proper interpretation of divorce settlement –

Section and rule do not operate where the intention of the parties was to exclude wife's pension – court order cannot be varied if the effect would be to amend agreement – amended agreement not intended by parties – order not granted erroneously – 'good reason' does not exist to vary court order – application should have been refused –

Appeal upheld.

ORDER

On appeal from: The Vereeniging Regional Court (Acting Regional Magistrate C Reyneke sitting as Court of first instance):

(1) The appellant's appeal against the order of the court *a quo* is upheld with costs.

(2) The order of the court *a quo* is set aside and in its place is substituted the following: -

> '(a) The plaintiff's application for condonation of the late filing of the variation application is dismissed, with costs.
>
> (b) The plaintiff's variation application is dismissed, with costs.'

(3) The respondent shall pay the appellant's costs of the appeal.

JUDGMENT

Adams J (Turner AJ concurring):

[1]. The appellant and the respondent were previously married to each other in community of property. On 11 November 2013 they were officially divorced by a decree of the Vereeniging Regional Court ('the Regional Court' or 'the court *a quo*'), which incorporated a written settlement agreement, which had been concluded between the parties on 7 September 2013. Approximately four and a half years later – on 7 May 2018 – the respondent caused to be issued out of the said court an application for the variation of the divorce order, the effect of which would have been that the respondent would become entitled to thirty percent of the pension interest in the appellant's Pension Fund. The appellant's Pension Fund was not dealt with at all in the original divorce settlement, because, so the appellant alleged, the respondent had waived any and all of her rights to any entitlement to such pension interest when the divorce was settled.

[2]. On 18 April 2019, the court *a quo*, despite fierce opposition from the appellant to the variation application, granted the respondent the relief sought by her and issued an order in the following terms: -

> '(a) The decree of divorce dated 11th November 2013, is supplemented by the insertion of a third clause, to read as follows: -
>
> "It is ordered that 30 percent of the defendant's [appellant's] pension interest, as defined in section 1 of the Divorce Act, Act 70 of 1979, in the Government Employees Pension Fund be paid to the plaintiff [respondent].
>
> The abovementioned Fund is ordered to endorse its records accordingly and to make payment directly to the plaintiff of the amount due to her, or to

transfer the funds to an approved Pension Fund / Provident Fund / Retirement Annuity Fund within sixty days of her request, on presentation of this court order.

(b) Costs of the application are awarded to the applicant [respondent].'

[3]. It is against this order of the Regional Court that the appellant appeals to this Court, contending that the Regional Court erred in finding that a legal basis exists for the original divorce order to be varied. Therefore, in issue in this appeal is whether the Regional Court was correct in varying the decree of divorce by amending the settlement agreement entered into between the parties, that formed the basis of the divorce order. This issue is to be considered against the factual backdrop in the matter, as set out in the paragraphs which follow, and which also possibly require an exercise in the legal interpretation of the said settlement agreement.

[4]. The respondent had applied for a variation of the said divorce order presumably in terms of s 36 of the Magistrates Court Act[1], read with Magistrates Court Rule 49. Section 36 of the Magistrates Court Act reads in the relevant part as follows: -

'**36 What judgments may be rescinded**

(1) The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), *suo motu* –

(a) … … …;

(b) rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties;

(c) correct patent errors in any judgment in respect of which no appeal is pending;

[1] Magistrates Court Act, Act 32 of 1944;

(d) rescind or vary any judgment in respect of which no appeal lies.'

[5]. The relevant and applicable parts of rule 49 is sub-rules (7) and (8), which provide as follows; -

> '(7) All applications for rescission or variation of judgment other than a default judgment must be brought on notice to all parties, supported by an affidavit setting out the grounds on which the applicant seeks the rescission or variation, and the court may rescind or vary such judgment if it is satisfied that there is good reason to do so.
>
> (8) Where the rescission or variation of a judgment is sought on the ground that it is void from the beginning, or was obtained by fraud or mistake, the application must be served and filed within one year after the applicant first had knowledge of such voidness, fraud or mistake.'

[6]. Accordingly, the question to be considered in this appeal is whether 'good reason' existed for the Regional Court to have varied its previous divorce order, which incorporated the written agreement of settlement concluded between the parties and which formed the basis of the decree of divorce. The settlement agreement was in the form of a standard pre-printed form, which required to be completed by the parties or their legal representatives and which also, in certain parts, called for words, phrases or sentences to be deleted. The agreement, in the relevant parts, reads as follows: -

> **'(1) Proprietary Claims**
>
> (1.1) There will be a division of the Joint Estate / *It is further agreed that [respondent's] Pension / Provident fund interests (Member's Pension / Provident Fund no. [....]) be endorsed by the administrators of the Government Employees Pension Fund (Name of Pension / Provident fund) (or its successor in title) to the effect that the court has ordered a division of the joint estate subsisting between the parties and that such endorsement reflect that the [appellant] (Non-member) of such fund be entitled to 30%,

after taxation, of the [respondent's] (Member's) pension interest in such fund, calculated as at the date of divorce; *Payable by the fund within 60 days after receiving written notification from [appellant] in which such [appellant] specifies whether he elects to receive a cash benefit or have the benefit transferred to another fund.

This order is issued pursuant to the provisions of Section 7(8)(a)(1) of the Divorce Act, 1979 no 70 of 1979, as amended, as well as section 37D(e)(iii) of the Pension Funds Amendment Act no 11 of 2007.'

[7]. The pre-printed clause 1.2 of the standard agreement is deleted in its entirety in that a line is drawn through the contents of this sub-clause. Clause 1.3 provided, with regard to their respective proprietary claims, that the parties agreed to retain those assets then in their respective possession and/or under their respective control in settlement of their respective claims in the joint estate. Clause 1.4 dealt with the immovable property of the community estate, that being a house in Sebokeng, which the parties agreed would be retained by the appellant as his sole and exclusive property in exchange for payment to the respondent by the appellant of the equivalent of 50% of the value of the said property.

[8]. The aforegoing is the sum total of the material provisions of the divorce settlement agreement. The case of the respondent in the Regional Court was that, whilst she accepts that the agreement made no provision for her to receive a portion of the pension interest of the appellant's pension fund, she nevertheless contended that she is entitled to thirty percent of the said pension interest, because of their marriage in community of property. At the time of the settlement of the divorce, she did not insist that the agreement should provide for her share of the pension interest to be paid to her as the divorce process was 'extremely emotionally taxing, and all that [she] wanted to do was get it over and done with'.

[9]. I interpose here to mention that, at the time of their divorce, both parties were legally represented and it appears to me that the above settlement agreement was reached by the parties after a fair amount of negotiations between the duly represented parties. In fact, the general tenet of the case on behalf of the respondent

was that no agreement was reached between the parties in relation to the appellant's pension interest. She contends, however, that she remained entitled *ex lege* to a share in the appellant's pension interest. There is, in my view, no legal basis for this contention, which, on the basis of general principles of contract, is without merit. That, I believe, is the end of the respondent's case. And that is so despite the contention by the respondent that the appellant's pension interest in the Government Employees Pension Fund ('GEPF') was deemed to be an asset of their joint estate. The point is simply that *pacta sunt servanda* and there is no reason why the respondent should not have been held bound by their divorce settlement.

[10]. The only possible basis on which the original settlement agreement could be varied is if one is to interpret the agreement as awarding to the respondent, by implication, a portion of the pension interest. There are however two difficulties with that approach. Firstly, a purposive and contextual interpretation of the agreement does not support such a conclusion, the point simply being that, if the parties intended the respondent to receive a portion of the pension interest in the appellant's pension fund, the agreement would probably have expressly provided accordingly, as is the case in relation to the pension interest of the respondent in respect of which the parties agreed that the appellant would receive thirty percent of same. The point is that in the present case, the appellant's pension interest is excluded by the maxim *expressio unius est exclusio alterius*, meaning that the express mention of one thing is the exclusion of the other. In that regard, see for example, *Administrator, Transvaal, & others v Zenzile & Others*[2]. Moreover, if regard is had to the express provision in the agreement that the parties would each retain those community assets which they had in their possession or which were under their control at the time of the agreement, it has to be accepted that the parties intended that the pension interest in the appellant's pension fund was to be retained by him.

[11]. Secondly, in his answering affidavit in the Regional Court variation application, the appellant denied that the intention of the parties was that the respondent would receive a portion of his pension interest in his pension fund. He explained that the agreement was in fact that the respondent would not have any

[2] *Administrator, Transvaal, & others v Zenzile & Others* 1991 (1) SA 21 (A) at 37G-H.)

claim against his pension interest because of what he had contributed to the respondent's maintenance and her further education during the subsistence of the marriage. Also, so the appellant averred, during the divorce proceedings, he initially intended asking for and in fact did pray for a forfeiture by the respondent of some of the benefits of the marriage in community of property. On the basis of the *Plascon-Evans* principle, the version of the appellant should have been accepted by the Regional Court.

[12]. I am accordingly not persuaded that the divorce settlement agreement is open to an interpretation as contended for by the respondent. To my mind, the settlement agreement as framed, is to be interpreted so as to exclude the appellant's pension interest. The clear language of the settlement agreement militates against an interpretation to the contrary and the circumstances in which the settlement agreement came into being do not lend themselves to that interpretation.

[13]. It also does not avail the respondent to rely on cases such as *Ndaba v Ndaba*[3], for the simple reason that those cases are distinguishable from the present case on the basis that the original divorce orders in those matters, which included orders for the so-called blanket division of the estates, making provision for the equal division of the joint estates. That then means that s 7(7) of the Divorce Act[4], which is peremptory in its provisions, found application in those matters and that the pension interests of spouses married in community of property were, by default, deemed to be part of the joint estate. Not so *in casu*, where there was an express agreement between the parties to the contrary.

[14]. For all of these reasons, I am of the view that 'good reason', as a requirement of s 36 of the Magistrates Court Act and Magistrates Court Rule 49 for the variation of a court order, did not exist for the Regional Court to vary its previous divorce order, which should not have been amended.

[15]. In the Regional Court, the respondent also applied for condonation of the late filing of the variation application, which was granted by the Regional Court. From the

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[3] *Ndaba v Ndaba* 2017 (1) SA 342 (SCA); [2017] 1 All SA 33 (SCA);

[4] Divorce Act, Act 70 of 1979;

above it is clear that, on the merits of the main application, the respondent should have failed, which means that the application for condonation should not have been granted if for no other reason than the fact that she had no prospects of success on the said variation application.

Conclusion and Costs

[16]. For all of the aforegoing reasons, the appeal should succeed and the order of the Regional Court dated 18 April 2019 should be substituted with an order dismissing the variation application of the respondent, as well as the condonation application. There was clearly no good reason for the original divorce order to be varied.

[17]. As regards costs, I can see no reason why there should be a deviation from the general rule that the successful party should be awarded his costs.

Order

[18]. Accordingly, I make the following order: -

(1) The appellant's appeal against the order of the court *a quo* is upheld with costs.

(2) The order of the court *a quo* is set aside and in its place is substituted the following: -

'(a) The plaintiff's application for condonation of the late filing of the variation application is dismissed, with costs.

(b) The plaintiff's variation application is dismissed, with costs.'

(3) The respondent shall pay the appellant's costs of the appeal.

L R ADAMS

Judge of the High Court of South Africa

Gauteng Division, Johannesburg

HEARD ON:	24th January 2023.
JUDGMENT DATE:	30th January 2023 – handed down electronically
FOR THE APPELLANT:	Attorney Hlatswayo
INSTRUCTED BY:	Hlatswayo-Mhayise Incorporated, Johannesburg
FOR THE RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance