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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO.: **1751/2008**

Reportable: YES/**NO**

Circulate to Judges: YES/**NO**

Circulate to Magistrates: YES/**NO**

Circulate to Regional Magistrates: YES/**NO**

In the matter between:

K[...] P[...] M[...]	**APPLICANT**
And	
O[...] L[...]	**1st RESPONDENT**
MASTER OF THE NORTH WEST HIGH COURT	**2nd RESPONDENT**
(Estate Number: 2962/2017)	

REASONS FOR ORDER

MASIKE AJ

INTRODUCTION

[1] On 15 May 2025, this Court made an order which reads as follows:

> "1. The application is dismissed.
>
> 2. The applicant is ordered to pay the costs of the application on a party and party scale, including the costs of counsel on scale "A"."

[2] The applicant filed a notice on 16 May 2025 which reads as follows:

> "Be pleased to take notice that the Applicant requests written reasons for the judgment handed down by the Honourable Acting Justice Masike on 15 May 2025".

[3] On 15 May 2025, when handing down the order quoted in paragraph 1, the Court gave an *ex tempore* judgment. I, however, proceed to give written reasons as requested.

FACTS

[4] On 15 May 2025, what served before this Court was an application for variation of the final decree of divorce granted under case number 1751/2008. The relief sought by the applicant against the first and second respondent reads as follows:

> "1. Variation of the final decree of divorce granted under case number: 1751/2008;

2. That order 2 of the final decree of divorce be varied and substituted with an order as follows:

2.1 Equal division of the joint estate.

3. That any Respondent opposing this application be ordered to pay the costs.

4. Such further and/or alternative relief as the above Honourable Court deems fit."

[5] The genesis on this application stems from a divorce action between the applicant and the late Mr B[...] S[...] M[...] (the late Mr M[...]). The applicant and the late Mr M[...] were married to each other out of community of property.

[6] The late Mr M[...] instituted divorce proceedings against the applicant on 22 July 2008. The late Mr M[...] in his prayers in the divorce action claimed a decree of divorce and an order granting custody of the minor child to the applicant and he offered to pay maintenance for the child at R500 per month. At the hearing of the divorce action on 18 March 2013, the minor child had reached the age of majority and consequently the issue of maintenance was not pursued. There was also no claim for division for the joint estate of the parties because the marriage of the applicant and the late Mr M[...] was out of community of property with the accrual system inapplicable to the marriage.

[7] This issue of the marital regime between the applicant and the late Mr M[...] is dealt with in the Judgment of Madam Justice Leeuw Judge President (Leeuw JP) dated 16 April 2013 at paragraph 2. The judgment of Leeuw JP was attached to the founding affidavit of the applicant and marked "D".

[8] From the reading of the judgment of Leeuw JP it was common cause that the parties were married out of community of property on 7 February 1991. It was further agreed between the parties at the pre – trial conference that the marriage was out of community of property and the accrual system was not applicable to the marriage due to the fact that the parties had not entered into a pre-nuptial contract. It was agreed that the issue to be decided was in respect of division of house 1[...] D[...] Montshiwa.

[9] From the reading of the judgment of Leeuw JP, it is palpable that the evidence of the late M[...] was led, he was cross examined, the evidence of the applicant who was the defendant in the divorce action was led and she was cross examined. At the conclusion of the trial, Leeuw JP made an order which reads as follows:

> "1. A decree of divorce is granted;
>
> 2. I order absolution from the instance in respect of the claim for the division of the joint estate in respect of House No. 1[...] D[...] Street Montshiwa;
>
> 3. Each party to pay its own costs."

[10] It would be apposite to quote from paragraph 12 of the judgment of Leeuw JP dated 16 April 2013. I do this because this Court at the hearing of the matter on 15 May 2025, raised this issue with of counsel for the applicant and this Court indicated the doors of the court are not shut on the applicant. The Honourable Leeuw JP stated as follows at paragraph 12:

"With regard to the defendant's claim for the division of the house, I prefer to afford the defendant an opportunity to properly approach the Court on this issue if she is still of the view that she has a valid claim against the plaintiff in that regard."

[11] It is the judgment of Leeuw JP dated 16 April 2013 (the 16 April 2013 judgment), that the applicant seeks to have varied. The case of the applicant is that when she and the late Mr M[...] got married to each other, the provisions the Matrimonial Property Act 88 of 1984 were applicable. It is the case of the applicant, so the argument goes, that the marriage between herself and the late Mr M[...] was in community of property.

[12] When this matter was argued before me, counsel for the applicant insisted that the incorrect legal principles and/or legislation was utilized to determine the matrimonial property system in the divorce action between the applicant and the late Mr M[...].

[13] At the hearing of the matter before this Court, I enquired from counsels for the applicant and the first respondent, if this Court was competent to make an order sought in the notice of motion. I enquired if this matter should not have been brought as an appeal against the 16 April 2013 judgment. Counsel for the applicant informed the Court that the application is based on Rule 42 of the Uniform Rules of the Honourable Court. Counsel for the first respondent submitted that the matter should have been brought as an appeal to the 16 April 2013 judgment.

THE LAW

[14] Rule 42 reads as follows:

"**42 Variation and rescission of orders**

(1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

[15] In *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I – 533A Harms AJA as he was then held that:

"A judgment or order is a decision which, as a general principle has three attributes, first, the decision must be final in effect and not susceptible of alternation by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the affect of disposing of at least a substantial portion of the relief claimed in the main proceedings"

ANALYSIS

[16] Counsel for the applicant when addressing this Court, indicated that he is relying on Rule 42(1)(c) of the Uniform Rules of Court in that the judgment granted by

Leeuw JP was granted as a result of a mistake common to the parties. In my view, the reliance by counsel for the applicant on Rule 42(1)(c) was misplaced and bad in law.

[17] My understanding of the rule is as follows: A common mistake would cover the case of a judgment entered by consent where the parties consented in *justus error*. In the matter that served before Leeuw JP, the judgment was not entered by consent. The judgment was entered after a full trial was heard the evidence of both the plaintiff and the defendant having been led.

[18] It is my further understanding that it is not sufficient if the error is that of the court. If the court has given judgment on mistaken facts, the judgment can be set aside only if the error was due to the fraudulent misrepresentation (See: *First Consolidated Leasing Corporation Ltd v McMullin* 1975 (3) SA 606 (T) at 608). The applicant in her affidavit in support of the application for variation, never alleged fraud on the part of the late Mr M[...] or any party. In argument counsel for the applicant never made submissions to suggest there was fraud committed by the late Mr M[...] or any party.

[19] Lastly, it is my understanding that it is not sufficient if the error is that of the legal representative. A litigant who herself is mistaken about the relief to which she is entitled, so that this is abandoned, or who is mistaken due to the advice of a legal representative, cannot succeed on the basis of 'common mistake' in terms of Rule 42(1)(c). (See: *A.N v N.C.N* (2283/2021) [2022] ZAECMKHC 14 (17 May 2022) at para 29.

[20] The pleaded case of the applicant and the late Mr M[...] before Leeuw JP was that the parties were married out of community of property excluding the accrual system. The argument by counsel for the applicant is that Leeuw JP should not have decided the matter based on the pleaded case because Leeuw JP was not

presented with a pre-nuptial contract when the divorce matter was heard. This submission is without merit.

[21] Counsel for the applicant overlooks a number of issues in the divorce trial that served before Leeuw JP. He overlooks what is stated at paragraph 4 of the judgment dated 13 April 2013 which reads as follows:

"At the commencement of the proceedings the parties reiterated that it was agreed at the pre – trial conference that the marriage was out of community and that the accrual system was not applicable to the marriage due to the fact that the parties had not entered into a pre-nuptial contract."

[22] From the submissions made by counsel for the applicant, he expected Leeuw JP to have interrogated the pleadings of the applicant and the late Mr M[...] in the divorce proceedings that served before the court and in the absence of a pre–nuptial contract, should have found the parties are married in community of property and decided the divorce proceedings on that basis. I must with respect disagree with counsel for the applicant. That was not the pleaded case of the applicant and the late Mr M[...].

[23] The function of judicial officers is to determine the issues before them and to confine themselves to such issues. It is for the parties to set out and define the nature of their dispute in the pleadings and the court to then adjudicate on the issues so defined. It is not for the judicial officer to create new factual issues. (See: *Goedverwachting Farm (Pty) Ltd v Roux and Others* (641/2023) [2024] at para 21).

[24] The pleaded case before Leeuw JP, in my view, did not call on the court to insist on being presented with a copy of the pre–nuptial contract between the applicant and the late Mr M[...]. In my view, Leeuw JP relied on the pleaded case and the submissions of counsel that served before the court that the applicant and the

late Mr M[...] were married out of community of property, that the parties had not entered into a pre-nuptial contract. Consequently, Leeuw JP could not insist on being presented with a document the court had been told does not exist. It was not open to Leeuw JP to have decided the divorce action as though the parties were married in community of property, this would have amounted to Leeuw JP creating new factual issues which were not pleaded by the parties.

[25] The judgment of 16 April 2013 is final in effect, it is not susceptible of alternation by the court of first instance; it is definitive of the rights of the parties; and, it has the affect of disposing of at least a substantial portion of the relief claimed in the divorce proceedings that served before Leeuw JP. The applicant should have appealed the judgment of 16 April 2013.

[26] It is a principal of our jurisprudence that costs follow the cause unless there are reasons to depart from this trite principle. Counsel for the applicant was invited to make submissions on the question of costs. The Court was told that the applicant does not have money, and no order should be made as to costs. In my view this was not sufficient for the Court to depart from the trite principal relating to costs. The application to vary the order of Leeuw JP of 16 April 2013 was not complex.

[27] For these reasons, the application was dismissed, and the applicant was ordered to pay the costs on a party and party scale, including costs of counsel on Scale "A".

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T MASIKE

ACTING JUDGE OF THE HIGH COURT SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE FOR HEARING	**15 MAY 2025**
DATE REQUESTED FOR REASONS :	**16 MAY 2025**
DATE REASONS GIVEN	**17 JUNE 2025**
FOR APPLICANT	**MR B ZISIWE**
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