

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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

Court *a quo* Case No: 11038/2021

Appeal Case No: A5008/2021

- | | |
|-----|---|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES /NO |
| (3) | REVISED: NO |

28 March 2024

.....

In the matter between:

M[...]: L[...] B[...]

Appellant

and

M[...]: M[...] D[...]

Respondent

JUDGMENT

NOKO J (with Opperman *et* Wilson JJ concurring)

Introduction

[1] The appellant launched an appeal against the whole judgment and order of Maier-Frawley J delivered on 10 September 2020. Maier-Frawley J (*court a quo*)

ordered that the amount as determined by Senyatsi AJ¹ (as he then was) payable to be due to the respondent by the appellant be varied in terms of rule 42(1)(b) of the Uniform Rules of Court, (*rule 42(1)(b)*).

[2] Senyatsi AJ ordered that *'The Defendant is ordered to pay to the Plaintiff the amount of R3 037 000.00 in terms of the accrual between the parties respective estates as per the provisions of the Matrimonial Property Act 88 of 1984 with interest at 9% from the date of decree of divorce until date of payment'*. Maier-Frawley J ordered that the order be varied as follows: *'That Defendant is ordered to pay to the Plaintiff the amount of R5 449 761.00 in terms of the accrual between the parties respective estates as per the provisions of the Matrimonial Property Act 88 of 1984, with interest at 9% per annum from the date of divorce until date of payment'* (underlining added).

Background

[3] The parties were married out of community of property subject to the application of the accrual system in terms of the Matrimonial Property Act 88 of 1984 (*MPA*). The marriage was dissolved by a decree of divorce on 10 October 2016, which incorporated a settlement agreement.

[4] The terms of the settlement agreement relevant to this *lis* are, first, that an auditor, Manfred Getz (*Mr Getz*) of J Hollis & Co is appointed to determine the accrual in the parties' respective estates. Secondly, that the costs for Mr Getz's services would be shared equally between the parties. Lastly, that either of the parties may approach the court *'regarding their respective claim arising from the application of the accrual system'*.²

[5] The respondent launched an application for the determination of the accrual as the appellant did not co-operate with Mr Getz as he failed to furnish him with the source documents in respect of the financials prepared in respect of LBMC

¹ Senyatsi J is now appointed as a permanent Judge of the Gauteng Division.

² See clause 5.1.4.5 of the settlement agreement at 0003-44.

Consulting (Pty) Ltd (*LBMC*). The application served before Senyatsi AJ who after hearing evidence held that the amount payable to the respondent is R3 300 000,00. Senyatsi AJ then deducted the amount of R263 000.00 which was payable to Mr Getz for the service rendered and the total sum payable was therefore R3 037 000.00.

[6] The respondent being aggrieved with the calculations made by Senyatsi AJ launched an application in terms of Rule 42(1)(b) contending that Acting Judge Senyatsi, committed a patent error/ omission by concluding the sum of R3 300 000.00 (which was in fact the value of the shares of *LBMC*) is the amount payable to the respondent which amount did not include the value of other assets of the appellant which the parties had agreed upon. Further Senyatsi AJ committed another error by deducting Mr Getz's costs from the respondent's share instead of dividing the said costs equally between the parties.

Before the court a quo

[7] The respondent contended before Maier-Frawley J that the parties had agreed at the commencement of the hearing before Senyatsi AJ that what was contentious between the parties was the value of the shares in *LBMC*. Further that the parties had agreed on the value of their other assets as determined by Mr Getz as set out in annexure F4 to the respondent's founding affidavit. As such Senyatsi AJ was therefore only required to determine the value of the shares and the amount payable to the respondent from the accrual, if any.

[8] The respondent submitted that the evidence presented to Senyatsi AJ included that the parties had previously at a case management meeting had agreed that the value of the shares is R3 300 000.00. Further that the appellant's attorney stated in a subsequent meeting that the report by Mr Getz was disputed and the appellant will appoint an expert to provide evidence on the determination of the values.

[9] The respondent submitted further that Senyatsi AJ had subsequent to the evaluation of evidence presented by both parties³ regarding the valuation of the LBMC shares decided that evidence provided by the experts was of no assistance to determine the accrual except the evidence of Mr Cooke regarding the value of the shares of LBMC. Senyatsi AJ held that the value would be R3 300 000.00, which was the amount which was agreed to by both parties during pretrial meetings would be the value of the shares of LBMC. In the premises Acting Judge Senyatsi dismissed the appellant's contention that his attorney had subsequently resiled from the agreement that the value of the shares was R3 300 000.00.

[10] Unfortunately, so the respondent contended, Senyatsi AJ erroneously took the aforesaid amount of R3 300 000.00 without adding the value of the parties' other assets as determined by Mr Getz as agreed by the parties before the commencement of the hearing and ordered that same be payable to the respondent. Senyatsi AJ had in addition erroneously deducted the total costs for Mr Getz's services from her share instead of dividing the said costs equally between the parties as was stated in the settlement agreement.

[11] The appellant on the other hand contended first, that the correct process should have been to take the matter on appeal rather than to proceed in terms of rule 42(1)(b). Secondly, that the appellant resiled from the agreement that the value of the shares in LBMC is R3 300 000,00. Thirdly, that Senyatsi AJ held that the reports by the experts were of no assistance in coming to the determination of the accrual and as such everything flowing from those reports including the value of other assets would not be considered. Fourthly, that the parties had not agreed on the value of the other assets of the parties as alleged by the respondent. To this end there is no omission or error committed in the judgment of Senyatsi AJ and any variation as contemplated in terms of rule 42(1)(b) would be improper and may change the substance of the judgment.

³ Including Mr. Getz, (appointed by both parties) Mr. Steve Harcourt Cooke, on behalf of the respondent and Mr. KB Vilakazi (Chartered accountant) on behalf of the appellant, all referred to herein as experts.

[12] Maier-Frawley J concluded that the order of Senyatsi AJ is susceptible to be varied in terms of rule 42(1)(b) after having had regard first, to the fact that what served before Senyatsi AJ was the determination of *‘the value of the Defendant’s business called LBMC Consulting (Pty) Ltd and the amount of the accrual if any, to be paid to the plaintiff’*.⁴ Secondly, that the record of the hearing before Senyatsi AJ showed that the appellant’s attorney stated at the commencement of the trial that what was to be decided was only the valuation of the shares of LBMC.⁵ Thirdly, that indeed there was an error/omission by Senyatsi AJ not to include the value of the other assets as determined by Mr Getz and, fourthly, that the costs of R263 272.00 for Mr Getz’s services should have been divided equally between the parties.

[13] In the premises Maier-Frawley J held that the correct calculation of the amount due to the respondent in terms of sections 3 and 4 of the MPA is the amount equal to half of the difference in the accrual of the parties respective estate, yielding an amount of R 5 581 396.00 due to the respondent. Half of the costs due Mr Getz would be R131 635.99 hence the total payable to the respondent would be R5 449 761.00.

In this court

[14] The appellant was aggrieved by the judgment and order of Maier-Frawley J and then sought leave to appeal which was granted. The notice of appeal listed grounds for the appeal which are summarised as follows: first, the correct process should have been to appeal the order and judgment and not an application for variation in terms of rule 42(1)(b). Secondly, that the court *a quo* erred in not finding that there was a dispute of fact with regard to the value of each party’s estate and also that there was an agreement between the parties thereon concluded on the morning of the trial. Thirdly, that the court *a quo* just accepted the calculations by Mr Getz which was not in accordance with the provisions of the MPA as it did not take

⁴ See para 15 of the judgment of Maier-Frawley and para 5 the judgment of Senyatsi AJ.

⁵ Ibid, para 37 at 0000-16 where she stated that “*Mr. Ramothwala on behalf of appellant who stated that the beginning of the trial that ‘... the contentious issue here is going to be just the figure, how much of any of this experts (sic) at some different times conducted the valuation of the 100 percent shares of the business called LMBCC Consulting (Pty) Ltd (sic)’...* This is confirmed in paragraph 4.9 of the answering affidavit”.

into account the value of the respondent's assets and in fact there was no sufficient evidence presented before the court *a quo* for the determination of the accrual. Fourthly, that the court *a quo* erred in varying the judgment of Senyatsi AJ because the variation had the effect of altering the judgment's substance. Fifthly that the court *a quo* failed to correct the calculation of a patent error in terms of rule 42 which was common between the parties in Mr Getz's report and finally that Senyatsi AJ rejected the evidence of all three experts and could not place a value on the remainder of the respective estates and made no finding in this regard.

[15] These grounds of appeal are considered below and since they overlap with each other or are intertwined I will not necessarily consider them individually.

Finality of judgment

[16] The appellant contended that the common law decrees that once a judgment has been delivered the presiding judge is *functus officio*. In explaining the rationale for this common law principle, the appellant referred to the *Zondi judgment*⁶ where the court illustrated that the object is to ensure that once a judge has exercised his or her jurisdiction and has given a final order, his or her authority ceases to exist. The other objective is that it is in the interest of the public to bring the litigation to finality.⁷ Counsel submitted that there are exceptions to the rule which must be invoked sparingly.⁸ The exception is as set out in rule 42(1)(b) and has been dealt with in several cases where it was held that, *inter alia*, where a judgment is clear and unambiguous no extrinsic evidence should be invoked to assist in the interpretation. Furthermore, the variation of a judgment should not alter the sense and substance of the judgment.

[17] The appellant contended that the fact that Senyatsi AJ decided that the amount of the accrual is R3 300 000.00 meant that he had regard to the remainder of the assets⁹ of the parties and held that the figures in the expert's report add no

⁶ *Zondi v MEC Traditional and Local Government Affairs* 2006 (3) SA 1 (CC).

⁷ *Ibid* at para 28

⁸ See para 16 of the Appellant's Heads of Argument at 0008-25.

⁹ See para 26.1 of the Appellant's Heads of Argument at 0008-32.

value in the determination of the accrual. The order of Senyatsi AJ was therefore unambiguous and clear and there was no need to vary same in terms of rule 42(1). In addition, if it was not correct Senyatsi AJ would have decided that the accrual due to the respondent is R1 650 000.00 (being half of the R3 300 000.00) when calculating same in accordance with section 3 and 4 of the MPA.

[18] The respondent in retort contended that the error committed by Senyatsi AJ was to mistakenly have used the incorrect capital amount to determine the amount due to the respondent and further deducting R263 000.00 for Mr Getz's services from her share. This error, so the argument continued, was also admitted by the appellants who stated in its written submissions that "*Judge Senyatsi then, it seems incorrectly, uses the valuation of LBMC, which he finds to be R3 300 000.00 as the accrual due to the applicant...*".¹⁰, (sic). In the premises, so the argument continued, rectifying this error/omission does not amount to changing the essence and substance of the judgment.

Agreement on the remainder of the parties' assets.

[19] The appellant contends that what Senyatsi AJ was seized with was the dispute as was in the pretrial minutes of 19 September 2019 in terms of which everything was in dispute and there was no agreement to limit the issues to the valuation of the shares in LBMC. In addition, that the respondent did not attach the whole transcript of record of the hearing before Senyatsi AJ which therefore failed to present the comprehensive context of what transpired. The appellant had requested the whole transcript to be made available in terms of rule 35 which the respondent failed to heed.

[20] The appellant averred that '*the court could not place a value on the remainder of the value of the respective estates and made no finding in this regard as it did not accept the expert evidence in this regard*'.¹¹ Appellant further stated that

¹⁰ See para 16 of the Respondent's Heads of Arguments at 0008-9.

¹¹ Para 30 of the Appellant's Heads of Argument at 0008-34.

this can readily be deduced from the comparison of the spreadsheet of Mr Getz which was at variance with the report by the expert, Mr KB Vilakazi.¹²

[21] The respondent in retort persisted with the argument that the court *a quo* was correct in its finding and consistent therewith the appellant's attorney stated categorically at the commencement of the hearing before Senyatsi AJ that what was outstanding was the determination of the value of the shares of the company. The parties having agreed that the values of other assets as set out in Mr Getz's report were agreed to except the valuation of the company's shares. In addition, the appellant's attorneys, Mr Ramothwala, (as he then was) also confirmed that what is to be decided is the value of the shares and accrual if any, which is payable to the respondent.

Calculations in Getz's report

[22] The appellant contended that the calculations in Mr Getz's report took account of the assets of the appellant and excluded those of the respondent and as such it was not in accordance with the provisions of the MPA. In addition, the appellant contents that the annexure which allegedly refers to the calculation by Mr Getz is a spreadsheet and made no reference to the accrual amount as alleged by the respondent. The said annexure which the respondent identified as a report of Mr Getz, was in fact just a spreadsheet.

[23] The respondent contended that Mr Getz's report reflected the value of the respondent's assets as being R491 948.00 which amount was considered in the determination of the parties' respective accrual. To this end the respondent submitted that the contention that the respondent's assets were excluded is baseless.

[24] The respondent submitted further that the value of the parties' respective assets were as set out (and agreed to) in the report¹³ by Mr Getz including the value

¹² A chartered Accountant who prepared a report at the instance of the appellant.

of the shares of LMBC as R3 300 000.00¹⁴ and was R5 581 996.00.¹⁵ That after determining the value of the shares being R3 300 000.00 Senyatsi AJ made an arithmetical error or a patent error by solely using the value of LBMC's shares as the total capital sum to determine the amount due to the respondent pursuant to the determination of the accrual instead of adding the value of the parties' other assets which were agreed to by the parties.

Correction of the error in the calculations by Mr Getz

[25] The appellant contends as a ground for appeal that there was an error common to both parties but this was not substantiated in both the answering affidavit and the heads of argument. The appellant has not brought a counter application for the said common error to be rectified in terms of rule 42 of the rules of court.

Reports rejected.

[26] The appellant contended that the decision of the Senyatsi AJ to reject the evidence of the experts is clearly stated in paragraphs 35 where the court stated that after evaluation of the experts evidence same did not assist in the determination of the accrual. In addition, in paragraph 38 where the court stated that the reports by Cooke were also not helpful except the valuation of shares of the company. Both were rejected due to lack of source documents.¹⁶

[27] The appellant contended that the order of Senyatsi AJ was clear and unambiguous¹⁷ as it was stated categorically that the reports of the experts were of no assistance in determining the accrual. In addition, had the court construed R3 300 000,00 as the value of the respondents assets then the court could have

¹³ It is noted that the appellant contended that annexure F4 is not a report but a spreadsheet. It is the document reflecting the calculation of the values of the parties' respective assets.

¹⁴ This is the amount which was included by Mr. Getz when working out the accrual which was the same amount reached by Senyatsi AJ after evaluating evidence before him.

¹⁵ See para 3 of the Respondent's Heads of Argument.

¹⁶ See para 26.3 and 26.4 of the Appellant's Heads of Arguments at 0008-33.

¹⁷ The appellant having referred, at para 22.3 of the Appellant's Heads of Argument, to *MEC for Co-operative Government and Traditional Affairs, KZN v Nquthu Municipality* 2021 (1) SA 432 KZP where the court held that where judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it.

then ordered that the respondent should receive 50%¹⁸ thereof in accordance with the calculation as determined in terms of sections 3 and 4 of the MPA.

[28] The respondent in retort stated that the appellant conveniently displays lack of understanding of what paragraph 35 of the judgment says regarding the report by Mr Getz. The court's reference was in relation to the determination of the accrual to the appellant's assets as shares in the company. The court did not reject all that was in the report as part of the values in the report which was already agreed to between the parties. Any contrary view would have meant that that court was setting aside the parties' agreement reached regarding the values of the parties' other assets being an issue which Senyatsi AJ was invited to decide on.

Legal principles.

[29] Legal principles implicated in this *lis* relates to the interpretation and application of rule 42, whether this court may interfere with the judgment of the court *a quo*.

Test of the appeal court

[30] It is trite that the appeal court's power to interfere with the findings of a lower court are generally limited. A party needs to demonstrate that there was a clear misdirection on the applicable principles on the matter.¹⁹ This principle was considered by Moseneke DCJ as asserted its *raison d'être* is to foster certainty in the application of the law and finality in judicial decision making.²⁰

Variation in terms of Rule 42 of the Uniform Rules of Court

¹⁸ See para 26.1 of the Appellant's Heads of Argument at para 26.1.

¹⁹ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited* [2015] ZACC 22; 2015(5) SA 245 (CC), 2015 (10) BCLR 1199 (CC) at para 88 and *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (CC) at para 11.

²⁰ See *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC).

[31] The fact that there are exceptions in relation to the principle that once a judgment is made the presiding officer is *functus officio* was considered and illustrated its application in several court judgments. Reference was made at para 34 in the *Zondi judgment*²¹ of the judgment in *West Estates case*²² where the Appellate Division had to amend an order to include the award of interest which was inadvertently omitted even though it was argued.²³

[32] The SCA has stated in the *Thompson judgment*²⁴ that ‘*The enlightened approach, however, permits a judicial officer to change, amend or supplement his pronounced judgment, provided that the sense or substance of his judgment is not affected thereby.*’

[33] In interpreting the judgment the surrounding circumstances need to be considered and this was stated by the SCA in *HLB International*²⁵ where it was held that ‘*The manifest purpose of the judgment is to be determined by also having regard to the relevant background facts which culminated in it being made.*’²⁶ The court contrasted the position before and after the new constitution and held that subsequent to the new dispensation the basis of the correction could be in the interests of justice.

Analysis

Valuation of other assets.

²¹ Supra at note 6.

²² Ibid at para 34, the court stated that:

“*It is within the province of this Court to regulate its own procedure in matters of adjective law. And, now that the point has come before it for decision, to lay down a definite rule of practice. I am of opinion that the proper rule should be that which I have just stated. The Court, by acting in this way, does not in substance and effect alter or undo its previously pronounced sentence, within the meaning of the Roman and Roman-Dutch law. The sanctity of the doctrine of res judicata remains unimpaired and of full force, for the Court is merely doing justice between the same parties, on the same pleadings in the same suit, on a claim which it has inadvertently overlooked.*”

²³ The court stated that it was merely doing justice between the same parties.

²⁴ *Thompson v South African Broadcasting Corporation* [2001] 1 SA 329 (A), 2001 (3) SA 746 (SCA) at 749 B-D.

²⁵ *HLB International (South Africa) Pty Ltd v MWRK Accountants and Consultants (Pty) Ltd* (113/2021) [2022] ZASCA 52 (12 April 2022).

²⁶ At para 27.

[34] The court *a quo* was invited to determine whether there was an error or omission in the order of Senyatsi AJ as envisaged in terms of rule 42(1)(b) in relation to the calculation of the amount due to the respondent in terms of section 3 of the MPA. Secondly whether the dispute to be adjudicated upon was only limited to the value of the shares in LBMC and lastly the determination of the amount payable to the respondent, if applicable.

[35] The submission by the respondent that indeed there was agreement about other assets is sustainable. This was confirmed by the attorney of the appellant who unequivocally stated that what is left for determination was the valuation of the shares. The court *a quo* found correctly that this averment by the appellant's attorney has not been eschewed by the appellant. Though the appellant conveyed his intention to launch an appeal such an intention was never put into effect.

[36] Consistent with the above is the statement in the judgment of Senyatsi AJ that the issue for determination relates only to the value of the shares of LBMC. In addition, the amount of R3 300 000,00 was derived from the case management meeting minutes which was agreed to by the parties as the value of shares of LBMC. It cannot therefore be strange that the appellant appears surprised as to how the said amount was determined, as he also stated that the said amount was agreed to previously and subsequently resiled from the said agreement.

[37] The contention that the respondent only brought one page of the record of hearing could have been substantiated by the appellant by obtaining and availing to the court the remainder of the record which might have supported the contention that the parties' assets excluding the valuation of the shares was the subject of the dispute to be adjudicated upon by Senyatsi AJ. As set out above the appellant did not appreciate the importance of following on the rule 35 notice to finality or even obtaining the transcript of the record by himself.

[38] In the premises an allegation that there was a dispute of fact is unsustainable and was correctly dismissed by the court *a quo*. As was stated in *Plascon Evans*²⁷ judgment if it is demonstrated that the dispute is far-fetched and implausible same must be rejected.

[39] The appellant is approbating and reprobating, in one instance he states that “... the court could not place a value on the remainder of the value of the respective assets and no finding was made in this regards...”²⁸ at the same time he contends that “... the calculation appears to include, in addition, a share in the remainder of the assets of the appellant.”²⁹

Amount of R3 300 000.00 as value of the shares.

[40] The attempt by the appellant to disavow the agreement³⁰ on the value of the shares reached before the hearing was dismissed by Senyatsi AJ. This finding was (and has still not been) challenged by the appellant despite having stated that he will launch appeal proceedings against the findings of Senyatsi AJ. The learned Acting Judge erroneously used the said sum of R3 300 000.00 as the capital amount instead of including the values of the parties’ other assets.

[41] The appellant was also aware of this error and stated, (as mentioned by the respondent), in his submissions during the application for leave to appeal that the appellant stated that ‘Judge Senyatsi(sic) then, it seems incorrectly, uses the valuation of LBMC, which he finds to be R3 300 000,00 as the accrual due to the applicant...’³¹, (sic). The appellant has further conceded that the judgment or order of Senyatsi AJ is ambiguous by stating that ‘one could speculate how [Senyatsi] arrived at the amount of R3 037 000.00 seeing that he nowhere makes or refers to

²⁷ *Plascon-Evans Paints Pty Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

²⁸ para 30 of the Appellant’s Heads of Argument.

²⁹ *Ibid* at para 26.2.

³⁰ The appellant having stated in the Heads of Argument submitted in the court *a quo* in para 11.2 at 0014-39 that ‘...subsequent to this case management meeting there was further case management meetings where the respondent reneged on his agreement and specifically disputed the value of R3.3 million.’

³¹ See para 16 of the Respondent’s Heads of Argument at 0008-32.

calculations...'.³² The appellant further stated that... the calculation appears to include, in addition, a share in the remained of the assets of the appellant, to what extent is not explained by Acting Justice Senyatsi. (underling added). The appellant however fails to proffer a suggestion to explain what was intended by Senyatsi AJ in contrast to the explanation given by the respondent.

[42] The contention by the appellant that Senyatsi AJ's statement in para 35 that the reports by the experts did not assist in the determination of the accrual simply means that the appellant fails to interpret it in context. The evidence considered by the Acting Judge referred to what he was invited to adjudicate upon, being the valuation of the shares of the company. Once such determination is made such amount would form the accrual to the assets of the appellant. This would be followed by the calculation envisaged in section 3 of the MPA.

[43] In the alternative the sentence by the Acting Judge is therefore not clear and unambiguous and calls for the court to defer to the extrinsic evidence to assist in the correct meaning thereof.

Determination of accrual in terms of MPA.

[44] On a proper interpretation of the provisions of section 3 and 4³³ of the MPA one is required to first determine the growth of the estates of each party and secondly, calculate the difference between the two growth values and thirdly divide the difference by two (assuming there were no commencement values) and the quotient would be the amount payable to the party whose accrual was nil or smaller.

³² Ibid, at para 18.

³³ 'Section 3. Accrual system —

(1) *At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.*

(2) ...

Section 4. Accrual of estate —

(1) (a) *The accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage.*

[45] Senyatsi AJ held that the respondent is to be paid from the incorrect amount i.e. the value of the shares instead of the amount as determined in Mr Getz report, bearing in mind that Mr Getz's report was worked out on the basis that the value of the shares was R3 300 000.00 which amount is the same as the amount reached by Senyatsi AJ in his determination of the value of the shares in LBMC.

[46] The appellant sought to contend that there was a dispute of fact with regard to the value of the parties' other assets excluding the value of the shares in LBMC. Further that Maier-Frawley J made her conclusion on annexure F4 without proper reflection thereof. The order of the court *a quo* correctly concluded on the evidence presented before it that the parties' legal representatives unequivocally stated that the only issue for determination was to decide on the value of the shares in LBMC. Noting that Mr Getz was appointed by agreement between the parties and further that the appellant appointed its own expert to gainsay the evidence by Mr Getz, the agreement by the parties that the remaining dispute relates to the determination of the value of the shares it would have followed that the calculation by Mr Getz, with regard to the other assets of the parties except the share valuation, was accepted. To this end the court *a quo*'s conclusion is unassailable and the contention by the appellant that the version of the appellant should be accepted in terms of the *Plascon-Evans judgment*³⁴ is unsustainable as such an alleged dispute is far-fetched and implausible and untenable that it should be rejected without further reference to oral evidence.

[47] In brief the object of the application by the respondent was to determine the value of the shares in LBMC and then to determine its impact on the value of the appellants assets and to thereafter determine the value of the claim due to the respondent. The accrual due to the respondent was already partly determined and agreed to before the hearing but finally determined by Senyatsi AJ who decided that the accrual to the respondent's assets was R3 300 000.00. All that what was outstanding was to apply section 3 of the MPA. As set out above the calculation by Mr Getz had taken into account that the value of the shares is R3 300 000.00 in his

³⁴ Supra at note 27.

calculation of the accrual and amount due to the respondent and as such there was no need for the court a quo to embark on a further calculation.

[48] This rectification does not take away the substance of the judgment as the amounts are derived from the evidence and the record before the court, bearing in mind as stated in *West Rand Estate case*³⁵ that the addition of interest erroneously omitted could be added in terms of rule 42(1). As such in this case the value of the remainder of the parties' assets as captured in Mr Getz's report was left out. This was not adding extrinsic evidence to contradict, vary or qualify the judgment. If it was extrinsic evidence the appellant referred to *MEC v Nquthu Municipality*³⁶ where it was held that if there is any uncertainty then extrinsic circumstances leading up to the court's granting an order may be investigated and regarded in order to clarify it.³⁷

[49] The variation could also be considered as the court ' *merely doing justice between the same parties*'.³⁸ alternatively that it was in the interests of justice.³⁹

[50] Based on the foregoing it follows that the court *a quo* did not err in its adjudication of the application in terms of rule 42(1)(b). It is trite that the appeal court may interfere with the judgment of the court a quo where it has been demonstrated that the court *a quo* has misdirected itself in coming to a conclusion as it did. In the premises I am not persuaded that the court *a quo* misdirected itself and therefore find the appeal to be meritless.

[51] In the premises I make the following order

The appeal is dismissed with costs.

³⁵ See supra note 43.

³⁶ Supra at note 17.

³⁷ See also SCA in *Thompson judgment* above note 24.

³⁸ See *West Rand Estate Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 quoted by the Constitutional Court in Zondi judgment. It was held in *West Rand Estate case* that "*The sanctity of the doctrine of res judicata remains unimpaired and of full force, for the Court is merely doing justice between the same parties, on the same pleadings in the same suit, on a claim which it has inadvertently overlooked.*"

³⁹ See HLB International which contrasted the position pre and post constitutional era and stated that '*...the general rule that an order once made is unalterable was departed from where it was in the interest of justice to do so...*'. See para 23.

Mokate Victor Noko
Judge of the High Court

This judgement was prepared and authored by Noko J and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 28 March 2024.

Date of hearing:

1 November 2023

Date of judgment: 28 March 2024

Appearances

Counsel for the Appellant: Adv O Morapedi.

Attorneys for the Appellant: Roets & Du Plessis Attorneys
c/o Swanepoel Attorneys.

Counsel for the Respondent: Adv CE Thompson

Attorneys for the Respondent Martin Vermaak Attorneys.