



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

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

DATE

SIGNATURE

CASE NUMBER: 80744/19

DATE: 12 February 2021

DORCAS MOROKU MPHUTHI

Applicant

V

TLOU ERNEST KOMAPE

First Respondent

GOVERNMENT EMPLOYEES PENSION FUND

Second Respondent

JUDGMENT

MABUSE J

[1] This is an application by the Applicant, Dorcas Moroku Mphuthi, an adult unemployed female of [...], seeks the following order against the First Respondent, Tlou Ernest Komape, an adult male employed in the [...], residing at House Number. [...]:

"1. That it be declared that the Applicant is entitled to 50%(Fifty percent) of the First

Respondent's pension interest in the Government Employees Pension Fund under member number [...];

2. *That the Second Respondent be ordered to record in its records that the Applicant is entitled to 50% of the First Respondent's pension interest in the Government Employees Pension Fund under member number 98308349 calculated up to date of divorce Order;*
3. *That the Second Respondent be ordered to pay the aforesaid 50% of the First Respondent's pension interest in the Government Employees Pension Fund under member number 98308349 directly to the Applicant, alternatively to the Applicant's Attorneys of record, within sixty (60) days from date of this order;*
4. *In the alternative to Prayers 1 to 3 supra that the divorce order granted on 4 October 2018 be varied by including the following paragraphs thereto:*
"3 The Defendant is entitled to 50% of the Plaintiff's pension interest in the Government Employees Pension Fund under member number 98308349.
4 That the Plaintiff is ordered to take all reasonable steps to ensure that the Defendant's entitlement to 50% of the Plaintiff's pension interest be recorded in the records of the Government Employees Pension Fund and that the Defendant's share be paid to her within 60 (sixty) days from date of this Order."
5. *That the Costs of this application be paid by the First respondent in the event of it being opposed."*

[2] This application is resisted by the First Respondent only.

[3] The Applicant and the First Respondent were married to each other in community of property on 8 November 2011. The said marriage was terminated by an order of Court incorporating a settlement agreement on 4 October 2018.

[4] The said settlement agreement was signed by both the Applicant and the First Respondent in the presence of their witnesses on 1 May 2018.

[5] The salient terms of the said settlement agreement were as follows:

“1.2 Plaintiff and Defendant (hereinafter referred to collectively as “the parties”) have reached an agreement of settlement in regard to their proprietary rights; and

1.3 The parties desire that their settlement agreement be made an Order of Court subject to the approval of the above Honourable Court.

CASH SETTLEMENT

3.1 The parties agree that the Plaintiff will pay the Name Defendant the amount of R15,000.00(Fifteen Thousand) in full and final settlement of all disputes and/or any claims arising from the marriage in community of property into the Defendant’s nominated account which is

Name of Account Holder: DORCAS MOROKU MPHUTI

BANK: CAPITEC

ACCOUNT NUMBER:[....]

BRANCH CODE:470010

4.

POLICIES AND PENSION INTEREST

The parties agree that each party shall retain their respective policies and pension interest as their sole and exclusive benefit and the defendant waives any claim against the plaintiff pension held with the Government Employee Pension Fund, commonly known as “GEPF” with Pension Nr. [....].

FULL AND FINAL SETTLEMENT

8.1 This agreement is in full and final settlement of all or any claims of whatsoever nature and howsoever arising which either party might have against the other, and save as is expressly set out in this agreement, neither party shall have any claim against the other of whatsoever nature.”

[6] Now the Applicant claims the relief set out in paragraph [1] *supra* because she contends that:

- 6.1 the combined summons, the settlement agreement and the Court order did not make provision for an order that 50% of the First Respondent's pension interest be awarded to her;
- 6.2 she claims furthermore that she did not abandon her entitlement to 50% of the First Respondent's pension interest;
- 6.3 she claims that when she signed the settlement agreement, she was highly pregnant, emotionally challenged and mentally unstable. She did not comprehend the clause to mean that she abandoned her right. She then annexed copies of the medical certificate;
- 6.4 she states that she was under an impression that at all material times the First Respondent's pension benefits formed part of the joint estate;
- 6.5 according to her, the R15,000.00 that she received was in respect of the motor vehicles and the household effect.

[7] The Applicant states that the First Respondent's pension interest was discussed, and it was agreed that she would receive 50% of the First Respondent's pension interest.

[8] It is of paramount importance to point out that it was the First Respondent who initiated, by way of the combined summons, the divorce proceedings of the Applicant and himself. In the particulars of claim ("POC") the First Respondent had stated as follows:

"7.

The Plaintiff is a member of the Government Employee Pension Fund, commonly known as "GEPF", with Pension Nr. 98308349 and in terms of the provisions of the Divorce Act, as amended, the defendant is entitled to 50% of the plaintiff pension interest.

In prayer 2 of the POC the Plaintiff had prayed for:

(2) An order directing the Government Employee Pension Fund to pay the Defendant her half share of the plaintiff pension interest with the prescribed time limit and/or as may be directed by the above Honourable Court.”

[9] It is therefore not correct, as the Applicant stated in paragraph 6.1 *supra*, that the combined summons did not make provision for an order that 50% of the First Respondent's pension interest should be awarded to her. It is surprising that the Applicant should make such a statement and having done so, attach a copy of the combined summons that clearly refers to the First Respondent's pension interest.

[10] As I pointed out in paragraph [2] *supra*, the First Respondent opposes the application. For that purpose, he has, in addition, delivered an answering affidavit. In opposing the relief that the Applicant seeks, the First Respondent has raised three points *in limine* as follows:

10.1 non-compliance with the provisions of Regulation 4(1) as promulgated in Government Gazette 3619, Government Notice R1258 of 21 July 1972, as amended:

10.1.1 in this respect the First Respondent complains about the date on which the founding affidavit was commissioned. While the month of September 2019 appears in the typed certificate of oath, the Commissioner's stamp shows that the founding affidavit was commissioned on 29 October 2019;

10.1.2 the Applicant has pointed out in the replying affidavit that the founding affidavit was commissioned on 29 October 2019 and not in September 2019. This Court accepts the explanation as reasonable.

10.2 The second point *in limine* is *transactio*:

10.2.1 it is the First Respondent's case that during 2017 the Applicant was served with a copy of the divorce proceedings under case number 23712/2014; that the parties signed a settlement agreement on 1 May 2018; that in terms of paragraph 3.1 of the said settlement agreement, the Applicant agreed to receive the sum of R15,000.00; that she expressly waived all her legal rights and entitlements to any claim arising from marriage in community of property, which rights included her interest in the pension

fund held on administration by the Second Respondent; that by agreement between the Applicant and the First Respondent, the settlement agreement was made a court order; that on the basis of the said court order, the First Respondent paid the Applicant R15,000.00. It is finally the First Respondent's case that all the disputes between them have been properly resolved;

10.2.2 Rule 42 of the Uniform Rules of Court deals with the grounds upon which certain of its orders or judgments can be varied or rescinded or amended. With reference to the grounds set out in the application on which the Applicant seeks to rescind the Court Order of 4 October 2018 the provisions of Rule 42(1)(c) are apposite. Rule 42(1) states that:

“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 –

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

10.2.3 to succeed with her application to rescind or vary the Court Order, the Applicant must prove that the settlement agreement did not contain the true terms agreed. An analysis of her reasons for rescinding the settlement agreement will reveal that no blame whatsoever is placed by the Applicant at the feet of the First Respondent. Furthermore, no blame at all is placed by the Applicant at the feet of the First Respondent's legal representative. It is therefore not a common error that lead to the parties signing the settlement agreement. It is because of an error on the part of the Applicant that she signed the settlement agreement;

10.2.4 the Applicant does not explain how the fact that she was pregnant or emotionally challenged led her to signing the agreement. She does not say that she was misled into signing the settlement agreement. In the premises, the Court finds that it was an error on her part that led her to signing the settlement agreement;

10.2.5 in such circumstances I find no reason to deviate from the Judgment of **Joseph v Joseph 1951 (3) SA 776 [N.P.D]** where the Court held that if a litigant, by mistake of himself or his legal advisors abandons relief to which he is or may be entitled, the Court has no jurisdiction or power to recall or amend the order it had in consequence deliberately made, in the absence of fraud of the other party in the cause of the proceedings including the order;

10.2.6 at pages 779H to 770, the Court, as per Caney AJ, said the following to say in Joseph v Joseph:

“The Plaintiff was entitled of right to an order for forfeiture if she had asked for it. Ward v Ward, 1924 N.P.D 301. The fact that her omission to do so was due to an error on the part of herself or her legal advisors does not allow her now to obtain a variation of the Court’s judgment.....” (My own underlining).

There was no mistake or inadvertent omission or oversight on the part of the Court or in the issue of the order which was the very order for which the Applicant had asked;

10.2.7 the fact that the Applicant signed the deed of settlement meant that the mistake was due to her own carelessness or inattention. So, she cannot raise it;

10.2.8 in **Humphries v Laser Transport Holdings Ltd and Another 1994 (4) SA 388 CPD**, the Court dealt with, *inter alia*, firstly rectification of a contract and what the claimant must prove to succeed. To succeed, the claimant must prove common intention which the parties intended to express in the contract but which, through a mistake, they failed to express. Secondly, it dealt with the grounds of error. The error is required to be reasonable. It held that the unreasonableness of one parties’ conduct is not relevant when the parties are *ad idem* about the terms of the agreement.

10.2.9 Finally the First Respondent's legal representative referred this Court in his heads of argument to the judgment of **National and Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 (2) SA 473 (A), 479F-H**, where the Court had the following to say:

“Our law allows a party to set up his own mistake in certain circumstances 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 error 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. In the present case the plea makes no mention of mistake and there is no basis in the evidence for a contention that the mistake was reasonable.”

10.2.10 The First Respondent's legal representative submitted in his heads of argument that the issue of *justus* error was raised by the Applicant for the first time in her heads of argument and that it was never pleaded. He is correct. I agree with him. This is the principle set out in the Potato Board authority.

[11] RES JUDICATA

The last point *in limine* that the First Respondent has raised is that of *res Judicata*. It is contended by the First Respondent that after the settlement agreement being made an Order of Court and the marriage relationship between the parties being dissolved the matter became a *res judicata*. According to the First Respondent the effect of *res judicata* is that once a determination has been made on a specific dispute between the parties both parties are bound by that determination and cannot litigate the same dispute. The expression *res judicata* literally means that the matter has already been decided. In this regard the First Respondent's legal representative finds support in the judgment of **Prinsloo NO & Others v Goldex 15 (Pty) Ltd & Another 2014 (5) SA 297 SCA at para 10**. In the said paragraph the

SCA set out the general rule that was pronounced in **Estate Garlick v Commissioner or Inland Revenue, 1934 AD, 499 at 502**, De Villiers, J A, that “*an order of Court, once it has been pronounced by the word of mouth of the Judge, cannot as a rule be thereafter altered or amended by that Judge*”.

Having set out the general rule above, the court then stated that:

“To this general rule there are certain exceptions, which are stated by the writers referred to; for instance, and order after having been pronounced may be amended or added to where through some mistake it does not express the true intention and decision of the Court; or where it is ambiguous; or where the Court through an oversight has omitted to include in its order something which is accessory to the principal, such as interest, fruits, or costs.”

[12] I therefore do not agree with the First Respondent’s legal practitioner that the Applicant may not challenge the order of Court granted at the end of the divorce proceedings in this regard. For instance, in **West Rand Estate, Limited v New Zealand Insurance Co., Ltd 1926 A.D.173 at p.179** where Innes C.J. cited with approval from **Randfontein Estates Ltd. v Robinson, 1921 A.D. 515**, the following passage:

“It is sufficient for purposes of this case to say that a Judge may explain his order if ambiguous, or may correct an error, or add a supplementary detail so as to give effect to his true intention but cannot alter an order once duly made and accurately drawn up”.

[13] Therefore the fact of *res judicata* cannot prevent the Applicant from launching an application to rescind and set aside an order obtained in circumstances referred to in Rule 41(1)(c) of the Rules, nor can it prevent the Judge who granted the Order from amending it or adding to it if the conditions set out in *Estate Garlick supra* prevail.

[14] I have already stated in paragraph 10.2.6 *supra* that in his application the order that was expressed between the parties, in my view, expressed the true intention and decision of the

Court. There was no mistake, inadvertent omission, or oversight on the part of the Court or in making the Order which was the very Order that the Applicant had sought in the draft Order that was ultimately confirmed by the Court at the application of the Applicant. The relief that she now seeks would be in direct conflict with the order that was granted by the Court on 4 October 2018.

[15] Accordingly, the application is refused.

PM MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant: Adv AM Letwaba

Instructed by: Mukwevho NP Attorneys

Counsel for the Defendant: Attorney S Makhafola

Instructed by: Makhafola & Verster Incorporated

Date on the opposed roll before Mabuse J: 18 November 2020

Date of Judgment: 12 February 2021