REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: HCA23/2023
REPORTABLE: ~~YES~~/NO
OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
REVISED
DATE: **17/01/2024**

In the matter between:

M[…] G[…] S[…] **APPELLANT**

And

M[…] A[…] P[…] **RESPONDENT**

JUDGEMENT

KGANYAGO J

[1] The appellant and the respondent were married to each other by customary union. The appellant had instituted an action for the dissolution of the customary union between the parties. The appellant in his action was seeking orders for (a) decree of divorce; (b) division of the estate: (i) that each party to retain such property in that party's current possession as that party's sole property, (ii) that the appellant be entitled to be paid 50% of the respondent's pension benefits/interest held at Government Employees Pension Fund (GEPF) within 60 days of finalising the divorce, (iii) that an endorsement be made by the administrators or registrars in the records of GEPF that the appellant is entitled to be paid 50% of the respondent's pension

benefits/interest held at GEPF; (c) that it will be in the best interest of the minor children if their parental responsibilities, care, maintenance and guardianship are awarded to both parties, however the primary residence and day to day care of KP be awarded to the appellant, subject to the respondent's right to reasonable contact and visitation rights, and primary residence and day to day care of NP be awarded to the respondent subject to the appellant's right of reasonable contact and visitation rights; (d) that the issue of maintenance be referred to the maintenance court.

[2] The respondent had defended the appellant's action. On the date on which the divorce action was set down for hearing, the respondent and her counsel were in default and the appellant proceeded with the divorce action in the absence of the respondent. Counsel for the appellant in addressing the regional court on the issue of the respondent's pension interest submitted that there was still a contention on the issue of the division of the joint estate, and that the appellant's pension interest should therefore at that stage not be paid to the appellant. Further that the issue of the respondent's pension interest will be dealt with by the appointed liquidator of the parties' joint estate.

[3] The regional court proceeded to grant orders that (i) the bonds of marriage subsisting between the parties is dissolved; (ii) division of the joint estate that each party shall retain the movable property already in his/her possession as his/her sole property; (iii) the parties shall retain full parental responsibilities and rights over the minor children, inclusive of the right to maintain contact with and contribute to the maintenance of the minor children; (iv) the respondent shall have the following specific parental responsibilities and rights in respect of the minor children: guardianship, daily care and permanent residence of the minor children; (v) the matter of maintenance of the minor child must be referred to the maintenance court; and (vi) a liquidator be appointed, should the parties not reach agreement within 60 days concerning any other assets and liabilities in the joint estate.

[4] The respondent brought an application for rescission of the judgment and order that was granted in her *absentia.* The appellant had opposed the respondent's rescission application. In his answering affidavit the appellant had stated that the respondent's rescission application was premature as the respondent did not engage

him for further division of their joint estate and also that a liquidator has not been appointed to assist them in the division of their joint estate. The respondent agreed to the appointment of a liquidator and withdrew her rescission application. After the withdrawal of the rescission application, the parties could not agree on the division of their joint estate. The respondent suggested that Phillip Jordaan be appointed as the liquidator and receiver of their joint estate. The appellant did not indicate whether he was amenable to Phillip Jordaan being appointed as a liquidator and receiver of their joint estate, but in turn brought an application for the variation of the divorce order that he had obtained by default.

[5] In the variation application the appellant was seeking orders that paragraph 6 of the decree of divorce granted on 12th May 2021 be varied to read (i) that the appellant be paid an amount equal to fifty percent (50%) of the respondent's pension interest held by GEPF and/or its administrator such amount having accumulated and accrued until or up to 12th May 2021, within 60 days after receipt of an order in the matter; and (ii) that the administrator was ordered to endorse into its or their records that the appellant is entitled to be paid an amount equal to fifty percent (50%) of the respondent's pension interest held by GEPF and or its administrator such amount having accumulated and accrued until and/or up to 12th May 2021, within 60 days after receipt of the order.

[5] In the alternative the appellant in his variation application was seeking an order that paragraph 6 of the decree of divorce granted on 12th May 2021 be varied to read (i) that the parties' joint estate be fully and equally divided in terms of paragraph 2 of the decree of divorce, every party shall be solely responsible for and absolve the other party from the debts incurred in his or her names, such debts having being incurred up to 12th May 2021 and the respondent shall retain one hundred percent (100%) of her pension interest held in or by GEPF as her sole property.

[6] The grounds for the appellant bringing a variation application are that (i) the orders as they stand in the decree of divorce creates a perpetual possibility of the parties finalising the division of their joint estate with implied engagement of the liquidator following appointment by the court with such powers as it would deem fit; (ii) the parties have unsuccessfully attempted to agree on what constitute the remainder

of the joint estate, which according to the appellant is the respondent's pension interest held by GEPF; (iii) he is aware that the respondent's attorneys have addressed a letter requesting that he agree to the appointment of a liquidator, which he reasonably believe that it will be waste of time and limited resources; (iv) he was present in court when the order of 12th May 2021 was granted and he deliberately instructed his attorney not to entertain the pension interest issue at that stage as he was advised same could be entertained by the liquidator in future, if there was a need; and (vi) that a period of 60 days as ordered had expired without the parties agreeing to what constitute the remainder of the joint estate, and he can reasonably state that it is highly unlikely that he will agree with the respondent on anything.

[7] The respondent had opposed the appellant's variation application. In her answering affidavit the respondent had stated that the appellant's application is a rescission of judgment disguised as a variation application. The respondent had further stated that the issue of the liquidator is necessary and that it is not correct that the liquidator will be dealing with the pension interest. It is the respondent's contention that the regional court had already dealt with the issue of the pension interest, and that if the appellant wishes to revisit that he must bring a proper application for rescission or an appeal. That the real reason the applicant is bringing this application is that he wants to prevent her from accessing her half share in the companies registered in the names of the appellant.

[8] The regional court had dismissed the appellant's variation application, and the appellant is appealing against the whole judgment and order of the regional court. This court must determine whether the regional court had erred in dismissing the appellant's variation application.

[9] The general rule is that a judgment once given is final, but a court in certain circumstances either under common law or under the rules of court may correct, alter or supplement its judgment or order. In *Firestone South Africa v Genticuro A.G*[1] it was held that the exceptions to the general rule prompting for a correction, alteration or supplementing of a judgment are (i) the principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or

[1] 1977 (4) SA 298 (A) at 306G – 307H

interest on the judgment debt, which the court overlooked or inadvertently omitted to grant; (ii) the court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order; (iii) the court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention; and (iv) where counsel had argued the merits and not costs of the case, but the court, in granting judgment, also makes an order concerning costs, it may thereafter correct, alter or supplement that order.

[10] In terms of Rule 49 (7) of the *Magistrates' Courts Rules of Court* (Rules) all applications for rescission or variation of judgment other than default judgment must be brought on notice to all the parties, supported by an affidavit setting out the grounds on which the applicant seeks rescission or variation, and the court may rescind or vary such judgment if it is satisfied that there is good reason to do so. The applicant in a variation application must therefore set out the grounds for variation of the order in a clear manner in his/her founding affidavit which will enable the court hearing the application to properly exercise its discretion after it is satisfied that there is good reason to do so. Good reason will entail the applicant giving a reasonable explanation for the application and also showing that his/her application is *bona fide*. (See *Colyn v Tiger Food Industries LTD v Meadow Feed Mills (Cape)*[2]*).*

[11] In my view, the appellant's explanation for bringing the variation application is not satisfactory and also lacks *bona fides.* The appellant's variation application is centered around the respondent's pension interest which had not been inserted in the order of 12th May 2021. The appellant in his founding affidavit to the variation application has stated that he had deliberately instructed his attorney not to entertain the pension interest at that stage as he was advised that same could still be entertained by the liquidator in future, if there was a need. The appellant was therefore consciously aware of the instructions he was giving to his attorney, and he gave those instructions on purpose. As he gave those instructions deliberately, there was no question of mistake, his instructions were intentional.

[2] 2003 (6) SA 1 (SCA) at 9E-F

[12] From the transcribed record of the proceedings of 12th May 2021 it shows that the court *a quo* wanted to include 50% of the respondent's pension interest in the court order, but it was the appellant's attorney who told the regional magistrate not to do that as that will be dealt with by the liquidator. For the court order of 12th May 2021 not to include the 50% percent of the respondent's pension interest was not by mistake, but was at the request of the appellant. The alternative relief which the appellant is seeking in his variation application shows that the appellant is using the variation application in order to effect division of their joint estate and avoid the appointment of a liquidator.

[13] When the matter was argued in the court *a quo*, counsel for the appellant had submitted to the regional magistrate that if the order of the 12th May 2021 was amended to include both the pension funds and the appellant's shares, he believes that they will have a much clearer way forward. This is a clear indication that the appellant's application is not a variation application in the true sense, but wanted to avoid the appointed of a liquidator. That is also confirmed by the appellant's submission that he reasonably believes that it is highly unlikely that he will agree with the respondent on anything. If they are unable to agree on anything, the proper person to come to their rescue is the liquidator. The appellant has failed to show good reason why the order of 12th May 2021 should be varied, and it follows that the appeal stands to be dismissed.

[14] In the result the following order is made:

14.1 The appeal is dismissed with costs

KGANYAGO J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

I AGREE

NAUDE-ODENDAAL J
JUDGE OF THE HIGH COURT OF SOUTH

AFRICA, LIMPOPO DIVISION,

POLOKWANE

APPEARANCES:

Counsel for the appellant	**: Mashile ME**
Instructed by	**: Malope D Mahlaela Inc**
Counsel for the respondent	**: Leso JT**
Instructed by	**: JT Leso Attorneys Inc**
Date heard	**: 10th November 2023**
Electronically circulated on	**: 17th January 2024**