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

**Case Number: 030710-2024**

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **NO**

**DATE 27 February 2025**

SIGNATURE

In the matter between:

**P[...] S[...] G[...]**

Applicant

And

**L[...] G[...]**

Respondent

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**JUDGMENT**

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**BOTSI-THULARE AJ**

*Introduction*

[1] This is an application for variation of an order granted by this court on 7 August 2023 (the Court Order). More pointedly, the applicant requests this court to make an order varying clause 6 of a settlement agreement signed by the applicant and respondent on 7 March 2023 (Settlement Agreement), which was subsequently made the Court Order.

- [2] In essence, the applicant launched this application seeking the variation of the Court Order to liquidate the immovable property and to appoint Mr. Thomas Motala as Receiver and Liquidator of the estate. The respondent opposes this application.

*Factual background*

- [3] The genesis of this matter emanates from a divorce action instituted by the respondent against the applicant under case number 049826/2022. The applicant and the respondent were previously married to each other in community of property. On 7 August 2023 they were officially divorced by a decree of this court, which incorporated the Settlement Agreement.

- [4] Clause 6 of the Settlement Agreement, which is the subject of this application, provides as follows:

“6. PROPRIETARY ASPECTS

6.3. IMMOVABLE ASSETS

6.3.1. The parties are the joint registered owners of the property known as Erf 2[...], A[...], Pretoria West ("the Property").

6.3.2. The parties agree that the property falls within the joint estate.

6.3.3. The Defendant has agreed to transfer her 50% half-share of the property into the Plaintiff's name immediately after the date of divorce, and the Plaintiff has agreed to accept all liabilities associated with the property, including but not limited to the repayment of the bond registered on the property.

6.3.4. The Defendant undertakes to fully co-operate and sign all necessary documents in order to effectively transfer her half-share of the property into the Plaintiff's name.

6.3.5. The parties shall appoint EW Serfontein & Associates as the conveyancers, and the Plaintiff shall be liable for the fees and costs associated with the transfer.”

- [5] In her variation application, the applicant seeks an order varying three of the paragraphs of the Settlement Agreement. The first variation is the portion of the settlement agreement which provides that the applicant transfers her 50% half-

share of the property into the respondent's name immediately after the date of divorce, and the respondent to accept all liabilities associated with the property, including but not limited to the repayment of the bond registered on the property (Clause 6.3.3).

[6] The second portion of the settlement agreement she seeks to vary provides that the applicant fully co-operates and sign all necessary documents to effectively transfer her half-share of the property into the Respondent's name (Clause 6.3.4).

[7] The third portion of the settlement agreement which she seeks to be varied, provides that EW Serfontein & Associates be appointed as the conveyancers, and for the Respondent to be liable for the fees and costs associated with the transfer (Clause 6.3.5).

[8] The Applicant effectively seeks to delete the identified paragraphs of the settlement agreement to achieve a result in which:

- a. A Receiver and Liquidator is appointed;
- b. The property would be "liquidated" by the liquidator; and
- c. The applicant would become entitled to 50% of the net proceeds of the sale.

### *Issues*

[9] This application turns on the following two issues.

- a. Whether the applicant made out a case for variation within the scope of Rule 42(1) of the Uniform Rules of Court, alternatively the common law.
- b. Whether a Receiver and Liquidator can be appointed in the circumstances.

### *The law*

[10] The well-established rule is that once a court has duly pronounced a final judgment or order, it has itself no authority to set it aside or to correct, alter or supplement it. The reasons are twofold: first, the court becomes functus officio and its authority over the subject matter ceases; secondly, the principle of

finality of litigation expressed in the maxim *interest rei publicae ut sit finis litium* (it is in the public interest that litigation be brought to finality) dictates that the power of the court should come to an end.

[11] The purpose of rule 42 is 'to correct expeditiously an obviously wrong judgment or order'. Rule 42 makes provision for the following distinct procedures:

- a. the rescission or variation of an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby, either by the court *mero motu* or upon the application of any party affected by such order or judgment (subrule (1)(a);
- b. the rescission or variation of 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, either by the court *mero motu* or upon the application of any party affected by such order or judgment (subrule (1)(b); and
- c. the rescission or variation of an order or judgment granted as the result of a mistake common to the parties, either by the court *mero motu* or upon the application of any party affected by such order or judgment (subrule (1)(c).

[12] All the jurisdictional requirements of rule 42(1) must be present. The rule gives the courts a discretion to order rescission or variation, which discretion must be exercised judicially.<sup>1</sup> Broadly speaking, the exercise of a court's discretion is influenced by considerations of fairness and justice, having regard to all the facts and circumstances of the particular case. It is worth mentioning that the purpose of the rule is to correct expeditiously an obviously wrong judgment or order.

[13] In *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State*<sup>2</sup> observed that:

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<sup>1</sup> *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9B–D

<sup>2</sup> 2021 (11) BCLR 1263 (CC) at para 97-98.

“[t]he principle of finality in litigation which underlies the common law rules for the variation of judgments and orders is clearly relevant to constitutional matters. There must be an end to litigation and it would be intolerable and could lead to great uncertainty if courts could be approached to reconsider final orders made.”

There is a reason that rule 42, in consolidating what the common law has long permitted, operates only in specific and limited circumstances. Lest chaos be invited into the processes of administering justice, the interests of justice requires the grounds available for rescission to remain carefully defined. In *Colyn*, the Supreme Court of Appeal emphasised that “the guiding principle of the common law is certainty of judgments”. Indeed, a court must be guided by prudence when exercising its discretionary powers in terms of the law of rescission, which discretion, as expounded above, should be exercised only in exceptional cases, having “regard to the principle that it is desirable for there to be finality in judgments”.

### *Analysis*

#### *Applicant's submission*

- [14] The applicant submits that if she does not make an application to vary the settlement agreement to the effect that a liquidator be appointed and the property in question be sold and the proceeds thereof shared between herself and the respondent, she would remain in bondage for the rest of her working life as she has enquired from the bank and was told that the period remaining on the mortgage bond is approximately 18 years.
- [15] She submits that the respondent has made no effort nor shown any interest in obtaining her co-operation in the transfer of her 50% share of the property, even though she has undertaken and offered her co-operation. The applicant informed this court that she is currently leasing a property in Nina Park, and as she was told by Standard Bank, she does not qualify to purchase a property while she has this other bond on her name.
- [16] The applicant submits that it is against the public policy that she will be perpetually tied to this Property and unable to move on with her life and secure

further properties on her name. The applicant argues that she is tied to the Property because of the respondent's blatant refusal to effect the transfer of the Property.

[17] The applicant further submits that the Court Order indicated that the transfer of property must be immediately after the divorce. However, it has been almost six months when the applicant's Attorneys wrote a letter to the respondent but he(respondent) elected not to respond to the correspondence nor indicate intention of settling the matter.

[18] The applicant alleges that he has done everything possible to resolve the issues and/or at least obtain an undertaking from the respondent that he will initiate the transfer. Nevertheless, the respondent has failed to cooperate. Accordingly, a liquidator should be appointed to ensure that the property is sold at a fair market price and to avoid any potential conflicts wherein she would seek the respondent's cooperation and/or signature when the property is being sold and to avoid any potential conflict or misunderstandings between the respondent and herself during the sale of the property.

*Respondent's submission*

[19] In opposition of the application, the respondent submits that first, and at best for the applicant (who does not even rely on Rule 42), there is no reason for this court to depart from its well-established approach of dealing with such applications in terms of Rule 42 because the applicant has made no attempt to identify the relevant principles of the common law on which she purportedly relies. Further, the applicant has not urged this court to develop a new rule of the common law or stated what the content of that rule should be.

[20] Secondly, and in any event, given the facts of this matter, there is no justification in terms of either Rule 42 or the common law for this court to grant the application because the circumstances of this application do not on any basis warrant variation of the court order.

Reasons for decision

- [21] In my view, none of the jurisdictional factors set out Rule 42(1)(a) to (c) of the Uniform Rules of Court have been established by the applicant. Furthermore, the applicant did not rely on any of the grounds on which a final order can be varied at common law. None of the above grounds fall within the ambit of Rule 42 of the Uniform Rules of Court, or the common law.
- [22] The applicant failed to establish that the Court Order it seeks to vary was erroneously granted in her absence because she was at all times a party to the proceedings. There is no ambiguity in the Court Order, and it does not contain any errors. There is no mistake common to the parties – on the contrary, the applicant unequivocally acknowledges that the settlement agreement accurately reflects the true intentions of the parties.
- [23] The applicant did not allege any of the exceptional circumstances and has not expressly relied on any of the grounds for variation within the scope of Rule 42(1). The court does not have a discretion to set aside or vary an order in terms of Rule 42 where one of the jurisdictional facts contained in Rule 42(1)(a)-(c) do not exist.
- [24] The applicant relied on the judgment of the Mpumalanga High Court in *S.Z v L.Z*<sup>3</sup> in which the decision of the Regional Court in Middleburg, granting an order in favour of the respondent appointing a liquidator in the joint estate of the parties which were married in community of property, was set aside. It should be noted that, similar to the applicant's argument in this court, in its application for the appointment of a liquidator in the Regional Court in Middleburg the respondent in *S.Z v L.Z* stated that she had requested the appellant to sign a sale agreement to finalise the sale of the property to a third party without success.
- [25] In setting aside the decision of the Regional Court in Middleburg, the Mpumalanga High Court observed that a settlement agreement, once made an

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<sup>3</sup> [2020] ZAMPMHC 20 (22 June 2020).

order of court, may only be varied or amended on application to court.<sup>4</sup> The majority of the Mpumalanga High court went further to mention that in the absence of any consensus between the parties, the settlement agreement may be varied by a formal application to court in circumstances where the order through error or oversight do not correctly reflect the true intentions of the parties.<sup>5</sup>

[26] It is surprising that the applicant in this matter relied on *S.Z v L.Z* in support of its application. In my view, the decision of the Mpumalanga High Court in *S.Z v L.Z* does not favour the applicant. I therefore fail to understand which reasons of the judgment in *S.Z v L.Z* advances the applicant's application. Accordingly, I am of the view that reliance in *S.Z v L.Z* by the applicant is misdirected and baseless.

[27] In conclusion, I am therefore of the view that the applicant has failed to make a case for the variation of the Court Order.

#### Costs

[28] The respondent prays for costs of this application to be awarded on an attorney-client scale. The respondent argues that this application is entirely without merit and the applicant's persistence therewith, is nothing but an abuse of court process. further, the applicant's *mala fides* are evident throughout and should be met with a punitive costs order. On the other hand, the applicant also argues that the respondent pay cost on punitive scale of attorney and client. The applicant submits that she wasn't supposed to be before this court if the respondent has complied with Court Order.

[29] Generally, courts do not order a litigant to pay the costs of another litigant on the basis of attorney and client unless some special grounds are present, such as, for example, that he has been guilty of dishonesty or fraud or that his motives have been vexatious, reckless and malicious, or frivolous, or that he

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<sup>4</sup> *Id* para 19

<sup>5</sup> *Id* at para 22

has acted unreasonably in his conduct of the litigation or that his conduct is in some way reprehensible.<sup>6</sup>

[30] It has frequently been emphasised that in awarding costs, the court has a discretion to be exercised judicially upon a consideration of the facts in each case, and that in essence the decision is a matter of fairness to both sides.<sup>7</sup> In giving the court a discretion, the law contemplates that it should take into consideration the circumstances of each case, carefully weighing the issues in the case, the conduct of the parties and any other circumstance which may have a bearing on the issue of costs and then make such order as to costs as would be fair and just between the parties.

[31] In this matter, the applicant's application is entirely without merit and not properly brought before this court. In my view, the application is without any reasonable grounds or justification. It is therefore in the interest of justice to ensure that the respondent is not burdened with unwarranted exorbitant legal costs because of this application.

[32] Against this background, in the exercise of my discretion and mindful that a punitive costs order is not awarded easily or readily, I am of the view that a punitive costs order against the applicant is justified and warranted in this matter.

### *Order*

[33] In the result, I make the following order:

1. The application is dismissed with costs on the attorney and own client scale, including the costs of Counsel with counsel 's rate allowed as per Scale B of Rule of the Uniform Rules of Court .

**MD BOTSI-THULARE,**

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<sup>6</sup> See *Mahomed & Son v Mahomed* 1959 (2) SA 688 (T); *Ridon v Van der Spuy and Partners* 2002 (2) SA 121 (C).

<sup>7</sup> *Mashele v BMW Financial Services (Pty) Ltd* 2021 (2) SA 519 (GP) at para 39.

**ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA**

**APPEARANCES**

Counsel for the Applicant: Adv EM Lekgwathi

Instructed by: Baloyi Masango Inc.

Counsel for Respondent: Adv J Kamffer

Instructed by: EW Serfontein & Associates Inc

Date of Hearing: 02 December 2024

Date of Judgment: 27 February 2025

