

**In the High Court of South Africa  
(Western Cape Division, Cape Town)**

**Case No: 17268/2024**

In the matter between:

**G[...] W[...] X[...] (PREVIOUSLY G[...])**

Applicant

and

**THE MAGISTRATE OF THE REGIONAL DIVISION OF THE  
WESTERN CAPE BLUE DOWNS, MR AC MASHALA N.O**

First Respondent

**E[...] M[...]**

Second Respondent

*Matter Heard: 24 March 2025*

*Judgment Delivered: 27 March 2025*

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**JUDGMENT**

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**MANTAME, J**

[1] The applicant seeks to review, correct and/or set aside the orders and decisions made by the first respondent on 11 July 2022 (the first order) and 5 September 2022 (the second order) respectively, at Blue Downs Regional Court in a divorce action. However, at the hearing of this application, the applicant brought to the attention of this Court that in fact there was another order that was granted by

the first respondent on 15 August 2022 on this matter, but was not issued. For purposes of this review, this Court will ignore such an order as it bears no consequences and rather focus on the first and second orders as identified by the applicant.

[2] On 11 July 2022, and on the day of the hearing of this divorce, the second respondent was neither represented nor appeared personally in court. The applicant gave *viva voce* evidence and the divorce action was finalised on an unopposed basis. The first respondent granted a decree of divorce with ancillary relief regarding care and contact of the applicant and the first respondent's minor children and the division of their joint estate.

[3] On 5 September 2022, the first respondent proceeded to unilaterally amend the order granted on 11 July 2022 in the absence of the parties and without any application as such being brought before him and/or any proceedings for a variation of such order that was initially sought. The applicant said that the subsequent order the first respondent made dividing the parties' joint estate, prejudiced the applicant in such a manner that this application was filed.

[4] This application was launched on 5 August 2024 and set down on an unopposed roll on 30 August 2024 and 11 September 2024 when it became opposed and a timetable for the further filing of papers was agreed upon between the parties. The first respondent did not oppose this application.

[5] This application was opposed only by the second respondent on the basis that the review was brought late and that the reason for this application was that the first respondent could not get a buyer for the Ezakheni property which was registered in his name before marriage. It was further intimated during argument that the second respondent always had a wish that the Brackenfell property be sold and the proceeds be shared between the parties. It was not explained by the first respondent how he got to implement the second respondent's wishes in his order of 5 September 2022. Similarly, the second respondent is unaware how the first respondent arrived at his decision of 5 September 2022.

[6] The background facts germane to this matter are that the applicant and the second respondent were married to each other on 20 March 2004, in community of property. Three children were born from this union, and two are still minors aged 16 and 12 years old, respectively. Both still reside with the applicant.

[7] On 26 January 2021, the applicant instituted divorce proceedings against the second respondent in terms of which she sought a decree of divorce and a division of the parties' joint estate, in terms of which she sought:

7.1 That she retains an immovable property known as 3[...] M[...] W[...], S[...] Brackenfell (the first property), which was utilized by the parties as their matrimonial home and the home where the applicant raised their children. The said property was situated in close proximity to their children's school.

7.2 That the second respondent would retain an immovable known as Erf 1[...] E[...], Pietermaritzburg (the second property), as his sole and exclusive property.

7.3 That the applicant and the second respondent each retain the vehicles in their possession at the time and each party retain their respective pension interest.

[8] The second respondent defended the divorce action and delivered a counterclaim amongst others, seeking care and contact to the parties' minor children every alternative weekend. No relief was claimed with regard to the division of their joint estate.

[9] On 11 July 2022, the divorce action was heard by the first respondent. The applicant appeared and testified at the hearing. However, the second respondent did not attend the hearing. At the conclusion of the proceedings, the first respondent granted an order in line with what was sought by the applicant in her particulars of claim. The applicant was later issued a copy of the decree of divorce.

[10] Notwithstanding, the first respondent replaced the order of 11 July 2022 with the second order of 5 September 2022 (and the inconsequential order of 15 August 2022) in circumstances where there was no application for rescission and/or variation application made by either the applicant or the second respondent. A

distinguishable feature in the subsequent orders was that in relation to the relief for the division of the joint estate, the first respondent ordered that both immovable properties i.e. Brackenfell and Ezakheni properties be sold and the net proceeds be shared in equal portions between the parties.

[11] What made the second order controversial was that it referred to the date of granting the order as 11 July 2022, although it was stamped by the Registrar of the Regional Court on 5 September 2022. That, on its own, did not reflect a true state of affairs of what transpired in court on those different days.

[12] Most importantly, what is evident from the record is that the second respondent filed an application for rescission of the order granted by the said Court on 11 March 2022, which on its own is a mistake. The first order was granted on 11 July 2022. That application was not prosecuted by the second respondent and remained undetermined. However, the applicant's Counsel pointed out that what the second respondent alleged in his opposing affidavit at paragraph 12 that "*...I further submit that this Honourable Court erred in its order when it awarded an order that had not been prayed for by any of the parties*"<sup>1</sup> is at variance or a mutually destructive version of what he alleged in his opposition of this application at paragraph 3.3 when he stated that "*...The matter was held on the 11<sup>th</sup> of July 2022 and the Final Decree of Divorce was granted on the 5<sup>th</sup> of September 2022*"<sup>2</sup>. All of a sudden, it appeared that the second respondent was contented with the second order that was granted by the first respondent.

[13] In such circumstances, the applicant submitted that the first respondent committed an irregularity by, *first*, amending an order after he became *functus officio*. In the absence of any application by either party for a variation of the order, he acted grossly irregular in the proceedings. *Second*, the conduct of the first respondent was so grossly irregular in the *court a quo* in that it resulted in substantial prejudice being suffered by the applicant. *Third*, the conduct of the first respondent was so unreasonable that no reasonable Court would have exercised the power or performed a judicial function in the same way as he did.

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<sup>1</sup> Record Page 110, Founding Affidavit (Counter application), paragraph 12

<sup>2</sup> Record Page 54, Opposing Affidavit, paragraph 3.3

[14] In his opposition, the second respondent took issue with the fact that this application was brought out of time. According to the second respondent, Section 7 (1) of the Promotion of Administrative Justice Act 3 of 2000 (*PAJA*) requires that:

‘Any proceedings for judicial review in terms of Section 6 (1) must be instituted without unreasonable delay and no later than 180 days after the date-

a. Subject to subsection 2 (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection 2 (a) have been concluded; or

b. Where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.’

[15] It was said that since this application was brought two years after the issue of a decree of divorce, the applicant should have filed an application for condonation. Reference was made to *BJM vs MAM* where the Court concluded that: -

‘...Despite the obvious inordinate delay, the applicant has not brought an application for condonation of the delay. Furthermore, the applicant has not furnished any reason(s) for the delay...

This is fatal to this application.’<sup>3</sup>

[16] The second respondent suggested that what motivated this application is the fact that he could not find a buyer for the Ezakheni property. Otherwise, the Brackenfell property was sold and both parties shared the proceeds equally. That alone was not disclosed by the applicant. For these reasons the application should fail.

[17] Quite importantly, the applicant contended that the second respondent did not raise legitimate grounds in opposition of this application. Although he disagreed with

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<sup>3</sup> (1423/2004) [2023] ZAGPPHC 20 (1 March 2023) at para 20

an order that was made on 5 September 2022, and the process in which such order was granted, his opposition of the review application cannot be regarded as *bona fide* opposition and should be disregarded.

[18] This application, it was submitted was brought in terms of Section 22 of the Superior Courts Act 10 of 2013 where grounds upon which the proceedings of any Magistrate's Act may be brought under review are; -

- '(a) absence of jurisdiction on the part of the court;
- (b) interest in the cause, bias, malice or corruption on the part of the presiding officer;
- (c) gross irregularity in the proceedings; and
- (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence'

[19] As envisaged in Section 22, it was said in order to successfully apply for a legality review, the applicant must show that she suffered prejudice as a result of the proceedings she seeks to set aside.<sup>4</sup> In this application, the applicant explained that the consequence of the first respondent amending an order in the absence of the litigating parties, in the absence of any process in terms of which such amendment was sought, and the circumstances where the Court was *functus officio*, was a gross irregularity as envisaged in section 22 (1) ( c ) of the Superior Courts Act and grossly prejudiced her interests.

[20] The irregularity which manifested during the divorce resulted in a court order which was not catered for in the pleadings, and which was not prayed for by either parties to the divorce. This resulted in the applicant accepting the sale of their joint household and having to share the sale proceeds of her residence where she raised her children with the second respondent – in circumstances where had it not been for the irregularity in the proceedings, she would have been in a position to retain all

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<sup>4</sup> Napolitano v Commissioner of Child Welfare, Johannesburg 1965 (1) SA 742 (A)

the sale proceeds. In *Ablansky v Bulman*<sup>5</sup>, it was held that a gross irregularity in civil proceedings in a magistrate's court means an irregular act or omission by the presiding judicial officer in respect of proceedings of such a nature that it was prejudicial to the aggrieved litigant, on proof of which the court would set aside such proceedings unless it was satisfied that the litigant had in fact not suffered any prejudice.

[21] Likewise, in *Lovius Block Incorporated v BP Makae and Others*<sup>6</sup>, the Court was faced with a review application in circumstances where a magistrate altered a court order in circumstances where no party applied for such an alteration. The Court held:

[15] There evenly existed no patent error which required correction in the Court order. It was therefore grossly irregular for the First Respondent to purport to “*change the Court order*” after it became *functus officio*, in the absence of any justification and only after hearing submissions from Mr Mokhele in chambers in the absence of the Applicant or its representatives. It also bothers on unethical conduct on the part of the attorney to approach the third respondent in Chambers and move an application in the absence of his colleague. This type of conduct must be frowned upon and should not only be discouraged but eradicated.

[16] The Third Respondent therefore committed a gross irregularity and the Applicant is prejudiced by the conduct of the Third Respondent, in that it was arbitrarily deprived of a final order without any due justification. As such the Court order is, reviewable in terms of Section 22 of the Superior Courts Act.’

[22] It is trite and often a repeated phrase that the magistrates’ courts are creatures of statutes and have no jurisdiction beyond that what is provided for in the enabling statute.<sup>7</sup>

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<sup>5</sup> 1915 TPD 71; also followed in *Rowe v Assistant Magistrate*, Pretoria 1925 TPD 361; also followed in *Berg v Regional Magistrate, Southern Transvaal* and another 1956 (2) SA 676 (T); also followed in *Geidel v Bosman NO* and another 1963 (4) SA 253 (T)

<sup>6</sup> (1279/2021) [2021] ZAFSHC 230 (08 October 2021) para 15 & 16

<sup>7</sup> *Vorster v Clothing City (Pty) Ltd* (159/2023) [2024] ZASCA 53 (19 April 2024)

[23] Both parties in these proceedings are *ad idem* that the first respondent replaced the court order of 11 July 2022 with that of 5 September 2022 without any application having been brought for variation by any of the litigants. Most concerning, and despite this acknowledgment, the second respondent seeks to legitimize the second order by stating that it has partially complied with it since the Brackenfell property has been sold and the parties shared the proceeds. It was only when Ezakheni property could not be sold that necessitated the applicant to bring these proceedings. In fact, it was submitted by the second respondent's Counsel that the second order granted on 5 September 2022 was the 'final decree of divorce'. This argument lost sight of the fact that all orders that were granted by the first respondent were titled "final decree of divorce".

[24] It appears that when all that happened, the applicant was unaware that the second order and other order/s were a nullity as the magistrate issued them under unlawful circumstances. Further, it is unclear exactly whose interests the magistrate sought to protect.

[25] The dictation expressed in *Firestone South Africa (Pty) Ltd v Gentiruco AG*<sup>8</sup> is applicable in this instance where it was stated:

'The general principle, now established in our law is that once a Court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased.'

[26] Simply put, once a court has pronounced a final judgment or order, it has no authority to correct, alter or supplement it, unless that is done shortly after the judgment was delivered just to correct a minor detail and that would not affect the substance or reasoning therewith. Unfortunately, the first respondent did not proffer any explanation why he elected to replace the first order with the second order and other orders *mero moto*.

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<sup>8</sup> 1977 (4) SA 298 (A) at 306 F - G

[27] The second respondent in opposing this application, seemed to suggest that this is an administrative law review as he stated that Section 7 (1) of PAJA has not been complied with. The applicant stated unequivocally that this is a legality review in terms of Section 22 of the Superior Courts Act. That section fully states the grounds upon which the proceedings of any magistrate's court may be brought. There is no mention of any time period in which it has to be brought. The legality review and the administrative law review are far apart and distinguishable from each other. Besides, the applicant explained her reasons for the delay in filing these proceedings were occasioned by the *bona fide* ignorance of the law. She was unaware that these proceedings were possible. It was after she consulted with her attorney that she was advised to file these proceedings.

[28] In such circumstances, I am satisfied that both orders issued by the magistrate are fatal. In my view, the applicant has made out a proper case for the magistrate's orders to be reviewed and set aside. Since this Court is endowed with inherent jurisdiction to decide on such matters, it would not be necessary to remit the matter back to the magistrate's court as this would cause unnecessary further delay.

[29] The applicant argued that this is a typical case for substitution. In *Trencon Construction v Industrial Development Corporation*<sup>9</sup>, the Constitutional Court in conducting an inquiry on whether substitution is justifiable it held that:

'[47] To my mind, given the doctrine of separation of powers, in conducting the inquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an

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<sup>9</sup> 2015 (5) SA 245 at para 47

examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.’ [Emphasis added]

[30] This Court agrees with the applicant’s submissions with regard to substitution. It is our considered view that this is a matter that need not be delayed any further. As a result thereof, this Court should substitute the orders granted by the magistrate with its just and equitable order as the applicant cannot be put in the same position that she was when the final order was granted on 11 July 2022. At this juncture, this Court is not in a position to ascertain the financial status of the second respondent or whether he is in a position to restore the applicant in a position that was ordered by the magistrate on 11 July 2022. Without a doubt, that would require some investigation by a receiver.

[31] In the result, the following order is made:

31.1 The Court Orders granted by the first respondent under Regional case number RCC/BD039/21, dated 5 September 2022 and (15 August 2022) are set aside.

30.2 Paragraph (g) of the Court Order granted by the first respondent under Regional case number RCC/BD039/21, dated 11 July 2022, which provided for the applicant and the second respondent’s division of their joint estate is set aside and substituted by the following order:

31.2.1 Division of the joint estate;

31.2.2 In respect of the aforesaid division of the joint estate, a Receiver be appointed by the chairperson of the Cape Bar with all the powers to take charge and dispose of the assets of such estate, and specifically:

31.2.2.1 to determine the extent of the joint estate as at 11 July 2022 (“the date of divorce”);

31.2.2.2 to place value upon the assets and liabilities of the parties' estate and on any direct or indirect interest which either party has an entity whatsoever;

31.2.2.3 to institute such action proceedings as may be necessary for the return or recovery of any assets of the joint estate;

31.2.2.4 to realize, in discretion, any assets of the joint estate either by public auction or private treaty so far as may be necessary in order to effect an equal division of the joint estate.

31.2.2.5 to divide the joint estate between the parties by allocating, awarding and distributing any moveable or immovable assets to one or either of the parties, or by distributing any monies in the joint estate, including the proceeds of any sale of assets, to one or both of them, or by allocating any debt or liability of the joint estate to one or other of the parties, or by any one or more or all the aforementioned methods;

31.2.2.6 to conduct a specific investigation into all retirement benefits or policies held in the name of the second respondent (Defendant) and to determine the applicant's (Plaintiff's) share in any interest that the second respondent (Defendant) may have in this regard, forming part of the joint estate;

31.2.2.7 to sign all documents and take all other steps necessary in order to effect an equal division of the joint estate;

31.2.2.8 to apply to the High Court for any further directions as the said receiver might consider necessary;

31.2.2.9 to demand payment over, or deliver of any asset in the hands of either party;

31.2.2.10 to engage the services of any suitable qualified person or persons to assist him/ her in determining the proper value of any assets to market and sells the assets and to attend to the registration of the transfer of immovable property, if any;

31.2.2.11 to subpoena such documentation from such persons or institution as may be necessary in order for him/ her to determine the value of the estate/s of the parties;

31.3 Pending the division of the joint estate neither party will in any way dispose of nor encumber any assets, other than in accordance with their living requirements.

31.4 The Receiver shall be entitled to make such determination as to the payment of his/ her sole discretion.

31.5 The Receiver shall prepare an account, which account shall reflect;

31.5.2 the values which he/she places upon each asset and liability;

31.5.3 the manner in which he/she proposes to distribute and/or liquidate assets;

31.5.4 the manner he/she proposes to effect the equal division of the joint estate.

31.6 The second respondent is ordered to pay costs of this application on scale B.

**MANTAME J**  
**WESTERN CAPE HIGH COURT**

I agree:

**MTHIMUNYE AJ**  
**WESTERN CAPE HIGH COURT**

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