

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 36798/2014

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

4 June 2025

DATE


[Redacted Signature]
SIGNATURE

In the matter between:

P. L. B

Applicant

and

L. R. B

Respondent

JUDGMENT

DOMINGO, AJ

INTRODUCTION

[1] This is an application for variation of a divorce settlement agreement signed by the parties on 18 September 2018 and made an order of court on 19 November 2018.

[2] There are two applications:

2.1 The main application is to vary clause 3.1 of the divorce settlement agreement and appoint a Liquidator and Receiver to divide the remaining assets of the joint estate, including the matrimonial home.

2.2 The second application is a counter-application brought by the respondent in terms of which the respondent seeks to claim from the applicant 50% of the applicant's pension interest held by Alexander Forbes and vary the settlement agreement so that each party be liable for 50% of the liabilities/debts incurred during the subsistence of the marriage.

[3] For the purposes of ease of reference and ease in reading this judgment, when I refer to the applicant it is the wife (P.L.B) and the respondent is the husband (L.R.B) in both the main application and the counterclaim application.

BRIEF BACKGROUND

[4] The parties were married to each other in community of property. The applicant in this application was the plaintiff and instituted the divorce proceedings against the respondent. The action was unopposed, and the parties concluded a settlement agreement which was made an order of court on 19 November 2018.

[5] Two children were born of the marriage. The eldest child is currently 27 years old, and the youngest child is presently 17 years old.

[6] It is submitted by the applicant that the eldest child is employed but is still dependant on the applicant to supplement his income as his salary is insufficient. The younger child is still dependant on the applicant and respondent for support and resides with the applicant in an RDP house.

[7] The respondent has submitted that the eldest child is self-supportive and his salary is sufficient for his needs.

[8] The applicant seeks the variation of clause 3.1 of the divorce settlement agreement. Clause 3.1 states the following:

“Immoveable property situated at ... Khutsong Extension, Mamelodi East, Pretoria registered in the names of the parties will be transferred to a Trust and the beneficiaries shall be the children.”

- [9] It is submitted by the applicant that the trust envisaged has not yet been created because the respondent refused to move out of the matrimonial home. While the respondent has submitted that the trust had not yet been created due to the applicant not honouring her undertaking to register the trust to the benefit of both children as it was easier for her to do so since she worked at a law firm at the time of the divorce.

RELIEF SOUGHT BY THE APPLICANT: MAIN CLAIM

- [10] The relief sought by the applicant in the main application is the following:

- 10.1 An order that clause 3.1 of the Deed of Settlement Agreement signed by the applicant and respondent on 18 September 2018 and made an order of court on 19 November 2018 be varied and set aside.
- 10.1 The appointment of a Liquidator and Receiver to divide the remaining assets of the joint estate including the immovable property (matrimonial home).
- 10.2 The counterclaim application be dismissed for lack of merit;
- 10.3 Costs of this application be against the respondent.

RELIEF SOUGHT BY THE RESPONDENT: COUNTERCLAIM

- [11] The respondent seeks the following relief in his counterclaim application:

- 11.1 That 50% of the applicant's pension interest held by Alexander Forbes Pension Fund be paid to the respondent;
- 11.2 That each party be liable for 50% of the debts incurred during the subsistence of the marriage;

11.3 The main application to be dismissed as the applicant failed to register the trust to the benefit of the children and therefore the application lacks merit;

11.4 Costs of this application be awarded to the applicant.

APPLICANT'S CONDONATION APPLICATION

[12] The applicant brought an application to this court to make an order condoning the late filing of the application for the variation of the settlement agreement incorporated into the divorce order granted by this court on 19 November 2018, which is almost six (6) years ago.

[13] In the applicant's founding affidavit in support of the condonation application, the applicant contended that the delay was extensive, however it was reasonable because of the following:

13.1 The applicant averred that when the decree of divorce was granted, she was residing at the matrimonial home with the respondent and their two children. In terms of clause 1.2 of the settlement agreement, she was awarded permanent residence of the children, it is submitted by the applicant that this meant she should stay at the matrimonial home with the children. However, it is alleged by the applicant that she moved out of the matrimonial home because the physical and emotional abuse by the respondent became unbearable. The applicant moved to her parent's home with the two children in June 2022.

13.2 After the decree of divorce was granted, a letter was sent to the applicant on 11 June 2019, to vacate the matrimonial home and the letter also brought clause 3.1 of the settlement agreement to the attention of the respondent in regard to its defects, in that, the clause made no provision for the registration of the trust and the appointment of trustee(s).

13.3 The applicant submitted that she could not afford to engage lawyers to deal with the matter as she had no financial means due to being under debt review resulting from debt incurred during the marriage and due to

the renovation of the matrimonial home. Furthermore, the applicant averred that she did not know what steps to take legally to address the issue of the immoveable property.

13.4 The applicant submitted that the respondent did not communicate with her regarding the immoveable property or his intention therein. The applicant averred that the respondent is living comfortably in the matrimonial home with another woman unknown to the applicant, whilst she and the children live in an RDP house where she shares a room with her daughter.

13.5 During July 2022, the applicant submitted that she was employed at another attorneys office as a secretary. In October 2024, she narrated her story of her divorce to her employer, her employer then explored the possibility of filing the current application to vary clause 3.1 of the settlement agreement and to appoint a Liquidator and Receiver to deal with the remaining division of the joint estate.

13.6 On the 9 October 2024, a letter was sent to the respondent in which he was informed that the applicant intended to appoint a Liquidator and Receiver to deal with the issue of the immoveable property.

13.7 The applicant submitted that her employer arranged counsel who agreed to take the matter on a *pro bono* basis and assist within the current application.

[14] In regard to the prospects of success of the main application, the applicant submitted the following:

14.1 The respondent and the applicant were married in community of property. The joint estate has not been fully divided by the parties. The respondent has taken full occupation of the matrimonial home to the exclusion of the applicant and has not made any effort to pay the applicant what she is entitled to.

14.2 Clause 3.1 of the settlement agreement is defective. As set out in the letter she sent to the respondent, clause 3.1 of the settlement agreement makes no provision for the names of the trustees and their appointment. Thus, this clause is unenforceable, and it is submitted by the applicant that even if trustees were to be appointed, there will always be a dispute as to who occupies the property. Accordingly, the applicant averred that clause 3.1 serves no purposes in the settlement agreement and should be varied and set aside.

14.3 The best way to resolve the dispute is for the property to be sold. Thus, the applicant submitted that the relief sought in the main application is competent in law.

[15] The applicant further contended that she would be severely prejudiced if the condonation is not granted or the main relief is not granted because she was married to the respondent for over 20 years in community of property. She contributed to the renovation of the immovable property, she currently stays in and RDP house with her children, she shares a bedroom with her daughter, the situation is untenable and undesirable as the respondent lives in luxury in the matrimonial home. Furthermore, the applicant contended that she would be prejudiced if the joint estate is not divided equally as required by the law and in terms of the marital regime.

[16] The applicant submitted that the respondent would not suffer any prejudice as he is employed and would be able to find alternative accommodation and he would receive his half share of the property once the property is sold. The applicant averred the respondent would not be rendered homeless.

[17] The applicant contended that it would be in the interest of justice that the joint estate be divided equally between the parties in terms of the applicable law. Furthermore, the applicant contended that this case is of importance to her and her children who are not self-supportive (one child is still a minor) and who do not live in a comfortable home.

[18] The respondent has not opposed the applicant's condonation application.

RESPONDENT'S CONDONATION APPLICATION

- [19] The respondent in his counterclaim founding affidavit set out his grounds for an application for condonation.
- [20] The respondent submitted that he was not aware of this right to claim from the pension fund of the applicant, it was not until this action when he was served this application and approached his current legal representatives that he was advised that he had a right to claim.
- [21] The respondent further submitted that according to clause 2.1 of the settlement agreement he was not legally represented and relied solely on the advice provided by the applicant's legal representatives who misled him, and they did not properly explain the contents and the meaning of clause 2.1. Clause 2.1 states that "*the defendant [respondent in this matter] irrevocably and unconditionally relinquishes his right to claim any furniture acquired before and during the marriage.*" The respondent submitted had he understood the implication and or meaning of clause 2.1 he would not have attached his signature, however he trusted what was conveyed and explained to him at the time.
- [22] It is submitted by the respondent that the applicant will not be prejudiced by the variation and allowing the respondent to receive what is legally his as he is entitled thereto, as the applicant herself has received her 50% portion of his pension interest.

EVALUATION OF THE CONDONATION APPLICATIONS

- [23] In *Grootboom v National Prosecuting Authority*¹ the court held the following in regard to condonation applications:

"It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance

¹ 2014 (2) SA 68 (CC) at para 23.

with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default."

[24] Furthermore, in *Melanie v Santam Insurance CO Ltd*² the court stated:

"In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospect of success, and the importance of the case. Ordinarily these facts are interrelated; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion..."

[25] Having considered the applicant's application for condonation and the totality of evidence presented before this court for the late filling of the main application, while the degree of lateness is extensive and substantial, this case is important because a variation of clause 3.1 of the settlement agreement will impact on the best interests of the children born of the marriage. It is in the interest of justice that the condonation application be held as it affects the best interest of the children as the beneficiaries of the trust which should have been registered in terms of clause 3.1 of the settlement agreement. The respondent has not opposed the applicant's condonation application, thus, I am satisfied that there is no prejudice to the respondent that would warrant the refusal of the application.

[26] Having considered the respondent's counterclaim condonation application and the totality of evidence presented before this court in this regard, the applicant has not opposed the condonation application, while the delay is also substantial, in the interest of justice, I will not dismiss the condonation application. Furthermore, I am satisfied that there is no prejudice to the applicant that would warrant the refusal of the application.

[27] I will now proceed to deal with the main claim and thereafter the counterclaim.

MAIN CLAIM

[28] It is submitted by the applicant that it is not viable that a trust be established in terms of clause 3.1 of the settlement agreement because the respondent has

² 1962 (4) SA 531 (A) at paras C-F.

taken full control of the matrimonial home with another woman and he is residing in the home to the exclusion of the children. It is further submitted by the applicant that by way of operation of law with a marriage in community of property, the parties share a joint estate. The matrimonial home is an asset within that joint estate. The applicant contended that clause 3.1 is unenforceable because (as stated earlier) even if trustees were appointed, there will always be a dispute as to who should occupy the matrimonial home, thus the clause serves no purpose and should be varied and set aside. The applicant submitted that the best way to resolve the dispute regarding the occupancy of the matrimonial home would be for the immovable property to be sold and the proceeds divided equally between the parties.

[29] It is contended by the respondent that the general rule for applications in terms of Rule 6(1) of the Uniform Court Rules, is that every application brought in terms of a notice of motion must be supported by an affidavit as the facts upon which the applicant relies for relief.

[30] The respondent has directed the court to the case of *Quatermark Investments (Pty) Ltd v Mkhwanazi and Another*³ where it was held that:

“[I]t is trite that in motion proceedings affidavits fulfil the dual role of pleadings and evidence. They serve to define not only the issues between the parties but also to place the essential evidence before the court. They must therefore contain the factual averments that are sufficient to support the cause of action or defence sought to be made out. Furthermore, an applicant must raise the issues as well as the evidence upon which it relies to discharge the *onus* of proof resting on it, in the founding affidavit.”

[31] It is submitted by the respondent that the founding affidavit in motion proceedings must not lack averments that are necessary to assist the court to come to a just and fair decision. It is submitted by the respondent that in the main application, the applicant in her notice of motion is asking the court to make an order that clause 3.1 of the settlement agreement signed by the applicant and the respondent on 18 September 2018 and made an order of court on the 19 November 2018 be varied and set aside. However, it is submitted by the

³ 2014 (3) SA 96 (SCA) at para 13.

respondent that the applicant failed to state the necessary averments that warrants the variation and setting aside thereof. The applicant failed to disclose to this court who was responsible for the registration of the trust and further that on what grounds should the order be set aside.

[32] It is further submitted by the respondent that an order that a Liquidator and Receiver be appointed to divide the remaining assets of the joint estate, including the matrimonial home also lacks averments. It is submitted that the applicant failed to list the assets that forms part of the joint estate that was not dealt with and or distributed by the divorce court when the divorce matter was finalised. In addition, the applicant failed to advance substantial reasons that warrant the appointment of the Liquidator and Receiver and state further which assets apart from the immoveable property, will be subject to distribution.

[33] The respondent averred that in the *Quatermark*⁴ case mentioned above, the court is clear that an applicant seeking an order must raise the issues as well as the evidence upon which it relies to discharge the *onus* of proof resting on it. In the founding affidavit, it is submitted that the applicant failed to discharge the *onus* resting upon her not only by not including the necessary averments to make out a case but also failed to produce evidence that supports her claim, in that there is no inventory list of the assets belonging to the joint estate which requires the appointment of a Liquidator and Receiver.

[34] It is submitted by the respondent that the applicant in her founding affidavit alleges that she was forced to move out of the matrimonial home due to the abuse of the respondent however, the applicant failed to support this allegation by producing documentary evidence such as an application for a protection order and or a case number from any police station to support the allegations.

[35] It is further submitted by the respondent, on the issue of the applicant not having a place to reside with the two children, she made mention of two addresses in her founding affidavit, which one of them is an RDP house and the other is an ordinary house that is capable to accommodate the applicant and the two children. It is submitted by the respondent that in terms of the eldest son whom

⁴ *Supra*.

the applicant alleges is not self-supportive (the son's current income is insufficient to meet his needs) and whom the applicant supports; the applicant has not taken the court into her confidence to fully disclose how she is helping with the shortfall. It is submitted by the respondent that the applicant wants this court to take her word on all that is alleged and grant an order which will ultimately affect the respondent and the two children, as the children are the sole beneficiaries of the trust when it is eventually registered.

LEGAL FRAMEWORK: MAIN APPLICATION

[36] At the outset it is important to note that there were a number of facts disputed by the parties on affidavits. The *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd*⁵ sets out the rule when dealing with such matters. This rule was succinctly summarised in *M M S v L E S*⁶ as follows:

"The rule is that in proceedings where disputes of fact have arisen on affidavits, a final order may be granted if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. Simply put, the court will consider what facts have been alleged by the respondent in his answering affidavit against the version of the applicant which have been admitted by the respondent."

[37] In this matter I have been mindful of both the respondent and applicant's versions where there have been disputes of fact taking into account the above *Plascon Evans*⁷ rule.

[38] Rule 42 of the Uniform Rules of Court deal with the rescission or variation of court orders and provides, *inter alia* as follows:

"(1) 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:

(a) absence of any party affected thereby;

⁵ 1984 (3) SA 623 (A).

⁶ 5910/2019 (19 December 2024) at para 77.

⁷ *Supra* note 5.

- (b) an order or judgment in which there is ambiguity, or patent error or omission, but only to the extent of such ambiguity, error or omission;
- (c) an order or judgment granted as a result of a mistake common to the parties.”

[39] In regard to the courts discretion in applying Rule 42 of the Uniform Rules of Court, the Constitutional Court 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 and Others*,⁸ held:

“The precise wording of Rule 42 postulates that a court “may” not “must” rescind or vary its order -the rule is merely an empowering section and does not compel the court to set aside or rescind anything. The discretion must be exercised judicially.”

[40] In *Maharaj v Maharaj*⁹ the court held that where parties do not comply with the terms of the settlement agreement a liquidator may have to be appointed.

[41] The applicant directed the court to the case of *Gillingham v Gillingham*¹⁰ where court held the following:

“The law governing this matter seems to be perfectly clear. When two persons are married in community of property a universal partnership in all goods is established between them. When a court of competent jurisdiction grants a decree of divorce that partnership ceases. The question then arises, who is to administer what was originally the joint property, in respect of which both spouses continue to have rights? As a general rule there is no practical difficulty, because the parties agree upon division of the estate, and generally the husband remains in possession pending such division. But where they do not agree the duty devolves upon the court to divide the estate, and the Court has power to appoint some person to effect the division on its behalf. Under the general powers which the court has to appoint curators it may nominate and empower someone..to collect, realise, and divide the estate. And that has been the practice in South African courts is clear.”

⁸ 2021 ZACC 28 at para 15.

⁹ 2002 (2) SA 648 (D) at 652 C.

¹⁰ 1904 TS 609.

[42] The judgment of *Maharaj*¹¹ and *Gillingham*¹² was followed by this court in the matter of *E.M v W.S.M*¹³ where the court made an order for the appointment of a liquidator where the parties who were married in community of property did not comply with the terms of the settlement agreement.

EVALUATION AND DISCUSSION MAIN APPLICATION

[43] In terms of the application of Rule 42(1)(a) above, the court may vary an order granted in the absence of a party affected thereby. In the present matter this is not applicable as the divorce order was not granted in the absence of a party affected.

[44] In terms of Rule 42(1)(b) above, the settlement order, which was incorporated into the divorce order, particularly clause 3.1 sets out very clearly that the matrimonial home be placed in a trust for the benefit of the parties' two children born of the marriage. In regard to a court having the judicial discretion to vary an order where an order in which there is ambiguity, or patent error or omission, but but vary only to the extent of such ambiguity, error or omission. I am in agreement with the applicant that the defect in clause 3.1 is that it makes no provision for the appointment of a trustee.

[45] From the evidence the creation of the trust in terms of clause 3.1 of the settlement agreement, was not made as a result of a mistake common to the parties as set out in Rule 42(1)(c) of the Uniform Court Rules.

[46] The overarching reason why the applicant wants clause 3.1 to be varied, is that the applicant wants the matrimonial home to be sold instead of being placed in a trust for the benefit of the children, because a dispute has arisen between the parties as to who should reside in the matrimonial home. The settlement agreement is silent on who should reside in the matrimonial home. It is submitted by the applicant that it is her understanding that in terms of clause 1.2 of the settlement agreement where it states "*it would be in the best interest of the minor children if they resided permanently with the plaintiff*" that clause grants her the

¹¹ *Supra* note 9.

¹² *Supra* note 10.

¹³ 51743/16 (25 January 2018).

right to remain in the matrimonial home. In my view, this clause of the settlement agreement *prima facie* deals with the contact and care arrangements of the children. On a *prima facie* reading of clause 1.2, it is a standard clause in divorce proceedings where it states that the minor children's primary residence will be with the applicant permanently. The applicant further averred that even if a trust is created it will not solve the current dispute that she and the children should reside in the matrimonial home and the respondent should vacate the home.

[47] The respondent has submitted that he has paid the outstanding balance of the bond of the house, which means the house no longer has a bond and is debt free. I am in agreement with the respondent that should the trust be registered, the children would never be without a home in the future. It would be in the best interest of the children to create the trust as they would be beneficiaries of a home which is free of bond repayments; this is a valuable asset for the children.

[48] The dispute around who should occupy the marital home, from the evidence appears to have arisen when the applicant left the matrimonial home in June 2022 to go live with her parents. The applicant submitted that she lives in an RDP home with her children. The occupancy dispute between the parties from the evidence appears to have arisen for the first time, almost three (3) years after the divorce order, which in my view the applicant now wants to settle through a variation of the settlement agreement. I am further of the view that the applicant, presently as co-owner of the matrimonial home should explore other legal avenues to deal with the occupancy dispute, including the issue of tenants residing in the co-owned matrimonial home.

[49] Should the matrimonial home be divided as sought by the applicant, the home would be sold, and the proceeds would be divided between the parties. The children would have no right to claim a share of the proceeds of the sale. While the applicant submitted that she wants the division because this would not only benefit her, but also assist her in maintaining the children, both in terms of providing a better home for them and financially maintaining them; in my view this is a short-sighted benefit for the children in the context of the trust benefit. I am of the opinion that the creation of the trust in clause 3.1 in the settlement

agreement will benefit the children long term, a bond free house is a huge asset in the challenging socio-economic times we are living in.

[50] It is clear from the evidence that applicant has attempted to deal with the appointment of a trustee when she sent a letter to the applicant regarding the appointment of trustee(s). The respondent alleges that the applicant undertook verbally to register the trust as she was working at a law firm at the time of the divorce. To date the trust has not been registered and no trustee has been appointed.

[51] Drawing from the judgments in *Maharaj*,¹⁴ *Gillingham*,¹⁵ and *E.M*¹⁶ in the circumstances, it is appropriate that a trustee be appointed to give effect to clause 3.1 in the settlement agreement, as such in my view would be in the best interest of the children. In the circumstance, I am of the opinion that this court should intervene and order the appointment of a trustee. I am in agreement with the submission of the respondent that the trust should be registered within three months of a court order.

[52] In regard to the appointment of a Liquidator and Receiver to divide up the remaining assets of the joint estate, I am in agreement with the submissions made by the respondent that the applicant has not placed any evidence before the court to support her claim; there is no inventory list or description of the remaining assets, apart from the matrimonial home which need to be divided. Clause 2.1 of the parties' settlement agreement headed "immovable property" states, "*the defendant irrevocably and unconditionally relinquishes his right to claim any furniture before and during the marriage.*" The applicant has not averred that there has been non-compliance with clause 2.1 of the settlement agreement. In the circumstances, I am the view that this court should not intervene and accordingly not grant the relief sought by the applicant.

COUNTERCLAIM APPLICATION

¹⁴ *Supra* note 11 above

¹⁵ *Supra* note 12 above.

¹⁶ *Supra* note 13 above.

[53] The respondent in his counter application seeks a variation/amendment of the settlement agreement to include the following prayers:

53.1 that the 50% share of the applicant's pension interest at Alexander Forbes Pension Fund be paid to the respondent as at the date of divorce and their records be accordingly endorsed for the court to give effect to the defined rights of the parties in terms of section 7(8) of the Divorce Act 70 of 1979.

53.2 that each party is liable for 50% of the liabilities/debts incurred during the subsistence of the marriage.

[54] It is submitted by the respondent that the marital relationship between himself and the applicant irretrievably broke down, in an around 2014. Before that for all intents and purposes the parties had a happy marriage. The respondent alleges that the applicant started mistreating him and abused him emotionally and stopped caring for him, as well as denied him conjugal rights.

[55] The applicant consulted her attorneys and proceeded to issue summons against the respondent. The applicant was legally represented, while the respondent could not afford legal representation, subsequent to legal aid rejecting his application. The respondent submitted that the divorce was opposed, but the parties then entered into a settlement agreement which was incorporated into the decree of divorce granted by the court.

[56] It is submitted by the applicant that it was his understanding, based on advice he received from colleagues and internet research that upon the granting of a divorce, the applicant and he would each be entitled and share 50%, half share of their joint estate, including the pension fund and/or interests.

[57] The respondent further submitted that on 19 November 2019, when the divorce matter was heard in court, the applicant's attorneys omitted to include the 50% pension interest claim of the respondent against the applicant's pension fund.

[58] The respondent averred that as a lay person he was not legally represented, and he relied on the legal advice provided by the applicant's attorney at the time of

the divorce. The respondent alleges that the applicant's attorneys failed to advise him accordingly, that he was entitled to claim 50% share of the applicant's pension interest at Alexander Forbes. The respondent further submitted that the applicant's attorneys deceived, manipulated and misled him into believing that the settlement agreement did include the 50% share of the applicant's pension interest held at Alexander Forbes. Whilst, at the same time the respondent submitted that he was not aware of the fact that he was entitled to the 50% share of the applicant's pension interest. The respondent is requesting this court to give effect to his rights as envisaged in terms of section 7(8) of the Divorce Act 70 of 1979 [Divorce Act].

[59] It is also the submission by the respondent in his counterclaim application that he did not at anytime relinquish, forfeit and/ or abandon his right to claim his share of the pension interest held by the applicant's pension fund.

[60] The applicant's response in her replying affidavit to the respondent's counterclaim regarding the claim for 50% of her pension interest is as follows:

"The applicant can read and write. He opted not to oppose the divorce proceedings. No claim was made against my provident fund. It was the applicant's choice not to do so. In any event, all monies received were used to pay for the debts created by the applicant".

[61] Furthermore, at the hearing of the matter, counsel on behalf of the applicant submitted that the applicant has no pension interest held by Alexander Forbes.

LEGAL FRAMEWORK: COUNTERCLAIM APPLICATION

[62] In *C.N.N v N.N*¹⁷ the court stated:

"The parties engaged in divorce proceedings are within their rights to negotiate the terms of their divorce and agree on the various aspects including the division of one or both parties' pension interests. By voluntarily placing their signatures on their negotiated settlement agreements in the presence of their witnesses, parties expressly declare that they are satisfied with the contents of their settlement agreement and will be bound by the terms expressed thereto."¹⁸

¹⁷ [2023] ZAGPJHC 208; 2023 (5) SA 199 (GP) at para 11.

¹⁸ See also *PL v YL* 2012 (6) SA 29 (ECP) at para 6.

[63] Section 1 of the Divorce Act 70 of 1979 [Divorce Act] defines a pension interest in regard to a pension fund where a party seeks a divorce who is a member of a pension fund (excluding a retirement annuity funds) as:

“[T]he benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have terminated on the date of the divorce on account of his resignation from his office.”

[64] The court in *C.N.N v N.N*¹⁹ succinctly summarises the practical role played by section 7(8) of the Divorce Act in respect of pension interest as follows:

“First it provides the divorce court with a discretion to make an order that a portion of the member spouse’s pension interest is due to the non-member spouse. Secondly, it empowers the court to make an order against the identified retirement fund which may or may not have been joined in the divorce proceedings as a party to pay the prescribed portion of the member spouse’s pension interest to the non-member spouse when the benefits accrue to the member spouse. Thirdly, it authorises the court to direct the registrar of the court to notify the identified fund of the order for such fund to endorse its records in respect of its member that a proration of that members benefits will be paid to the non-member spouse. Fourthly, it creates an obligation on the administrator of the identified fund, once an endorsement in the records of the fund has been made, to provide proof of such endorsement to the court in writing.”

EVALUATION AND DISCUSSION: COUNTERCLAIM APPLICATION

[65] Having regard to the evidence before this court, at the time of the divorce, the respondent was not legally represented, and it appears that the settlement agreement was reached by the parties through the negotiations of the applicant’s legal representatives. It is not disputed by the applicant that her legal representatives led the negotiations and that the respondent was reliant on the advice of her legal representatives.

[66] The general tenet of this case in respect to the negotiations around the pension interest is not clear from either of the parties. The applicant in her replying affidavit simply states that the applicant did not make a claim against her provident fund and he chose not to do so. She does not mention what role if any

¹⁹ *Supra* note 17.

her legal representatives played in negotiating the settlement agreement in this regard. The respondent on the other hand alleges that he was misled, deceived and manipulated by the applicant's legal representatives, however, there are no details or evidence in the form of correspondence, conversations or any other proof how this was done by the applicant's legal representatives; firstly, that the respondent did not know he was entitled to the 50% pension interest share and secondly, how he was misled to believe that the 50% share was then included in the settlement agreement.

[67] In the case of *Kotze v Kotze*²⁰ the court held that where parties who were married in community of property did not deal with pension interests in divorce proceedings by way of a settlement agreement or by a forfeiture, both spouses remained entitled to share in the member spouse's pension interest, which must be determined at the date of divorce. The fact that the estate had already been divided, should not affect that entitlement. In the present case, there is no evidence before this court that supports the contention that the respondent received proper legal advice. The applicant is a layperson with his highest qualification at grade 12, in the premises and in the interest of justice, I will proceed to address the relief sought by the applicant.

[68] In regard to the pension interest claim, on the day of the hearing, the applicant's counsel averred that the applicant had no pension fund at the time of the divorce. Furthermore, it was submitted in the applicant's heads of arguments that the applicant has no pension interest held by Alexander Forbes.

[69] The respondent's counsel directed the court, to Annexure "BB2" in the applicant's founding affidavit which is the applicant's contract of employment. The contract set out that the letter of appointment of the applicant dated 29 November 2005, was revoked by the contract of employment dated 1 January 2021. It was submitted by the applicant that due to restructuring at work her salary decreased with the new contract of employment. However, the contract included the benefits of the applicant which included provident fund contributions. The applicant also included her salary slips which also referenced provident fund deductions.

²⁰ (2013) JOL 30037 (WCC).

- [70] Having regard to the evidence and having heard counsel, at the time of the divorce I am satisfied that the applicant did have a provident fund, as evidence above and as evidenced by the applicant herself when she stated in her founding affidavit that the respondent made no claim against her provident fund.
- [71] What has not been placed before this court is the evidence that the applicant's provident fund was held by Alexander Forbes.
- [72] The applicant in her founding affidavit submitted that she recently secured employment with a law firm in Pretoria. This means she has resigned from her previous position where her pension interest was held; she is no longer a provident fund member belonging to a provident fund as a result of the employment with her erstwhile employer.
- [73] A pension interest as defined in section 1 of the Divorce Act, is the resignation benefit that would be payable in terms of the rules of the fund if you resigned on the date of divorce. The conundrum with the present case, is that at the time of the divorce the applicant was a member of a provident fund, but at date of this hearing the applicant has since resigned from her previous employer, thus the pension interest at the time of this hearing no longer exists.
- [74] Having regard to the evidence presented to this court, it appears that the provident fund money accruing to the applicant has been paid out; the applicant states in her replying affidavit, that the respondent made no claim against her provident fund and in any event that she has used all monies received to pay for the debts created by the respondent. The respondent on the other hand in his responding answering affidavit, alleges that the applicant utilised her provident fund from her previous employer to purchase immovable property. Thus, there is a common understanding between the parties that the applicant's provident fund from her employer at the time of the divorce has accrued and has been paid out.
- [75] The relief sought by the respondent is to vary the settlement agreement to allow for the claim of the 50% share of the pension interest of the applicant's Alexander Forbes Fund, which was held by the applicant at the time of the divorce. In the circumstances, the relief sought cannot be granted by this court because the order would be unenforceable as the applicant must be an active member of the

fund (whether it is Alexander Forbes or not) in order for the fund to pay the respondent.

[76] In *Eskom Pension and Provident Fund v Krugel and Another*²¹ the court held:

“[O]nce the pension benefit has accrued ie beyond the date of divorce at which time the pension interest converts into a pension benefit, the provision of ss7(7) and 7(8) are no longer applicable.”

[77] Thus, in the present matter section 7(8) of the Divorce Act is no longer applicable. In other words, if the settlement agreement is varied according to the relief sought by the applicant, the order, would direct the fund and not the member (applicant), to pay 50% of the pension interest to the former spouse (respondent). Therefore, the variation of the settlement agreement and the resultant order would be unenforceable as the pension interest has accrued and has been paid out at the time of the applicant's resignation.

[78] In the case of *Eke v Parsons*²² it was held by the Constitutional Court that:

“If an order is ambiguous, unenforceable, ineffective, inappropriate, or lacks the element of bringing finality to a matter or at least part of the case, it cannot be said that the court that granted it exercised its discretion properly. It is a fundamental principle of our law that a court order must be effective and enforceable, and it must be formulated in language that leaves no doubt as to what the order requires to be done.”

[79] When a pension interest accrues it becomes a pension benefit.²³ At most in the case of a pension benefit the accrued right would form part of the joint estate.²⁴ Thus, the first relief sought by the respondent in his counterclaim application falls to be dismissed.

[80] The second relief sought by the respondent in his counterclaim application is that each party is liable 50% of the liabilities/debts incurred during the subsistence of the marriage.

²¹ 2012 (6) SA 143 (SCA) (31 May 2011).

²² [2015] ZACC 30 at para 74.

²³ *Elesang v PPC Lime Limited and Others* 2007 (6) SA 328 (NC) at para 20.

²⁴ *Supra*. Also see *De Kock v Jacobson and Another* 1999 (4) SA 346 (W) at 349H; *Sempapalele v Sempapalele and Another* 2001 (2) SA 306 (O) at 311C and *Maharaj supra* note 9 at 650-651.

[81] In *J.A.N v N.C.N*²⁵ the court held:

“[T]he effect of a ‘settlement order’ or ‘consent order’ is to change the status of the rights and obligations between the parties. ‘Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties: the *lis* becomes *res judicata* (literally, “a matter judged”). [The principle is that generally parties may not again litigate on the same matter once it has been determined on the merits]. It changes the terms of a settlement agreement to an enforceable court order.”

[82] In the present matter, the parties in their affidavits have made reference to paying off each others debts incurred during the marriage after the granting of the divorce order, thus, it is not for this court six (6) years later after the divorce order to deal with the merits of parties’ debt disputes, particularly when the matter around the debt payment was dealt with in the settlement agreement. Clause 5 of the settlement agreement is headed “debts” and states that “*each party undertakes responsibility for payment of debts incurred in his or her own name.*” There is no ambiguity in the phrasing of this clause and having regard to the evidence before this court there are no grounds upon which to seek the variation of this clause on the facts, in the circumstances the relief sought by the respondent in this regard is not granted as the respondent has provided no cogent reasons to support his claim for the variation of the debt agreement in the settlement agreement.

CONCLUSION

[83] Having regard to the terms of the settlement agreement and the evidence placed before this court, there exists in my view, on an application of the law referred to in this judgment, no reason why the court cannot intervene and direct the appointment of a trustee to give effect to clause 3.1 of the settlement agreement as it would be in the interest of justice to protect the best interests of the two children born of the marriage who are the beneficiaries of the trust, whilst the applicant’s application and the respondent’s counterclaim application falls to be dismissed.

²⁵ (2283/2021) [2022] ZAECKMHC 14 (17 May 2022) at para 24.

[84] Finally, as to costs in general, the principle is that costs follow the results of the proceedings. Thus, I can see no reason why there should be a deviation from the general rule that the successful party should be awarded her/his costs.

ORDER

[85] Having heard counsel for both parties and considered the evidence before this court, in the circumstances, I hereby make the following order:

- 85.1 The applicant's condonation application is granted.
- 85.2 The respondent's condonation request is granted.
- 85.3 The applicant's application for the variation of clause 3.1 of the divorce settlement agreement incorporated into the divorce order dated 19 November 2018 is dismissed with costs.
- 85.4 The applicant's application for the appointment of a Liquidator and Receiver to divide the remaining assets of the joint estate, including the matrimonial home is dismissed with costs.
- 85.5 The respondent's counterclaim application is dismissed with costs.
- 85.6 To give effect to clause 3.1 of the settlement agreement as incorporated into the divorce order dated 19 November 2018, the attorneys of the respondent, is hereby ordered to register the trust and appoint an independent trustee to administer the trust within three (3) months of this order.



W DOMINGO
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Delivered: This judgment was delivered and prepared by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of the this matter

on CaseLines. This matter was heard in open court on 4 March 2025. The date for hand down is deemed to be 4 June 2025.

APPEARANCES

For the Applicant: ADVOCATE F BALOYI instructed by MAGAGANE
ATTORNEYS INC

For the Respondent: ADVOCATE HM MAHLANGU instructed by LS
MAHLANGU ATTORNEYS

