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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 6055/2005

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

SIGNATURE

DATE: 25/09/2025

In matter between:

L[...] N[...] M[...]

Applicant

and

K[...] M[...]

First Respondent

GOVERNMENT EMPLOYEES PENSION FUND

Second Respondent

In re:

K[...] M[...]

Plaintiff

and

L[...] N[...] M[...]

Defendant

JUDGMENT

STONE AJ

Introduction

- [1] The applicant and the first respondent were previously married in community of property. Their marriage was dissolved in terms of an order of this Court on 3 November 2006. The division of their joint estate is still in dispute. This application is a further chapter in a history of litigation between them regarding the division of their joint estate and the applicant's entitlement to a part of the Respondent's pension interest.
- [2] The second respondent is the Government Employee Pension Fund (The GEPF). The second respondent has not participated in the application.
- [3] The first respondent (as plaintiff) instituted divorce proceedings in 2005 under case number 6066/2005 against the applicant (the defendant in such action). Subsequent litigation proceedings between the parties to which I refer herein, have all been instituted under the same case number.

Relief claimed by the applicant

- [4] The relief claimed by the applicant in her notice of motion is formulated as follows:

"1. The settlement agreement made an order of court on 31 October 2023 signed by me and the First Respondent is to be declared null and void and to have no force and effect.

2. *Alternatively, the settlement agreement made an order of court on 31 October 2023 be varied and to include the following clause:*

That the Plaintiff is a member of the Government Employee Pension Fund, with Pension No.: 96221151, In terms of provisions of section 7 of the Divorce Act, the said Plaintiff pension fund's interest in the Government Employee Pension Fund forms part of the joint estate.

The Defendant is entitled to an amount of R360 000.00 of the Plaintiff's pension fund interest in the Government Employee Pension Fund, the Government Employee Pension Fund is hereby directed to endorse the amount of R360 000 [Three Hundred and Sixty Thousand Rand] in favour of the Defendant against Plaintiff Pension Fund interest and to pay the said amount of R360 000 to the Defendant within 30 days of the order."

That, the immovable property situated at 1[...] R[...] Street, Sun Valley, Mamelodi West, Pretoria, Mamelodi, which the joint estate is the owner thereof, shall be evaluated by a professional valuator to be appointed jointly by the parties alternatively by Association of Professional evaluators of South Africa, within 30 [Thirty] days of the order, and the cost of such evaluation shall be on the account of the parties in equal share.

After the evaluation of the immovable property the property shall be sold either by a direct sale, or estate agent or public auction and the proceeds thereof shall be shared between the parties.

The Plaintiff shall exercise his rights of first preference to purchase the Defendant half share of the immovable property within 30 [thirty] days of order, if not, then it shall be sold to a third party.

3. *Costs of this application only in the event of opposition".*

Background

[5] On 3 November 2006 this court per Shongwe DJP made an order ("the 2006 order") as follows:

- "1. THAT the bonds of marriage subsisting between the plaintiff and the defendant are hereby dissolved.*
- 2. THAT custody of the two minor children be and is hereby awarded to the plaintiff, to the plaintiff, subject to the defendant's reasonable rights of access*

3. *Division of the joint estate.*

4. *No order as to costs. “*

[6] The remaining contentious issue is whether the joint estate has been fully divided as contemplated in paragraph 3 of the aforesaid order, in terms of a settlement agreement that was made an order of court on 31 October 2023, or whether it still remains to be implemented in full.

[7] Although it was previously disputed by the applicant, it is common cause in the present application that the parties signed the aforesaid settlement agreement which is referred to in the notice of motion, on 14 December 2020 (the settlement agreement).

[8] Despite the fact that she signed the settlement agreement in 2020, the applicant subsequently lodged an application to this Court for the variation of the 2006 order, to include relief that she be awarded 50% of the first respondent's interest in the GEPP. The applicant did not rely on the settlement agreement in such application. Pursuant to such application, Kovari J granted an order on 17 October 2022, in the absence of the first respondent, varying the 2006 order. His order read as follows:

“1. The Order dated 3 November 2006 is varied to include paragraph 4 in the following terms: -

“That the Second Respondent (the pension fund) be ordered to pay to the Applicant the half share of the pension interest in the fund known as GOVERNMENT EMPLOYEES PENSION FUND WITH NUMBER: 96221153 within three months of date of this order.”

2. *(Was deleted)*

3. *No order as to costs*”

[9] The first respondent thereafter contended that the order of Koevertjie J was granted in his absence, and that it was at variance with the abovementioned agreement of settlement. The first respondent therefore applied, in turn, for an order that the variation order granted by Kovari J on 17 October 2022 be set aside and/or varied, in terms of rule 42 of the Uniform Rules of Court, and that the aforesaid settlement agreement concluded between the parties be made an order of court.

[10] Such application came before Molopa-Sethosa J on 31 October 2023. She granted an order in the following terms:

- “1. The order of Koevertjie J of 17 October 2022 is rescinded and set aside.*
- 2. The settlement agreement entered into by the applicant (the first respondent in the present application) and the first respondent (the applicant in the present application) herein dated 14 December 2020, marked ‘X’ is made an order of court*
- 3. Each party is ordered to pay his/her own cost.”*

[11] Although such order does not indicate that it was made by agreement, I was informed in argument by counsel, that the parties were in agreement that the order of Molopa-Sethosa J was granted by agreement. The order of Koevertjie J was rescinded and paragraph 2 of the order of 31 October 2023 (making the settlement agreement an order of court) was made by agreement. There is no judgment of Molopa-Sethosa J on record, which is evidently due to the fact that the parties agreed to the said relief.¹

¹ Upon enquiry I was assured that Molopa-Sethosa J only made the order on 31 October 2023.

[12] The relief in the present application is now aimed at declaring null and void or varying the settlement agreement which was made an order of court by Molopa-Sethosa J on 31 October 2023. (“the 2023 order”).

[13] Applicant’s counsel approached the application on the basis that the agreement should be declared void or varied. The Applicant did not make it clear in her papers whether the application was based on common law grounds or rule 42. The respondent and his counsel approached the matter on the basis that the application is brought in terms of rule 42 of the Uniform Rules of Court. In my view the application must be determined in terms of such rule.

The settlement agreement which was made an order of court

[14] The settlement agreement of 14 December 2020, which was made an order of court on 31 October 2023 (the 2023 order) reads as follows:

“WHEREAS the Plaintiff and the Defendant hereto were married to each other on 20 July 2000 at Pretoria, in community of property in terms of the Matrimonial Property Act, Act 88 of 1984.

AND WHEREAS the marriage relationship has broken down and the parties divorced on 03 November 2006.

AND WHEREAS Plaintiff was a member of the GOVERNMENT EMPLOYEES PENSION FUND (“the Fund”) at the time of divorce held under pension fund number 9[...]. The Parties agree that the Defendant shall be entitled to THREE HUNDRED AND SIXTY (sic) THOUSAND RANDS (R 360 000.00) of the pension interest held in the fund. [the paragraph numbering starts with the number 7.2]

7.2 The said amount of the Plaintiff’s pension interest shall be payable to the Defendant by the fund as contemplated in section 37D(1)(d)(I) of the Pension Fund Act read with section 7(8)(a) of the Divorce Act,

7.3 *The Plaintiff will retain the remainder of the value of his fund as his sole and exclusive property,*

7.4 *An endorsement shall be made in the records of the Government Employees Pension Fund that the Defendant's share of the Plaintiff's pension interest is payable to defendant. The Fund shall pay to the defendant his share of the interest as referred to herein within 90 days of being informed of how the amount must be dealt with in accordance with Defendant's election.*

NOW THEREFORE the parties hereto agree as follows:

ENTIRE AGREEMENT

11.1 *This agreement is in full and final settlement of the issues between the parties hereto and save as provided herein, no party hereto will have any further claim and/or claims against any other party in any form whatsoever.*

11.2 *Any amendment and/or variation or change to any of the terms of the agreement will only be of any force and/or effect if such amendment, variation and/or change is reduced to writing and signed by all the parties hereto."*

Main issues for decision

[15] The main issues for decision are:

15.1 Whether the settlement agreement should be declared void and of no force or effect based on alleged fraud by the first respondent's representative.

15.2 Whether, in the alternative, the settlement agreement should be rescinded or varied.

15.3 Whether the 2023 order should be rescinded or varied.

15.4 Whether the applicant should be declared a vexatious litigant.

15.5 The interpretation of the settlement agreement: Whether it includes a full and final settlement of the division of the joint estate, or only a settlement in respect of the pension interest.

15.6 Whether the order of Molopa-Sethosa J, as it stands, can be implemented to obtain payment from the GEPP.

The applicant's main contentions

[16] The applicant relies thereon that the settlement agreement is void, as the first respondent was represented by a Mr Khoza when the agreement was negotiated and signed, who was not an attorney, but misrepresented that he was (this is common cause). She contends that the settlement agreement is to be set aside due to the fraud of Mr Khoza.

[17] She avers in the alternative, if the settlement agreement is not set aside, that it should be varied, as set out in the notice of motion.²

[18] In her founding affidavit the applicant relies thereon that the 2006 order only provided for the "*division of the joint estate*", without providing how it should occur. She contends that the amount in the settlement agreement is not a settlement in full of the division of the joint estate, but only constitutes a settlement of her entitlement to receive a part of the first respondent's pension interest in the GEPP. It is common cause that an immovable property in Mamelodi, Pretoria³ (which she contends forms part of the

² See paragraph [4] *supra*.

³ Referred to in paragraph 2 of the notice of motion. See paragraph 4 *supra*.

common property owned by her and the first respondent) remains in his possession. She avers that the immovable property should still be divided by selling and dividing the proceeds, or that a liquidator be appointed to divide the joint estate.

- [19] She complains that the GEPF has failed to make payments to her in respect of the first respondent's pension interest, as the settlement agreement does not accord with the fund's requirements. In her replying affidavit she avers that the request for a variation of the settlement agreement stems from "*the impracticability and short comings as the settlement fail to deal with other joint estate, the errors come from the settlement itself*". Unfortunately, she however does not provide full particulars of the alleged short comings and the reasons why the GEPF's has allegedly refused to make payments. She avers that the wording of the clause containing an obligation that the GEPF must pay her R360 000.00 as contained in the settlement order, "*is of such a nature that the Fund requires direction to pay and in the absence of such they will not pay, it is therefore on that basis that the settlement agreement be varied*" as set out in her notice of motion. A somewhat more detailed indication appeared from her answering affidavit in the application which served before Molopa-Sethosa J, wherein it is stated:

"In order for me to be able to enforce joint division on the pension, the pension fund clause, and pension number as well as full details of parties, were required to enforce the pay-out from the administrators of the second respondent (the GEPF)."

- [20] Her counsel unfortunately also could not provide more clarity regarding the exact nature of the reasons why the GEPF would not make payment

pursuant to the 2023 order, and the reasons why the fund required a varied court order. He argued that the “*precise concern*” in the 2023 order is that if the settlement is not corrected alternatively varied, there will not be finality on the division of the part of the joint estate (the property) as the pension fund will still require a varied order to effect payments to the applicant.

[21] The applicant denies that she ever waived her entitlement to receive a division of the common property, which she says is not provided for in the settlement agreement. She avers that she would not have accepted the amount reflected in the settlement as a settlement which includes the division of the immovable property, as she never received particulars of the value of the pension fund nor of the common property.

[22] In her replying affidavit she responded to allegations by the first respondent (which he had also made in the application which served before Molopa-Sethosa J, that the parties reached an agreement at a round table in 2018, for the settlement off all claims for a specific amount of R360 000.00, and that it was intended to consist of amounts of R250 000.00 for her half share in the common property based on the market value thereof, and R110 000.00 from his pension interest calculated as at the date of divorce. She contends that it is “*legally wrong to read his intention into the agreement, whereas, such is not recorded, I have read the settlement, but I could not find such clause.*”

- [23] Her counsel submitted that the contention of the first respondent is at variance with the contents of the settlement agreement, wherein no such values or division are specified as being included in the R360 000.00.
- [24] Her counsel contended that the true intention of the parties with the settlement was to only settle her claim in respect of the first respondent's pension interest, and that the settlement agreement should be interpreted accordingly. He submitted that such division still has to take place.
- [25] On the basis of the applicant's main contentions that the agreement is void, he submitted that the parties will still have to convene again to agree on a division of the immovable property, and if they cannot agree, the court should then make a division order. I understood him to contend, regarding the alternative relief of a variation of the agreement, that the court has a discretion to make an order for the division of the immovable property, and should do so in the interest of justice, to set out how the division should occur, with reference to the procedure mentioned in the alternative prayer in the notice of motion, in order to bring finality to the disputes between the parties.
- [26] He submitted that although the parties now have divergent stances regarding the interpretation of the settlement agreement, the settlement agreement is not ambiguous. He submitted that both parties must have intended to only settle the pension interest. If I understood him correctly, he contended that, if the aforesaid is not the interpretation of the agreement, it does not conform with the intention of the parties.

[27] He submitted in argument that the main point, which is really in issue, is how the settlement agreement should be interpreted. He contended that the dispute about what was included in the settlement amount, is not a material dispute of fact on the papers.

[28] He indicated in argument that the applicant would be seeking a rescission of paragraph 2 of Molopa-Sethosa J'S 31 October 2023⁴. In the alternative, if relief is not granted as per paragraph 2 of the notice of motion, then a 50/50 division of the joint estate property should be ordered.

The first respondent's main contentions

[29] In his answering affidavit the first respondent relies on the following main contentions:

29.1 The first respondent initially, submitted that the relief claimed cannot be sustained as the court, per Molopa-Sethosa J, has already pronounced on the matter and is *res judicata*. This point was however withdrawn by his counsel, in argument.

29.2 He submitted that the applicant's recourse is to appeal against the order of Molopa-Sethosa J, not by way of the relief she presently seeks.

29.3 The settlement agreement constitutes a full and final settlement of the division of the joint estate and should so be interpreted. The

⁴ The applicant has not sought a rescission of the part of the order of Molopa-Sethosa-J setting aside the order of Koertge J.

settlement agreement (paragraph 11.1) provides for a full and final settlement of all claims between the parties for the amount of R360 000.00, and the parties have agreed that they will have no further claims of whatsoever nature against each other. The applicant is therefore not entitled to further relief in respect of the division of the joint estate.

29.4 The applicant's reliance on the misrepresentation of the first respondent's representative (Mr Khoza) that he was an attorney, has no merit. The first respondent does not concede that this tainted the consensus between the parties.

29.5 The application is in essence an application in terms of rule 42, and he submitted that the applicant has not made out a case, in compliance with such rule, for a rescission or variation of the order of Molopa-Sethosa J.

29.6 The application is also opposed on the ground that the applicant should be declared a vexatious litigant, and he seeks an order that she should be declared as such.

29.7 The first respondent's counsel initially submitted that there was not a meeting of the minds between the applicant and the first respondent, but he withdrew this submission during argument and submitted that the settlement agreement reflects what was agreed between the parties, and that there exist no grounds on which it is void or should be varied.

Rescission or variation of the 2023 order: The legal position

[30] It is a well-established rule 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, it is in the public interest that litigation be brought to finality, which dictates that the power of the court should come to an end.⁵

[31] 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**⁶ the Constitutional Court observed:

“[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 interest 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”.

⁵ Gaborone v Gaborone 2025 JDR 0907 (GP) par [10]; Morae v Morae and another 2023 JDR 2064 (GP) at par [19]-[21].

⁶ 2021 (11) BCLR 1263 (CC) at para 97-98.

- [32] Once a settlement agreement is made an order of Court, it obtains the status of a court order⁷, and must be dealt with as such. Court orders may be set aside or varied in terms the common law, under rule 31 or in terms of rule 42, whichever finds application. The applicant did not set out in her application on which of these bases she relies. The first respondent accepted in his papers, and it was also argued by his counsel, that the application should be assessed as a rule 42 application.
- [33] The applicant has failed to set out sufficient allegations in her papers to support a case in terms of the rule 31 or the common law, and she did not rely thereon. She does not contend that the order was made in her absence, and she has failed to provide a proper explanation why the settlement agreement was made by agreement.
- [34] The court has a discretion to rescind or vary an order in terms of rule 42, which must be exercised judicially, taking into account considerations of fairness and justice, in view of the facts of a particular case. Before relief is granted in terms of rule 42(1), all the jurisdictional requirements must be present. In the absence of one of the jurisdictional facts as contained in rule 42 (a), (b) or (c) the court does not have a discretion to set aside or vary an order.⁸
- [35] In terms of the common law a judgement can be set aside on grounds of fraud, *Justus error*, in certain exceptional circumstances when new documents have been discovered, where judgment was granted by default,

⁷ Eke v Parsons 2016 (3) SA 37 (CC).paras [8] – [14] & [24] – [25].

⁸ Gaborone v Gaborone 2025 JDR 0907 (GP) par [10]; Morae v Morae and another 2023 JDR 2064 (GP) at par [19]-[21].

in the absence of a valid agreement. The only identifiable common law ground relied on by the applicant is the alleged fraud by the abovementioned Mr Khoza, who misrepresented that he was an admitted attorney whilst acting on behalf of the first respondent. She has not demonstrated good cause or sufficient cause in her affidavits for a rescission under rule 31 or the common law.

[36] A court may clarify its judgment or order if, on a proper construction, the meaning thereof remains obscure, ambiguous or otherwise uncertain, in order to give effect to its true intention, but it may not alter the substance of the order or judgment⁹.

[37] *In casu* the jurisdictional facts for an application in terms of rule 42(1)(a) are absent. That leaves potentially rules 42(1)(b) or (c). The ambiguity or patent error or omission mentioned in rule 42(1)(b) must be attributed to the court itself.¹⁰ Whether a common mistake existed as contemplated in rule 42(1)(c), must be proved by the party seeking such rescission or variation. The court however retains a residual discretion to rescind or vary an order or judgment on the grounds in rule 42(1) if applicable. It can do so *Mero motu*, but this discretion should be exercised judicially, and sparingly.

Is the settlement agreement void due to fraud?

[38] An assessment of the applicant's founding affidavit shows that this is the only ground clearly relied on by her for the contention that the agreement is

⁹ Firestone South Africa (Pty) Ltd v Gentrack AG 1977 (4) SA 298 (A) at 307 C – G; Thompson v South African Broadcasting Corporation 2001 93 SA 746 (SCA) at par [5].

¹⁰ First National Bank of South Africa Ltd v Jurgens and other 1993 (1) SA 245 (W) at 246 F; Mostert NO v Old Mutual Life Assurance Co SA Ltd 2002 (1) SA 82 SCA at 86C-D

void. The other allegations in her affidavits are rather made in support of the alternative relief.

[39] The applicant submits that the first respondent cannot rely on the agreement as Mr Khoza falsely represented that he was an admitted attorney, and that he rendered advice to the first respondent whilst not being an admitted attorney. She says that such misrepresentation renders the agreement null and void. Her counsel relied on a reported review application¹¹ where criminal proceedings were set aside in circumstances where a person held himself out to be a legal practitioner and represented an accused without being admitted as an attorney. The court considered it a gross irregularity and set aside proceedings. In my view the facts in this matter are different. The first respondent, who was represented by Mr Khoza, does not complain that Mr Khoza's position affected him or his decision to agree to the terms of the agreement. He was not represented by Mr Khoza when the 2023 order was made.

[40] A party who is induced by a misrepresentation of the other party to enter into a contract, is entitled to rescind the contract. A person relying on a misrepresentation to avoid the contract, must allege and prove that the misrepresentation induced her to enter into the agreement, or that she would not have entered into the agreement if it was not for the misrepresentation¹². Such misrepresentation must however be material, or in respect of a material fact. If not, a rescission will not follow. Whether a misrepresentation

¹¹ S v Sereni and other 2023 JDR 4041 (NWM); (HC 05/2023) [2023] ZANWHC 193 (25 October 2023).

¹² See the discussion in Christie's, *The Law of Contract in South Africa*, 8th Edition p 346 -347.

is material, is assessed by applying an objective test. It must be such that it goes to the root of the contract, and it must have persuaded the other party to enter into the agreement. It must have been made with the intention to induce a contract and must in fact have induced the person to conclude the agreement. The maxim that fraud unravels a contract depends on its victim, not the fraudster or third parties. A party must have acted to his detriment, or have been prejudiced by the fraud, to be able to rely on fraud.¹³

[41] The applicant's averments regarding the misrepresentation fall short of these requirements. It is not disputed that the applicant herself was duly represented by attorneys when the settlement agreement was negotiated and signed. Although she says that Mr Khoza misrepresented his position during negotiations and the signing of the settlement agreement, she does not allege that the fraud of Mr Khoza induced the settlement agreement, nor that she would not have signed it if she knew that Mr Khoza was not an attorney, nor does she make out a case that she was prejudiced thereby. In the absence of clear allegations by the applicant that Mr Khoza's misrepresentations concerning his position as an attorney affected her in accepting and signing the settlement agreement, and how it affected her, and as the first respondent himself does not have such a complaint, I am of the view that this does not afford a basis for a finding that the agreement is void.

The alternative relief, to vary the settlement agreement which was made an order of court on 31 October 2023.

¹³ Nihongo Property Investments (Pty) Ltd v Groenewald and Others 2022 (2) SA 543 (WCC) at [25] – [27].

[42] The court may grant orders regarding the way in which assets of a joint estate should be divided, if the parties cannot agree thereto, and if the joint estate has not yet been divided¹⁴. It is however trite that the court cannot make a new contract for the parties. A request for a variation of the agreement can be made if it does not reflect the parties' true intention.¹⁵

[43] The applicant seeks alternative relief in the form of a variation of the terms of the settlement agreement. She seeks relief that is final in nature.¹⁶ Her real motivation with the application appears to be to obtain an order that could place her in a position to receive a part of the first respondent's pension interest from the GEPF. The stated reason for the amendments is to include practical arrangements to achieve a division, and to record her entitlement to an interest in the first respondent's pension fund. These allegations are however not presented as a basis to avoid the agreement. Her contentions, and that of her counsel, illustrate that her requested variations to the settlement agreement constitute an attempt to obtain an order which the GEPF would be willing or compelled to implement. The applicant does not rely on an ambiguity, a patent error or omission attributable to the court, save insofar as it is alleged that the GEPF has requested a clearer or more circumscribed order. She equally does not clearly rely in her papers on a mistake common to the parties. She has not made out a case on her affidavits in terms of rule 42¹⁷.

¹⁴ *Id.*

¹⁵ LH v NH 2020 JDR 2711 (GP) par [30];

¹⁶ JN v NN 2022 JDR 1357 (ECMA).

¹⁷ Fritz v Feudatory Umbrella Pension Fund and Others 2013 94 SA 492 (ECP)

[44] In argument counsel for the applicant submitted that there has not been a meeting of the minds between the parties as to the question whether the agreement included a total settlement of all disputes, or only a settlement in respect of the pension interest. Counsel for the first respondent initially also submitted that there was no meeting of the minds, but he withdrew the submission in argument. He then proceeded to contend that there was indeed a meeting of the minds in respect of the terms of the settlement agreement.

The interpretation of the settlement agreement

[45] In deciding whether a court order should be rescinded or varied, the order itself must also be considered and interpreted. *In casu*, this also entails the interpretation of the settlement agreement which now forms part of the 2023 order. I deal with this *infra*.

[46] Counsel for both parties intimated that there should be finality to the disputes between the parties. They agree that the court should decide on the correct interpretation of the settlement agreement in order to determine whether it includes a full and final settlement in respect of the applicant's entitlement to a part of the first respondent's interest in the GEPF only, or whether it includes a total settlement in respect of the division of the joint estate. The interpretation of the agreement also proved to be relevant to the relief to be granted.

The Law: Interpretation of contracts and court orders

[47] **Erasmus, Superior Court Practice**¹⁸, summarise the principles applicable to the construction of court orders, with reference to **Natal Joint Municipal Pension Fund v Endumeni Municipality**¹⁹, as follows:

“The basic principles applicable to construing documents apply to the construction of a judgment or order. This includes settlement orders. In a long line of cases the position has been held to be as follows:

- (i) The Court’s intention is to be ascertained primarily from the language of the judgment or order as construed according to well-known rules.*
- (ii) As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention.*
- (ii) If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it. In such case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it.*
- (iv) If any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court’s granting of the judgment or order may be investigated and regarded in order to clarify it;*
- (v) If the meaning of the order is, however clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment”.*

[48] In **Endumeni Municipality** the approach to interpretation of contracts was set out as follows by the Supreme Court of Appeal: ²⁰

“The present state of our law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration

¹⁸ Second Edition, Volume 2 at p42-25/26.

¹⁹ 2012 (4) SA 59 (SCA) at 603F-610C.

²⁰ *Id* par [18].

*must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*²¹

[49] In the same matter²² Wallis JA further explained:

"[24]The sole benefit of expressions such as 'the intention of the legislature' or 'the intention of the parties' is to serve as a warning to courts that the task they are engaged upon is discerning the meaning of words used by others, not one of imposing their own views of what it would have been sensible for those others to say. Their disadvantages, which far outweigh that benefit, lie at opposite ends of the interpretative spectrum. At the one end, they may lead to a fragmentation of the process of interpretation by conveying that it must commence with an initial search for the 'ordinary grammatical meaning' or 'natural meaning' of the words used seen in isolation, to be followed in some instances only by resort to the context. At the other, they beguile judges into seeking out intention free from the constraints of the language in question, and then imposing that intention on the language used. Both of these are contrary to the proper approach, which is from the outset to read the words used in the context of the document as a whole and in the light of all relevant circumstances. That is how people use and understand language and it is sensible, more transparent and conduces to greater clarity about the task of interpretation for courts to do the same.

[25] Which of the interpretational factors I have mentioned will predominate in any given situation varies. Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary

²¹ Also: MAS Stores (Pty) Ltd v Marray & Roberts Construction (Pty) Ltd and Another 2008 (6) SA 654 (SCA) para 7; Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Funs 2010 (2) SA 498 (SCA) paras 12-14; Bothma-Batho Transport v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) paras [10] – [12]; Better bridge (Py) Ltd v Masilo and others NNO 2015 (GNP) par [8], where Unterhalter J referred to the approach as "a unitary endeavour requiring the considerations of text, context and purpose".

²² Indumeni, *supra* n19 paras [24] and [25].

grammatical meaning of the words used. However, that too is a misnomer. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning; a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction [or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning [or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity.”²³

[50] The shift to an emphasis on context recognises that attributing meaning to words always involves a consideration of the context in which they are used²⁴. A court should seek the intention of the parties as it appears from the contract to be assessed. As pointed out in Christie’s the phrase “*intention of the parties*” should not be misunderstood to mean what the parties proposed to do, rather than what the words they used mean. The authors state in this regard:

“This misunderstanding might cause courts to stray into the error of seeking the parties’ intentions outside the contract terms and giving effect to the intention by substituting words that express that intention for those actually used by the parties. This is not what the process of interpretation entails. It must be restricted to construing the meaning of the language of the contract in context.”²⁵

²³ See also Batho Transport (supra) n21 par [12].

²⁴ Christie’s The Law of Contract in South Africa, 8th Edition, p 260; Natal Joint Municipal Pension Fund *supra*, at par [18].

²⁵ *Id* p 257.

[51] In **University of Johannesburg v Auckland Park Theological Seminary and Another (University of Johannesburg)**²⁶ the Constitutional Court dealt with the parole evidence rule as follows:

“[68] Let me clarify that what I say here does not mean that extrinsic evidence is always admissible. It is true that a court's recourse to extrinsic evidence is not limitless because 'interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses'. It is also true that 'to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible'. I must, however, make it clear that this does not detract from the injunction on courts to consider evidence of context and purpose. Where, in a given case, reasonable people may disagree on the admissibility of the contextual evidence in question, the unitary approach to contractual interpretation enjoins a court to err on the side of admitting the evidence. There would, of course, still be sufficient checks against any undue reach of such evidence because the court dealing with the evidence could still disregard it on the basis that it lacks weight. When dealing with evidence in this context, it is important not to conflate admissibility and weight.”

.....

“[89] The rule consists of two subrules. This duality was outlined by Corbett JA in Johnston:

*' As has been indicated, the parole evidence rule is not a single rule. It in fact branches into two independent rules or sets of rules: (1) the integration rule . . . which defines the limits of the contract, and (2) the [interpretation] rule, or set of rules, which determines when and to what extent extrinsic evidence may be adduced to explain or affect the meaning of the words contained in a written contract.'*¹

[90] The parole evidence rule therefore has both an integration facet and an interpretation facet. It is the latter facet that was relied on by the Supreme Court of Appeal. That facet of the rule was explained by Corbett JA as follows:

'In many instances recourse to evidence of an earlier or contemporaneous oral agreement would, in any event, be precluded by . . . that branch of the rule which prescribes that, subject to certain qualifications, when a contract has been reduced to writing, the writing is regarded as the exclusive embodiment or memorial of the transaction and no extrinsic evidence may be given of other utterances or jural acts by the parties which would have the effect of contradicting, altering, adding to or varying the written contract. The extrinsic evidence is excluded because it relates to matters which, by reason of the reduction of the contract to writing and its

²⁶ 2021 (6) SA 1 (CC) paras [68], [89] [90],

integration in a single memorial, have become legally immaterial or irrelevant.'

[91] *He continued to say:*

'(I)t is clear to me that the aim and effect of [the integration] rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract. The object of the party seeking to adduce such extrinsic evidence is usually to enforce the contract as redefined or, at any rate, to rely upon the contractual force of the additional or varied terms, as established by the extrinsic evidence.'

[92] *The integration facet of the parole evidence rule relied on by the Supreme Court of Appeal is relevant when a court is concerned with an attempted amendment of a contract. It does not prevent contextual evidence from being adduced. The rule is concerned with cases where the evidence in question seeks to vary, contradict or add to (as opposed to assist the court to interpret) the terms of the agreement...*²⁷

Evidence

[52] *In casu*, it was indicated in a practice note that the first respondent would request to give oral evidence. At the hearing, counsel for the first respondent indicated that he would not present oral evidence. Counsel for the applicant submitted that there were no material disputes of fact, and the applicant did not apply that any aspect of the matter be referred for oral evidence or for trial. I therefore deal with the matter on that basis.

[53] The gist of the first respondent's extrinsic evidence is that the parties met with their legal representatives and negotiated in 2018, deciding on the fixed amount of R360 000,00 calculated by way of an amount of R110 000 as pension interest as at date of the divorce and R250 000.00 based on a half share of the immovable property value. The settlement agreement itself

²⁷See also KPMG Chartered Accountants (SA) v Secure fin Ltd and Another 2009 (4) SA399 SCA par [30].

however does not contain an indication of such a division, or that the amount includes a share of the property. The applicant disputes this. In my view this evidence regarding the settlement agreement and negotiations rather fall in the second category of evidence to which the parole evidence rule pertains, namely evidence which seeks to vary, contradict or add to the agreement, as contemplated in **University of Johannesburg**²⁸. It is also of note that the round table was allegedly held in 2018, whereas the agreement was only signed in December 2020.

[54] In the application which served before Molopa-Sethosa J the first respondent also relied on the aforesaid agreement in 2018. The applicant avers that she raised, in previous papers, that the division of the joint estate has not yet taken place. She disputes that the parties agreed on the terms as alleged by the first respondent.

[55] The application unfortunately lacks full and supported particulars of the way in which the amount of R360 000.00 was compiled and calculated. The first respondent did not provide any valuation of the property as at the time of signature or on any other date, nor other supporting evidence. The applicant has equally placed no valuation of the property before the court. Furthermore, neither of the parties have submitted on record a certificate of the GEPP or other calculation of the actual value of the applicant's interest in the GEPP as at the date of the divorce on record. In the premises, even if the first respondent's evidence regarding prior negotiations is admitted, in my view the available evidence still does not conclusively show (even if the

²⁸ Supra n 28

amount of R360 000.00 was in full and final settlement) whether the calculation of the amount includes a value for common property or not.

Content, context and purpose.

[56] In applying the principles set out in the abovementioned authorities, and mindful of the importance of the words used, a contextual interpretation, and the purpose of the agreement, I proceed to consider the words of the agreement.

[57] In my view the words in the agreement are not ambiguous, (save in respect of minor ambiguity in paragraph 7.4. referred to *infra*²⁹, which does not affect the core enquiry of whether the settlement is a full and final). In my view the words of the agreement are sufficiently clear on the question whether or not it contains a full and final settlement. The first two unnumbered paragraphs of the agreement, and the first sentence of the third paragraph thereof, which respectively begin with words “WHEREAS” or “AND WHEREAS” contain statements which are in the form of a preamble or recital³⁰. It records the fact that the parties were married in community of property, and that they are divorced. The first sentence of the third unnumbered paragraph, which also starts with “AND WHEREAS”, is also rather in the form of a preamble, recording that the first respondent (plaintiff) was a member of the GEPE.

²⁹ Par [89] – [93].

³⁰ Logistic Inc and Others v Van der Merwe 2010 (3) SA 105 (WCC) par [11].

- [58] The aforesaid preamble paragraphs do not set out in respect of which part of the joint estate the settlement is concluded. The second sentence of the third unnumbered paragraph to the settlement agreement³¹, which provides for the payment by the Fund of an amount of R360 000.00, does not specify how it is made up. It provides that the payment is an amount “*of the Plaintiff’s pension interest held in the Fund*”. This in itself however does not indicate what the payment is for, it only specifies the origin of the payment.
- [59] Read with the contents of paragraphs 7.2 to 7.4 (which all only deal with the pension fund and pension interest), it is clear that the origin of the payment of R360 000.00 is the first respondent’s pension fund interest, and that the applicant is to receive such payment from the Fund. The agreement places no obligation to pay on the first respondent himself.
- [60] Applicant’s counsel submitted that paragraph 7.4 informs what is settled in terms of the agreement. He referred to section 7(8)(a) of the Divorce Act³², submitting that the use of the word “*share*” shows that it is only the applicant’s share in the pension interest which was settled. The Divorce Act does not use the same terminology. It refers to a “*part*” of the “*pension interest*” which is due or assigned to the party to a divorce which is not a member of the pension fund. Section 7(8)(a) of the Divorce Act provides that the court granting a decree of divorce in respect of a member of the fund may make an order that any part of the pension interest of the member due or assigned to the other party to the divorce action, shall be paid to the other party by the fund when the pension benefits accrue. In my view the use of

³¹ See paragraph [14] *supra*.

³² Act 70 of 1979.

the words “*share of the Plaintiff’s pension interest*” in paragraph 7.4 of the settlement agreement can only refer to the amount of R360 000.00. A different interpretation would be ambiguous.

[61] In paragraph 7.2 of the agreement, reference is also made to section 37D(1)(d)(i) of the Pension Funds Act 25 of 1956. This subsection provides that a registered fund may:

“(d) deduct from a member’s individual account in the case of a defined contribution category of a fund or, in any other case, from a minimum individual reserve in the fund as determined by the fund rules or as determined in accordance with the Income Tax Act and the Tax Administration Act, 2011 (Act 28 of 2011)-

(i) any portion of the pension interest assigned to a non-member spouse in the court order”

[62] In my view the references to section 7(8)(a) of the Divorce Act and section 37D(1)(d)(i) of the Pension Funds Act, and the reference to the “*share*” of the pension interest on their own inform an interpretation that the amount of R360 000.00 would be payable from the first respondent’s pension interest.

[63] This interpretation is reinforced by the content of paragraph 7.3 of the agreement which provides that the first respondent would retain the remainder of the value of his fund as his sole and exclusive property. It was argued on behalf of the applicant that, as the agreement does not in the same terms refer to a settlement of the division of the rest of the joint estate, it is excluded (apparently on the basis of the *inclusion unius exclusio alterius*

*maxim*³³). It was submitted that if the settlement agreement was intended to include a settlement in respect of the immovable property, one would have expected that it would also have referred to the immovable property.

[64] A further consideration is the fact that the agreement does not refer at all to the 2006 court order, in terms whereof the joint estate, so it is argued, still had to be divided. In this regard consideration should be had to the order of Molopa-Sethosa J, which did not vary paragraph 3 of the 2006 order. She did not, as was done by Koevertjie J, vary the 2006 order. The first respondent's counsel submits that her order was supplementary to the 2006 order. In my view this was the effect thereof.

[65] The first paragraphs of the settlement agreement (up to paragraph 7.4 thereof) however do not exist in isolation. It must be read in the context of paragraph 11.1 and 11.2 thereof. If regard is had to the words "NOW THEREFORE the parties agree as follows:" after paragraph 7.4, it would appear that the preceding paragraphs of the agreement (from the unnumbered paragraphs before paragraph 7.2 up to and including paragraph 7.4), serve to both record what is agreed, and in effect as a preamble to paragraphs 11.1 and 11.2.

[66] The use of the words "NOW THEREFORE" after paragraph 7.4 leads to an interpretation that what is contained thereafter, in paragraphs 11.1 and 11.2, is a consequence of or follows upon what is contained in the settlement agreement up to paragraph 7.4 thereof. The context of clause 11.1 is that at

³³ See Christie's *supra*, at p 277.

the time of the agreement, one of the issues that remained unresolved was the division of the property. The use of the word “*issues*” (plural) also informs an interpretation that all disputes between the parties are settled. It is not necessarily only the claim for a portion of the first respondent’s pension interest which is made part of the settlement, but indeed of other remaining issues in dispute. It is also compatible with the first respondent’s contentions that the settlement included a settlement in respect of the common property.

[67] The second part of paragraph 11.1, which provides that “*save as provided for herein, no party hereto will have any further claim and/or claims against any other party in any form whatsoever*”, is also clear and unambiguous. It must be read with the provision that the agreement is a settlement “*of the issues between the parties*”. In context, the parties must surely have known when signing the agreement what issues still remained to be resolved. The words “*any other claim and/or claims in any form whatsoever*” are wide in meaning, and inclusive. On the face of it, it is not necessarily limited to a division in respect of the pension interest. Although the issues are not specified, the words of paragraph 11.1 are clear, and leave no room for a contention that the agreement only contained a partial settlement. Such an interpretation would be at variance with the words of the agreement, and the mentioned principles of interpretation.

[68] Interpreted as a whole, the fact that the preceding paragraphs only deal with the pension interest, does not create an ambiguity. From the second sentence of the third paragraphs, up to paragraph 7.4, the settlement agreement deals with the existence of the pension interest and that an

amount will be paid to the applicant therefrom. This is not incompatible with the provision in paragraph 11.1 which can in my view only be interpreted to mean that, save for payment of such amount by the fund, the applicant will have no further claim of whatsoever nature against the first respondent.

[69] An important consideration of the context in which the agreement was signed, is that the applicant was at the time represented by attorneys. There could have been no doubt in the mind of a legal representative that the settlement's words, on the face of paragraph 11.1, referred to a full and final settlement of more than the pension interest. I also take into account that the parties subsequently agreed before Molopa-Sethosa J that the settlement be made an order of court. Thus, the applicant and her legal representatives had more than one occasion to consider the contents of the agreement, including the import of clause 11, and agreed thereto.

[70] As to the purpose of the agreement, it appears from paragraph 11.1 the agreement was to achieve a full and final settlement, so that the parties would not have further claims against each other.

[71] **Christie's**³⁴ describe the effect of a compromise as follows:

“...the effect of a compromise is the same as res judicata, or a judgment given by consent. It is an absolute bar to action on the cause of action compromised, but not, of course, on any claim not included in the compromise. What claims were not included is ascertainable from the pleadings if the compromise settled an action, and from the terms of the compromise interpreted in accordance with general rules of interpretation in any other case.”

³⁴ *Supra* p 557

[72] In **Tololo v Road Accident Fund**³⁵ the Supreme Court of Appeal had to decide whether an agreement of compromise was binding. The court found that it was binding, in circumstances where there was no basis on the pleadings or evidence found to impugn the settlement agreement, no rectification was pleaded, and no evidence could be led to contradict the terms.³⁶

[73] The applicant has made no proper application for rectification of the settlement agreement in respect of clause 11.1 and 11.2.³⁷ In order to succeed with rectification, the applicant would have had to allege and prove that the settlement agreement does not correctly reflect the true common continuing intention of the parties as it existed when the agreement was concluded, due to a mistake in drafting the document, as a result of a bona fide mutual error or an intentional misleading act.³⁸ The requirements for rectification have not been alleged nor proved. She did file a notice to amend the notice of motion, to include an alternative claim for rectification (in the alternative to a variation of the agreement), but at the hearing, her counsel indicated that she would ask relief based on the original notice of motion as set out above.³⁹ She also did not, for example, rely thereon that she signed the agreement due to a unilateral *justus error*, caused by a misrepresentation on the part of the first respondent⁴⁰ nor did she set out

³⁵ 2025 JDR 1212 (SCA) at [16] – [17]

³⁶ See also *Gollach and Gomperts (1967) (Pty) Ltd v Universal Mills & Produce (Pty) Ltd* 1978 (1) SA 914 (A0 at 922H).

³⁷ *Van Aardt v Galway* 2012 (2) SA 312 (SCA) at par [9].

³⁸ See for example: *Kathern Investments (Pty) Ltd v Woolworths (Pty) Ltd* 1970 (2) SA 498 (A) at 503 E-G; *Milner Street Properties (Pty) Ltd v Eckstein Properties (Pty) Ltd* 2001 (4) SA 1315 (SCA) para

³⁹ As set out in paragraph 4 *supra*

⁴⁰ For example: *Prins v ABSA Bank Ltd* 1998 (3) SA 904 (C); *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) at 316-317; *Snap Petroleum v Papagiannis* 1992 (3) SA 234 (A)

sufficient averments to make out a case for a common mistake or a mutual mistake.⁴¹

[74] The settlement agreement and the 2023 order must therefore be assessed and interpreted on the wording thereof, as it stands

[75] My interpretation of the effect of the settlement agreement, is that the parties settled all disputes and claims regarding the division of their common property, including her entitlement to a part of the pension interest, for an amount of R360 000.00 and after the settlement no party would have any claim against the other, whatever the form thereof. This finding however does not mean that I find that the allegations of intention outside of the agreement regarding the way in which the amount of R360 000.00 was calculated are accepted. The admissible evidence regarding this aspect is not sufficient to support a conclusive finding on this. On the face of the settlement agreement, it deals with the pension interest, no division, but it does constitute a full and final settlement.

[76] In reaching the conclusions regarding the final settlement, I also had regard to the broader context within which the settlement agreement was concluded, including the factual matrix mentioned above, and the following evidence and circumstances:

at 239I -240.

⁴¹ Krapohl v Orange Cooperative BPK 1990 (3) SA 848 (A) at 865; Diamond v Kernick 1947 (3) SA

- 76.1 The parties had already been divorced for about 14 years at the time of conclusion of the settlement agreement. It stands to reason that they would rather have been intent on a final solution.
- 76.2 At the time of the conclusion of the agreement the disputes regarding the common property had not been settled and the applicant's interest in the first respondent's pension fund has not been paid to her.
- 76.3 In the previous application before Molopa-Sethosa J the first respondent already took the stance that the amount of R360 000.00 was an amount which settled both the pension interest and division of the property. In her answering affidavit in such application (dated 13 March 2023) the applicant denied having knowledge of the settlement agreement, and that she had signed it or agreed to the terms thereof. This prompted the first respondent in his replying affidavit to such application, to attach a previous supplementary affidavit filed by the applicant in her application which served before Koevertjie J. It is evident from such affidavit (dated 9 June 2022) that she had averred that she and the first respondent attended at the Fund with the settlement agreement in 2021 to seek payment of the monies due to her, and she also attached the signed agreement thereto. In the present application she however avers that the agreement was signed by her. These conflicting statements under oath in different applications impact on her credibility in respect of her denials regarding the agreement.

76.4 The settlement agreement was concluded whilst the parties were represented. The applicant was represented by an admitted attorney. The first respondent avers that the applicant's legal representatives did not raise any objections and that there is no evidence that she was misled.

76.5 None of the parties have set forth any indication that the settlement agreement was made with reservation of rights.

76.6 When the applicant applied for the order granted by Koevertjie J in the absence of the first respondent, the settlement agreement was already signed (in December 2020). She however did not apply for an order in terms thereof, but for an order that she is entitled to 50% of the pension interest. If she had in her mind that a division of the joint estate still had to occur, one would have expected her to request relief in respect thereof, at the same time.

76.7 Cause 11.2 of the settlement agreement contains a non-variation clause, which prevents an amendment without mutual consent.

[77] The first respondent's contentions that a full and final settlement was reached can also be assessed on the basis of the Plascon-Evans rule⁴².

[78] In **National Director of Public Prosecutions v Zuma**⁴³ the Plascon-Evans rule was explained as follows:

⁴² Plascon-Evans v Van Riebeeck Paints 1984 (3) SA 623 A at 634F-G

⁴³ 2009 (2) SA 277(SCA) par [26].

*"[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well-established under the **Plascon-Evans** rule that where in motion proceedings disputes of fact arise out on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavit, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order."* ⁴⁴

[79] In **Mamadi v Premier, Limpopo and Others**⁴⁵ the Constitutional Court held as follows in respect of disputes of fact and the Plascon-Evans rule:

"General principles governing the referral of a matter to oral evidence or trial remain applicable. Litigants should, as a general rule, apply for a referral to oral evidence or trial, where warranted, as soon as the affidavits have been exchanged.⁴ Where timeous application is not made, courts are, in general, entitled to proceed on the basis that the applicant has accepted that factual disputes will be resolved by application of Plascon-Evans. Likewise, where an applicant relies on Plascon-Evans, but fails to convince a court that its application can prevail by application of the rule, a court might justifiably refuse a belated application for referral to oral evidence."

[80] No request was made for a referral for oral evidence. Applying the Plascon-Evans rule, the applicant's version that the settlement agreement does not include a full and final settlement of all disputes between the parties, cannot be sustained.

Patent error and ambiguity

[81] The applicant complains that she has been struggling to persuade the Fund to pay the pension interest to her. She therefore seeks an order as per the

⁴⁴ See also *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949(3) SA 1155 (T) at 1162. *Gounder v Top Spec Investments (Pty) Ltd* 2008 (5) SA 151 (SCA) par 10.

⁴⁵ 2024 (1) SA 1 (CC)

first two paragraphs contained in the alternative relief set out in the notice of motion⁴⁶, that she is entitled to an amount of R360 000.00 of the first respondent's pension benefit, and that the GEPP be directed to endorse such amount in favour of the applicant, and to pay same to her within 30 days.

[82] In my view the applicant seeks orders in respect of the pension interest which largely correspond with what has already been included in the settlement order.⁴⁷

[83] An analysis of the 2023 order and settlement agreement which was made an order of court on 31 October 2023, reveals that the GEPP is duly identified, as well as the relevant pension fund number. The names of the parties contained therein, and the part of the pension interest that is to be paid, is also identified therein (the amount of R360 000.00).

[84] Paragraph 7.2 of the settlement order furthermore makes it clear that the order pertains to payment of a part of the pension interest of the first respondent as at date of the divorce.

[85] It was not necessary for the settlement order to refer to section 7(7) and that the pension interest is part of the joint estate⁴⁸. It is deemed to be an integral part of the joint estate upon divorce which is to be shared between the parties.

⁴⁶ *Supra*, par [4].

⁴⁷ *WR v PR 2011 jar 0327 (GNP)* at par [12]; *AVW v SVW and Others (3118/2021) [2022] ZAWCHC*

⁴⁸ *MP v FN 2024 JDR 3781 (GP)* par [15].

[86] A court may clarify its judgment, or order, if, on a proper construction, the meaning thereof remains obscure, ambiguous or otherwise uncertain, in order to give effect to its true intention, but it may not alter the substance of the order or judgment⁴⁹. A court may substitute more accurate or intelligent language so as to give effect to its true intention, provided it does not thereby alter “*the sense and substance*” thereof. A court may also supplement an order in respect of accessory or consensual matters⁵⁰ and correct a clerical or arithmetical error in an order so as to give effect to its true meaning.⁵¹ A court can rescind or vary an invalid judgment, if the requirements of the common law have been met⁵².

[87] In my view the paragraph of the settlement order that should be varied is paragraph 7.4 of the settlement agreement, to clarify and correct a patent error and ambiguity.

[88] In this regard, the provisions in the third unnumbered paragraph of the settlement agreement and paragraphs 7.2 and 7.3 thereof, in my view clearly contain an intention that the applicant (defendant) shall be entitled to R360 000.00 of the first respondent’s pension interest, and that he will retain the remainder of the value of his interest in the pension fund.

[89] Paragraph 7.4 of the settlement agreement provides:

“7.4 An endorsement shall be made in the records of the Government Employees Pension Fund that the Defendant’s share of the Plaintiff’s

⁴⁹ Firestone South Africa (Pty) Ltd v Gentrack AG 1977 (4) SA 298 (A) at 307 C – G; Thompson v South African Broadcasting Corporation 2001 93) SA 746 (SCA) at par [5].

⁵⁰ *Id.*

⁵¹ *Id* at 307 D

⁵² Van Dyk and Another v Rhodes 2025(3) SA313 (GJ)

pension interest is payable to defendant. The Fund shall pay to the defendant his share of the interest as referred to herein within 90 days of being informed of how the amount must be dealt with in accordance with Defendant's election."

[90] In my view the words "*Defendant's share of the Plaintiff's pension interest*" refer to the amount of R360 000.00. The words "*The Fund shall pay to the Defendant his share of the interest*" in the second sentence of paragraph 7.4 is evidently a patent error, and ambiguous, if regard is had to the context of the preceding paragraphs of the settlement agreement, and the paragraph in which such words occur. The third unnumbered paragraph (which contains the reference to the amount of R360 000.00) in the settlement agreement provides that the applicant (defendant) shall be entitled to such amount "*of the plaintiff's pension interest*". Paragraph 7.2 provides that "*the said amount of the Plaintiff's pension interest shall be payable to the Defendant*", with reference to section 7(8) of the Divorce Act and section 37D(1)(d)(i) of the Pension Funds Act. Paragraph 7.3 provides that the first respondent will retain the remainder of the value of his funds as his sole and exclusive property. In the first sentence of paragraph 7.4 reference is made to an endorsement which shall be made in the records of the GEPP that the "*the Defendant's share of the Plaintiff's pension interest is payable to defendant*". In my view this is meant to be a reference to the amount of R360 000, if regard is had to the plain wording of the preceding paragraphs.

[91] The reference in the second sentence in paragraph 7.4 of the agreement to "*his share of the interest*" is therefore a patent error. It causes an ambiguity, as it is at variance with the preceding paragraphs. The word "*his*" should clearly have read "*her*". Furthermore, the reference to "*share of the interest*"

is unclear, and should be clarified, as it does not clearly reflect the intention, that R360 000.00 of the Plaintiff's interest in the GEPF calculated as at the date of divorce is to be paid to the defendant. The parties have also understood that payment would be made accordingly, as is for example evident from the applicant's application and the relief claimed therein. I intend to exercise my discretion to correct such patent error and ambiguity *mero motu*, and to make an order to vary and clarify paragraph 7.4 of the settlement agreement accordingly, formulating the order along the same lines as a recent order of the Bull Bench⁵³.

[92] The ambiguity is perhaps a reason why it is contended by the applicant that she has struggled to obtain payment from the GEPF and why the fund may have had difficulties with the interpretation of the agreement. In my view the order that I propose to make should address the issue.

[93] In view of the lack of detail in the application regarding reasons for the GEPF's previous failure to make payment, I will also order that, in the event that the GEPF should fail to make the endorsement or any payment in terms of the order, any party may set down the application, with such supplemented affidavits as may be necessary, for further relief.

Vexatious litigation

[94] The first respondent avers that the applicant's application is vexatious in nature, relying on section 2(1)(b) of the Vexatious Proceedings Act ⁵⁴ He

⁵³ MP v FN 2024 jdr 3781 (GP) nat par 29.

⁵⁴ 3 of 1956

avers that the applicant should be declared a vexatious litigant to prevent her from engaging in abusive litigation which he says is aimed at harassing him.

[95] The only application instituted by the applicant prior to the present application, is the application that served before Koevertjie J. Thereafter the first respondent lodged the application which resulted in the order of Molopa-Sethosa J. The applicant then lodged the present application.

[96] Whatever the merit of the applications, I am not satisfied that the first respondent has established that the proceedings were simply frivolous, improper, or instituted for the sole purpose of annoying the first respondent, as he contends, nor that it constitutes a mala fide use of the proceedings, for an ulterior motive⁵⁵. In my view, even if she may have misconstrued aspects of her rights and remedies, her applications were evidently aimed at obtaining a court order in terms of which she can enforce payment of amount what she believes are owing to her.

[97] The first respondent in any event did not file a proper formal application for such relief. I am not satisfied that the first respondent has demonstrated that the applicant should be declared a vexatious litigant. Such relief is refused.

Costs

[98] I exercise my discretion to order that each party will pay his/her own costs. I do so in view of the fact that two decades have elapsed since the parties'

⁵⁵ Fisheries Development Corporation of SA Ltd v Jorgensen & Another; Fisheries Corporation of SA Ltd v AW Investments (Pty) Ltd & Others 1979 (3) SA 1331 (W) at 1339E – F

divorce, and it is in my view undesirable to burden any of the parties with the other's costs.

ORDER

1. The first respondent's application to declare the applicant a vexatious litigant is dismissed.
2. The order of Molopa-Sethosa J incorporating a settlement agreement dated 31 October 2023. is amended to read as follows:
 - 2.1 "It is recorded that the Plaintiff is a member of the Government Employees Pension Fund (GEPF) with identity number 6412185401081, and with membership number 9[...]. It is ordered that in terms of section 7(8)(a) of the Divorce Act 70 of 1979, R360 000.00 of the Plaintiff's pension interest in the GEPF as at date of divorce, is assigned to the Defendant.
 - 2.2 An endorsement is to be made in the records of the GEPF that the amount of R360 000.00 (three hundred and sixty thousand rand) is payable to the defendant within sixty days of being informed of how the amount must be dealt with in accordance with the Defendant's election, and the GEPF shall make payment to the defendant accordingly."
3. In the event that the GEPF should fail to comply with paragraph 2.2 of this order, any party will be entitled to set this application down for further relief, on the same papers, with such supplementary affidavits as may be required.
4. Each party will pay his/her own costs of this application.

STONE AJ

ACTING JUDGE OF THE HIGH COURT

Counsel for the Applicant: Adv Mkheeva

Counsel for the First Respondent: Adv Netravali