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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 2025-060213

- (1) REPORTABLE: NO
 (2) OF INTEREST TO OTHER JUDGES: NO
 (3) REVISED:
 DATE 30/1/2026
 SIGNATURE

In the matter between:

N[...] M[...] S[...]

Applicant

and

R[...] I[...] S[...]

Respondent

JUDGMENT

VAN NIEKERK, N, AJ:

Application for the variation of a divorce court order granted in this court on the 30th of March 2023.

INTRODUCTION

[1] The applicant brought an application in April of 2025, which application was served on the respondent on the 22nd of May 2025 for an order that the divorce order be varied and specifically by:

1.1 deleting paragraphs 3.1 to 3.6 of the settlement agreement which was incorporated in the divorce decree and be substituted with the following:

“Each party to pay for their own medical aid”.

1.2 Deleting paragraphs 6.1 to 6.7 of the settlement agreement that was incorporated into the divorce decree and substituting with the following:

“The parties shall sell the immovable property, the proceeds shall settle the outstanding home loan debt, all rates and taxes, should there be any surplus it shall be divided between the parties in equal shares”.

[2] The applicant sought costs if the matter was defended.

[3] The respondent opposed the application and served her answering affidavit on the 7th of August 2025.

[4] A replying affidavit was filed by the applicant and which was deposed to on the 25th of August 2025.

- [5] This matter came before me as an opposed application in the family court and was enrolled for 19 January 2026 and allocated to be adjudicated upon on Thursday, the 22nd of January 2026.

COMMON CAUSE FACTS

- [6] The specific paragraphs of the court order that the applicant wishes to be varied by this court are provisions relating to medical aid, life insurance policy and an immovable property. It is noted that in the prevailing court order reference to the Defendant is reference to the Applicant in this application before court and reference to the Plaintiff is reference to the Respondent in this application before court.

- 6.1 The prevailing court order provides in paragraph 3 thereof the following:

“3.1. It is recorded that there is no maintenance payable between the parties apart from 3.2 and 3.5 thereunder:

3.2 The defendant will keep the plaintiff on his medical aid namely Discovery Health Medical Aid No. 3[...] and will pay the premiums thereof. Should the medical aid or any details change the defendant must keep the plaintiff on a medical aid equal to the current medical aid and is liable for the monthly premiums.

3.3 The medical aid as stipulated in 3.2 above shall be implemented until the plaintiff remarries or is in a long-term relationship of more than 12 months.

3.4 The defendant must inform the plaintiff if there is any issue relating to the payment of the monthly premiums.

- 3.5 The plaintiff is a beneficiary on the defendant's life insurance policy and the plaintiff will stay on the defendant's life policy and the defendant will pay the premium thereof. Defendant will arrange that the plaintiff have full access to the policy and that she receives monthly confirmation that the policy is active, and the defendant must inform the plaintiff if there is any issue relating to payment of the monthly premiums.
- 3.6 The medical aid as stipulated above is binding on the defendant's estate should the defendant pass away until the life insurance is paid out to the plaintiff."
- 6.2 It is the above clauses of the settlement agreement from paragraph 3.1 to 3.6 that the applicant wishes to vary by deleting same and substituting it with "each party to pay for their own medical aid".
- 6.3 The settlement agreement provides in paragraph 6, under the heading "immovable property" thereof:
- "6.1 It is recorded that the plaintiff and the defendant are joint owners of the immovable property situated at 3[...] B[...] Crescent, Midstream Estate (hereinafter 'the property').
- 6.2 The parties agree and is it recorded that the defendant would reside in the property and the defendant is fully liable to pay the bond with FirstRand Bank Limited and all expenses on the property.
- 6.3 The parties further agree and is it herewith recorded that the Plaintiff would purchase another property on her own name after the divorce order and the plaintiff may access the funding for a deposit on a new property from the existing bond account at FirstRand Bank as will be required by the financial institution on the deposit. The defendant will cover the transfer costs of the purchase of the new property in favour of the plaintiff. Should the plaintiff not be in a position for any reason to purchase a property the defendant will pay out an amount of R500 000.00 out of the existing

bond account to the plaintiff to assist her in renting and setting up her own home.

6.4 It is recorded that the defendant has the intention to pay and clear the existing bond on the property at FirstRand Bank by December 2023 and is the following then applicable:

6.4.1 Should the existing bond be fully paid by December 2023 the parties will register a family trust whereby the parties will be trustees and the major children will be beneficiaries and the parties will register the property that includes their undivided half shares in the property to the trust within a year after the existing bond is fully paid. At the end of December 2023 the defendant will have the right to always reside in the property.

6.4.2 Should the defendant not be able to pay the outstanding bond at the end of December 2023 or should the Defendant and the Plaintiff fail to register the property to the trust for any reason, then the property must be placed on the open market and sold for the highest price whereafter the profit on the property must be divided equally between the parties after deductions of any outstanding loan / bond on the property and, in the case the defendant paid the full bond of the property, the outstanding bond amount as at date of divorce and after deduction of any estate agent's commission.

6.4.3 Should 6.4.2 above come into effect the parties may not unreasonably withhold consent for the sale of the property when receiving reasonable offers and should there be a conflict by the parties to accept the reasonable offer, the property must be placed on a private auction to ascertain the reasonable market value and to sell or to accept a reasonable offer.

- 6.4.4 Should 6.4.2 above come into effect and should one of the parties want full ownership of the property at that time, same may be done on the value of the property, as valuated by two estate agents and a sworn valuation by paying half of the profit amount by the party wanting the property after deductions as stipulated in 6.4.2 above.
- 6.5 Whatever the parties decide to do regarding the property do they agree that NW Nothnagel Attorneys would proceed with the transfer to remove a party from the title deed on the property or transfer to the trust or to a purchaser.
- 6.6 The parties undertake to sign all documentation to effect transfer to either the other party wanting the property or to new purchasers on request by the transferring attorneys.
- 6.7 The parties record that they will include in their separate will and testaments that the property will be transferred to a trust for the benefit of the children but the defendant will be responsible for the full bond as stipulated above and the defendant will uphold any and all life policies for the bond to be settled should he pass away before the property is transferred to the trust or sold, whatever the case may be”.
- 6.4 It is the above clauses of the settlement agreement from paragraph 6.1 to 6.7 that the applicant wishes to vary by deleting same and substituting it with “The parties shall sell the immovable property, the proceeds shall settle the outstanding home loan debt, all rates and taxes, should there be any surplus it shall be divided between the parties in equal shares”.
- [7] In the founding affidavit the only allegation made by the applicant as to the basis for the variation application is found in paragraph 4 where he states that:

"The respondent and I are desirous of amending the settlement agreement as follows:

4.1 By deleting paragraphs 3.1 to 3.6 of the settlement agreement and substituting same with the following:

'Each party to pay for their own medical aid fees.'

4.3 The respondent and I are further desirous of amending the settlement agreement as follows:

4.4 By deleting paragraph 6.1 to 6.7 of the settlement agreement and substituting same with the following:

'The parties shall sell the immovable property the proceeds shall settle the outstanding home loan debt, all rates and taxes, should there be any surplus it shall be divided between the parties in equal shares'."

[8] In opposition the Respondent denies any such agreement that the specific paragraphs be varied at all and in reply the applicant admits that the parties did not reach an agreement on the variation of the specific paragraphs.

[9] In the premises it is clear that the allegation made by the applicant in his founding affidavit, which formed the basis of his application, was not the true position and there was no agreement between the parties to vary the prevailing court order, at any stage.

ARGUMENT BEFORE COURT:

FOR APPLICANT:

[10] In argument the representative for the applicant conceded that the applicant made out no case for the variation of the court order in the founding affidavit.

- [11] She contended that at the time of the filing of the founding affidavit the applicant was envisaging that the matter will become settled and it was on that basis that he deposed to his founding affidavit.
- [12] She confirmed that at the time of the deposition of the founding affidavit there was no agreement between the applicant and the respondent.
- [13] She conceded that at the time of the hearing of this matter there was no agreement between the applicant and the respondent to vary the prevailing court order.
- [14] She submitted that the basis of the applicant's allegation that the parties agreed to vary the order, was his believe that it would have become settled and then the variation would proceed.
- [15] She conceded that the applicant gave no facts to court to verify his allegation in his replying affidavit that his circumstances have changed since the granting of the order, which he attempted in his reply to use as a basis for the variation of the court order.
- [16] She conceded that the applicant did not make out a case and/or place any facts before court to enable the court to find in his favour.
- [17] The applicant's representative conceded that in respect of the variation sought with regards to the immovable property the possibility of the sale of the property was already included in the prevailing court order and if the respondent was not complying with those terms of the order the applicant had other remedies available and he did not have to come to court for a variation of the court order.
- [18] The applicant's representative submitted that in respect of the life policy the parties agreed that those terms of the court order should remain in place and not be varied.

FOR RESPONDENT:

- [19] On behalf of the respondent it was submitted that the settlement agreement (which was made an order of court) in paragraph 7.3 thereof contains a Shifren clause indicating that any amendment must be in writing and signed by both parties. No such agreement existed and therefore there is no agreement to amend the court order. The court order stands.
- [20] He referred the court to the allegation by the applicant that the respondent and the applicant wanted to amend the court order and referred the court to the numerous denials of this allegation by the respondent in her answering affidavit.
- [21] He argued that the founding affidavit was only 2 pages and that no case was made out in the founding affidavit. The applicant attempted to make out a case in the replying affidavit which consisted of 39 pages.

ANALYSIS:

- [22] From a reading of the documents before court it is clear that the applicant did not make out a case on any known legal basis for the variation of the court order.
- [23] The allegation whereupon he based the whole of his application in his founding affidavit, that the parties both wanted the court order to be varied, was not factually correct as there was no such agreement between the parties.
- [24] Even on the applicant's own version there was no such agreement when he deposed to his founding affidavit.

- [25] The applicant's version is factually incorrect and untenable. The contentions by his legal representative unpersuasive and her unavoidable concessions dooming to the applicant's case.

APPLICATION OF THE LEGAL PRINCIPLES:

- [26] A court order becomes final and unalterable by that court at the moment of its pronouncement by the judicial officer whereafter it becomes *functus officio*. Save in exceptional circumstances the order can thereafter not be varied or rescinded.

- [27] The Divorce Act 70 of 1979 makes provision for court orders relating to maintenance and to the division of assets. It provides that a court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of assets of the parties or the payment of maintenance by one party to the other.¹

- [28] In the present application the only possible remedy at the disposal of the applicant could have been section 8(1) of the Divorce Act 70 of 1979 and only in relation to the maintenance obligation pertaining to the medical aid as stipulated in paragraph 3 of the settlement agreement. In terms of section 8(1) of the Divorce Act, 70 of 1979:

"1. A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this act may at any time be rescinded or varied or in the case of a maintenance order or an order with regard to access to a child be suspended by a court if a court finds that there is sufficient reason therefore..."

- [29] This court has, however, found that section 8 of the Divorce Act relates to orders given in respect of children and not to orders in respect of spouses and that when a former spouse wishes to apply for

¹ Section 7(1) of the Divorce Act.

the variation of a maintenance order in respect of maintenance payable to her the appropriate forum is the Maintenance Court.² On this premise it would seem that Section 8(1) is not a remedy available to the applicant.

[30] Even if it was possible for the applicant to approach this court in terms of section 8(1) of the Divorce Act, the applicant would have had the onus to show sufficient reason for the variation of the order. In the present matter there is absolutely no reasons provided for the variation of the order and no facts provided to the court to adjudicate upon this question.

[31] The applicant provided the court with conclusions drawn by him, in his replying affidavit, as to why the court order should be varied without providing the factual basis for these conclusions to the court so that the court can determine whether or not there exists sufficient reasons for the variation of the order.

[32] The principle of *res judicata* is well-established in our law. Essentially it means that parties to a dispute cannot re-litigate the same dispute already litigated. It is meant to ensure the finality of judgments. Section 8(1) of the Divorce Act relating to the rescission, suspension or variation of amongst other things maintenance orders made under that Act should be construed so as to effect the operation of *res judicata* as little as possible.³

[33] A court may order variation of its own order only on the limited grounds available at common law or in terms of the uniform rules of court, rule 42(1) and Section 8(1) which relaxes the principle of the immutability of judgments. The Applicant has not made out a case for the variation of the court order based on any of the known grounds.

² See Botha v Botha 2005 (5) SA 228 (W).

³ See Reid v Reid 1992 (1) SA 443 (E) at 447.

- [34] The court must also take into account the principle that agreements must be kept – *pacta sunt servanda*. A man who has solemnly entered into an agreement must, as far as possible be held to his agreement.⁴
- [35] The court cannot ignore the principle of *pacta sunt servanda* which is generally translated in English as meaning “agreements must be observed”. An order of the court obliging the applicant to pay maintenance for the respondent has its origin in an agreement solemnly entered into between the parties in contemplation of the divorce.⁵
- [36] A settlement agreement in a divorce matter which does not only provide for the payment of maintenance by the one party to the other but also for *inter alia* the division of assets of the parties, constitutes a final agreement entered into between the parties, purporting to regulate all their rights and obligations upon divorce. For the court to interfere in that arrangement by varying one component of the agreement but leaving the balance of the agreement in tact would fly in the face of the time-hallowed principle that the court cannot make new contracts for parties. It must hold them to agreements into which they have deliberately entered.⁶
- [37] According to me, the principle of *pacta sunt servanda* is relevant and further supports the conclusion that the applicant’s application cannot succeed.
- [38] It is clear that in respect of the immovable property there is no basis upon which the applicant can approach this court for the variation of the court order.

⁴ See *Pieterse v Pieterse* 1965 (4) SA 344 (T) at 345F.

⁵ See *Botha v Botha* 2005 (5) SA 228 (W).

⁶ See *Georgiades v Janse van Rensburg* 2007 (4) SA 18 (C) at 23 (16).

ORDER

[39] The applicant cannot succeed with his application for the variation of this court's order. The court has already granted an order on Thursday the 22nd of January 2026, dismissing the applicant's application with costs on Scale B.

Acting Judge **Van Niekerk, N**
In The High Court of South Africa
Gauteng Division, Pretoria

This judgment was handed down electronically by circulating to the parties and the parties' representative by email and by being uploaded to CaseLines.

Date of hearing: Thursday, 22 January 2026
Date of order: Thursday, 22 January 2026
Date of judgment: Friday, 30 January 2026

Appearance

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