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

Case number:2024/024847

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

28 April 2026

SIGNATURE

DATE

In the application between:

ALLAN GRAY UMBRELLA PROVIDENT FUND

First Intervening Party

ALLAN GRAY INVESTMENT SERVICES (PTY) LTD

Second Intervening Party

In re

A[...] T[...]

Applicant

and

TYLER DU PLESSIS

First Respondent

FAIZIL JAKOET

Second Respondent

JONATHAN HENRY TURNER

Third Respondent

JUDGMENT

INTRODUCTION

1. In this matter, there are three interrelated applications:
 - 1.1 A contempt application instituted by Ms T[...] (hereinafter referred to as the applicant) against the first to the third respondents.
 - 1.2 An application for intervention by the intervening parties.
 - 1.3 A rescission application by the respondents as well as the intervening parties in respect of a declaratory order, granted by Swanepoel J on 27 January 2025, made in respect of a settlement agreement reached between the applicant and her former spouse in divorce proceedings, concerning the spouses' pension interest.
2. The parties agreed that the contempt application was not set down for hearing. However, it goes without saying that if the rescission application of the intervening parties as well as the respondents is granted, the contempt application becomes moot.

3. On behalf of the applicant the non-joinder of her husband by the intervening parties and the respondents in the application for rescission was raised, since he has a vested interest in the order granted.
4. On 3 March 2023, Mr T[...] specifically stated that he does not wish to participate in the applications before court and filed a notice to abide.

BACKGROUND

5. The applicant and her husband, S[...] A[...] T[...] (he is not a party to any of the applications before me) who were married out of community of property, were divorced on 10 June 2024 and their settlement agreement was made an order of court.
6. In November 2024 the plaintiff applied for a variation of the divorce order. The variation application was served on her ex-husband as well as on the second intervening party and the variation order was granted without any opposition on 27 January 2025.
5. The applicant, in the founding affidavit in support of the variation / declaratory order, dealt at length with the correspondence received from Allan Gray and the reasons for their refusal to pay her 50% of Mr T[...]’s pension interest.
7. The varied order provides as follows:

“1. The decree of divorce handed down on 10 June 2024 is varied to include an order incorporating the addendum attached hereto and marked “Y”.

2. The below provisions in the agreement of settlement incorporated in the decree of divorce on 10 June 2024 are declared lawful and the second respondent is bound thereby:

“6.5 It is recorded that the Defendant is a member of the Allan Gray Umbrella Provident Fund (the Defendant’s Pension Fund”) with membership number A[...], which is registered as a privately administered pension fund in terms of the Pension fund Act (1956) and approved as a pension fund in terms of the Income Tax Act (1962). The fund is administered by Allan Gray.

6.6 The parties agree that the Plaintiff is in terms of Section 7(8) of the Divorce Act, Act 70 of 1979, entitled to receive 50% (fifty percent) of the Defendant’s pension interest (“the pension interest”) in the Defendant’s Pension Fund.

6.8 The Plaintiff shall be liable for any and all taxes, penalties and costs occasioned hereby. The Plaintiff specifically acknowledges that tax, in accordance with the provisions of the Income Tax Act may be deducted from the amount of the pension interest”.

8. The amended order was emailed to the second respondent (hereinafter referred to as AGIS) on 6 February 2025, at the following general addresses, [i\[...\]](#) and [u\[...\]](#). In response to the email, the applicant and her attorney of record was once again informed that, according to Allan Gray, it is legally prohibited from transferring any portion of Mr T[...]'s pension benefits to the applicant since they were married out of community of property without the accrual and Allan Gray refused to comply with the order dated 27 January 2025.

9. Due to AGIS’s failure to comply with the order, the applicant brought a contempt application against the respondents, being employees of Allan Gray. The contempt application was issued under the same case number as the divorce action without any application to formally join them as respondents.

10 On receipt of the contempt of court application in March 2025, AGIS, being the second respondent in the variation order, as well as Allan Gray Umbrella Provident Fund (hereinafter referred to as the Fund) as the first intervening party, brought an application for intervention in the contempt of court application as well

as a rescission of the declaratory order dated 27 January 2025, application. The notice of motion was served in April 2025.

11. For completeness' sake, the difference between the Fund, AGIS and Allan Gray (Pty) Ltd (who is not a party to these proceedings) is important:

11.1 Allan Gray (Pty) Ltd is a private company and an investment manager and authorised financial service provider in terms of the financial Advisory and Intermediary Services Act. Mr du Plessis, the first respondent in the contempt of court application is an employee of Allan Gray (Pty) Ltd.

11.2 Allan Gray Umbrella Provident Fund (the Fund) holds the pension interest of Mr T[...], and the Fund has the necessary authority, by virtue of Section 37(D)(91)(d)(i) of the Pension Funds Act 24 of 1956, to give effect to court orders.

11.3 Allan Gray Investment Services (Pty) Ltd (AGIS) is the administrator of the Fund under section 13B of the Pension Funds Act and it performs administrative functions on behalf of the Fund and has to give effect to the Fund's authority in terms of section 37(D)(1)(d)(i) of the Act. Messrs Jakoet and Turner (the second and third respondents in the contempt application) are two of seven directors of AGIS.

LEGAL REQUIREMENTS FOR INTERVENTION

12. Rule 12 of the Uniform Rules of Court provides as follows:

"Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon such application make such order,

including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet.’

13. An applicant for intervention must establish a direct and substantial interest in the relief sought. In ***SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others***¹, the Constitutional Court stated the position as follows:

“[9] It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought.

[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a pre-decision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

[11] Once the applicant for intervention shows a direct and substantial interest in the subject matter of the case, the court ought to grant leave to intervene. In *Greyvenouw CC* this principle was formulated in these terms:

“In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject-matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests.”

¹ SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others 2017 (5) SA 1 (CC)

14. It follows that a party can only be said to have a direct and substantial interest in the matter if the relief sought cannot be sustained and carried into effect without prejudicing their interests.²
15. The Fund is the registered provident fund in which Mr T[...]’s pension interest is held, and AGIS is the registered fund administrator and authorised financial services provider, appointed by the Fund to administer the fund.
16. Although AGIS, was the second respondent in the declaratory application, it was not cited as a respondent in the contempt of court application. As indicated above, only Mr Jakoet (the second respondent) and Mr Turner (the third respondent) as directors of AGIS and Mr du Plessis (the first respondent) who is an employee of Allan Gray (Pty) Ltd, were for the first time cited as respondents.
17. It is clear that both the intervening parties have a direct and substantial interest in the contempt of court application as well as in the declaratory application, since the Fund holds the pension interest and AGIS as fund administrator must give effect to the Fund’s authority.
18. Both intervening parties are of the view that the agreement reached between the applicant and her husband, and consequently the declaratory order, relating to his pension interest in the Fund is invalid because it requires them to act in contravention of the Divorce Act, 70 of 1979.
19. In the premises, I grant both the intervening parties leave to intervene in the contempt of court proceedings and the Fund to also intervene in the declaratory proceedings.

² Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 653; Gordon v Department of Health, Kwazulu-Natal 2008 (6) SA 522 (SCA) at para 9; Absa Bank Ltd v Naude NO 2016 (6) SA 540 (SCA) at para 10.

RESCISSION APPLICATION

20. The intervening parties applied for a rescission of the declaratory order. AGIS applies in terms of the common law and The Fund in terms of the common law as well as Rule 42(1)(a) on the basis that the declaratory order was erroneously sought or erroneously granted in its absence.

21. In terms of the common law a default judgment may be set aside on the grounds of fraud or justus error³.

22. In ***De Wet and Others v Western Bank Ltd***³ the learned judge, remarked as follows about the common law provisions relating to the rescission of judgments:

“The Courts of Holland, as I have mentioned, appear to have had a relatively wide discretion in regard to the rescission of default judgments, and a distinction seems to have been drawn between the rescission of default judgments which had been granted without going into the merits of the dispute between parties, and the rescission of final and definitive judgments, whether by default or not, after evidence had been adduced on the merits of the dispute. (***Cf Athanassiou v Schultz 1956 (4) SA 357 (W) at 306 G, and Verkoteren v Savage 1918 AD 143 at 144***). In the former instance the Court enjoyed relatively wide powers of rescission whereas in the latter event the Court was, generally speaking regarded as been functus officio, and judgments could only be set aside on the on the limited grounds mentioned in the ***Childerley*** case.the learned judge at 1042 F continued and stated that “Thus, under common law the Courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient cause

³ Childerley Estate Stores v Standard bank of South Africa Ltd 1924 OPD 163

³ 1979 (2) SA 1031 (A) at 1041B

shown. This power was entrusted to the discretion of the Court. Although rigid limits were set as to the circumstances which constituted sufficient cause ... the Courts nevertheless laid down certain general principles, for themselves, to guide them in the exercise of their discretion. Broadly speaking, the exercise of the Court's discretionary power appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of a particular case. The onus of showing the existence of sufficient cause for relief was on the applicant in each case, and he had to satisfy the Courts, inter alia, that there was a reasonably satisfactory explanation why the judgment was allowed to go by default. It follows from what I have said that the Court's discretion under the common law extended beyond, and was not limited to, the grounds provided for in Rules 31 and 42 (1), and those specifically mentioned in the **Childerley** case."

23. In **Grant v Plumbers (Pty) Ltd**⁴ it was held that the following requirements should be complied with in order to show "good cause".

"(a) An applicant must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance,

(b) The application must be bona fide and not made with the intention of merely delaying plaintiff's claim, and

(c) The applicant must show that he has a bona fide defence to the plaintiff's claim. It is sufficient if he makes out a *prime facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of

the case and produce evidence that the probabilities are actually in his

⁴ 1949 (2) SA 470 (0)

favour.”

24. Rule 42(1)(a) provides that “the court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary an Order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby”. Generally, a judgement/order would have been erroneously granted if there existed at the time of its issue, a fact which the court was not aware of, which would have precluded the granting of the judgement/order and which would have induced the court, if aware of it, not to grant such a judgement/order.
25. The purpose of Rule 42(1) is to correct expeditiously and obviously a wrong judgement/order. When relying on this rule, both requirements must be shown to exist and once that is done, the court is merely endowed with a discretion which must be exercised judicially and influenced by considerations of fairness and justice, and it is not compelled to rescind the judgment/order⁵.
26. In ***Harris v ABSA Bank Ltd Volkskas***⁶ it was held that:

“(8) Before an applicant in a rescission of judgment application can be said to be in “wilful default” he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions. A decision freely taken to reform from filling a notice to

⁵ Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) at para 53.

⁶ 2006 (4) SA 527 (T) at paragraph 8.

defend or a plea or from appearing would ordinarily weigh heavily against an Applicant required to establish sufficient cause.'

and further

'(10) A steady body of judicial authorities has held that a court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or failure in isolation. "Instead, the explanation, be it good, bad or indifferent, must be considered in the light of the nature of the defence, which is an important consideration, and in the light of all the facts and circumstances of the case as a whole."

DISCUSSION

27. On behalf of the intervening parties it is argued that the declaratory order is inconsistent with the statutory framework governing pension interests, especially the provisions of section 7(7(c)) of the Divorce Act 70 of 1979 as well as section 37A of the Pension funds Act, 24 of 1956 and that the court was therefore legally incompetent to have made the order.

28. It is trite that an applicant for rescission must demonstrate the existence of a substantial defence and not necessarily a probability of success. It is sufficient if he presents a prima facie case that raises triable issues.

29. Both parties referred to the constitutional challenges of the Divorce Act, and it is evident from their arguments that they differ about the interpretation and impact thereof on the divorce of the applicant and her ex-husband.

30. Whether I agree with any of the arguments is neither here nor there, since it is clear that the intervening parties, *prima facie*, raised triable issues.

31. I already found that the Fund should have been a party to the declaratory proceedings since it is affected by the relief claimed and granted.

32. I therefore find that the declaratory order, granted in the absence of the Fund, must be rescinded and set aside. In the premises, I deem it unnecessary to deal with AGIS's default and good cause.

COSTS

33. Considering the circumstances of this matter and the issues that need to be resolved, I order that costs of the rescission application be costs in the declaratory application.

34. Regarding the intervening application, no order as to costs is made.

ORDER

35. In the premises, I make the following order:

1. The intervening parties, Allan Gray Umbrella Provident Fund and Allan Gray Investment Services (Pty) Ltd, are granted leave to intervene as the fourth and fifth respondents respectively, in the contempt of court application
2. Allan Gray Umbrella Provident Fund, the first intervening party is granted leave to intervene as the third respondent in the declaratory application.

3. The declaratory order granted by Swanepoel J on 27 January 2025 in Case 2024-02487 is herewith rescinded and set aside and the intervening parties are granted leave to oppose the application for a declaratory order.
4. Costs of the rescission application will be costs in the declaratory application and no order as to costs is made in the intervention application.

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

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 28 April 2026.

APPEARANCES

For the applicant: Alexia Vosloo -De Witt

Instructed by : Burnett attorneys

For the intervening parties: Joseph Whitaker

Instructed by: Andrew de Vos & Associates

C/o Friedland hart Solomon & Nicolson

Date of hearing: 11 March 2026

Date of Judgement: 24 April 2026

