REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A176/ 2023

In the matter between:

M D **Appellant**

And

N D **Respondent**

Heard: 28 October 2023

Delivered: 29 November 2023

JUDGMENT

LEKHULENI J

Introduction

[1] This is an appeal against the whole judgment and order handed down by the Regional Magistrate of Mitchell's Plain Court on 01 June 2023, in which the court varied a final divorce order granted by that court on 06 December 2021. When the decree of divorce was granted, dissolving the bonds of marriage between the appellant and the

respondent *(“the parties”)*, they signed a consent paper, which was, by agreement, incorporated into the final order of divorce. Among others, the consent paper regulated the care and contact of their minor child, maintenance, and the division of assets between the parties, including their pension interests. In terms of the said consent paper, the parties agreed that each party will be entitled to each other’s pension interest calculated from 15 October 2004 to December 2013.

[2] Pursuant to that agreement, it was alleged that the respondent submitted the divorce order incorporating the consent paper to the offices of the Government Employee Pension Fund (*"GEPF"*) for the payment of her share of the appellant's pension interest. On Friday, 17 June 2022, the respondent attended to the offices of GEPF to inquire about the delay in finalising her pension claim. The GEPF representatives informed her that they were unable to complete the calculation process as they required all the relevant information to the year reflected on the consent paper.

[3] Having been informed so, the respondent brought an application to vary the divorce order before the magistrate. In her variation application, the respondent sought an order that the period for the calculation of her share of pension interest from her ex-husband’s pension fund, as stated in the consent paper being 15 October 2004 to December 2013, be varied and substituted with the period 15 October 2004 to December 2021. The appellant opposed the application. After considering written and oral submissions, the court below granted the variation order in terms of the

respondent's notice of motion. It is this order that the appellant seeks to set aside in this appeal.

[4] I pause to mention that in the application for variation, the respondent previously sought an order varying the R2000 maintenance order that the trial court granted as maintenance for their minor child against the appellant. The respondent sought an order that this amount be varied and be substituted with R3500 and medical aid contributions. As appears from the magistrate's judgment, the respondent abandoned the latter two motions with respect to maintenance and medical aid contributions. The magistrate was left solely to deal with an application for a variation of final order of divorce that incorporated the consent paper, only in respect of pension interest.

[5] After the applicant filed his application for leave to appeal, the respondent filed a notice of cross-appeal requesting the magistrate order to be set aside and be replaced with an order that; (i) paragraphs 5.1 and 5.2 be varied and deemed as *pro non scripto*, and be declared that there was no agreement between the parties with regard to the division of their pension interest; (ii) that the determination of pension interest be remitted back to the magistrate for hearing of oral evidence to be heard *de novo;* (iii) and the Court make a determination on the application for variation of the maintenance order.

Factual Background

[6] In order to fully comprehend the issues that must be determined in this appeal, it is necessary to outline a brief background of the facts underpinning the view I take in this matter and the reasons that fortify my conclusion. The parties were formally married to each other in community of property on 15 October 2004 at Mitchells Plain. They have one minor child, born on 30 May 2008. The minor child is currently in the primary care of the respondent, subject to the appellant's rights of reasonable access. On 15 November 2019, the respondent issued divorce summons against the appellant on the grounds that the marriage relationship between them had broken down irretrievably with no prospects of reconciliation towards a normal marriage relationship.

[7] The appellant opposed the respondent's action and filed a Counterclaim. After several interlocutory applications, the matter eventually went to trial. On 6 December 2021, i.e., the date of trial, the appellant, and the respondent, with the assistance of their respective legal representatives, settled the divorce and consequently signed a consent paper. The consent paper regulated the care and contact of the minor child, maintenance, and division of the assets. The trial court finalised the matter and incorporated the consent paper into the final order of divorce.

[8] As stated above, the respondent later brought an application for variation seeking an order to vary the consent paper, particularly clauses 5.1 and 5.2 dealing with pension interest.

[9] For convenience, clauses 5.1 and 5.2 of the consent paper read as follows:

'5. Pension Fund Interest:

5.1 An order directing that the Plaintiff is entitled to the Defendant's pension interest calculated from 15 October 2004 to December 2013 which is held at the Government Employee Pension Fund (GEPF) held under identity number 6[…] (Pension Fund No: 971 […]), calculated as at date of divorce, with interest thereon calculated in accordance with the provisions of Act 70 of 1979 as amended when such monies accrue to the Plaintiff; and

5.1.1 That an endorsement be made in the records of the said fund that the above-mentioned portion of the Defendant's pension interest is payable to the Plaintiff.

5.2 An order directing that the Defendant is entitled to the Plaintiff's pension interest calculated from 15 October 2004 to December 2013 held at the (sic) Sanlam under identity number 6[…] (Policy No: SP3[…]), calculated as at date of divorce, with interest thereon calculated in accordance with the provisions of Act 70 of 1979 as amended when such monies accrue to the Defendant; and

5.2.1 that an endorsement be made in the records of the said fund that the above-mentioned portion of the Plaintiff's pension interest is payable to the Defendant.' (My emphasis)

[10] These clauses were varied by the court below by replacing the original period of 15 October 2004 to December 2013 with a new period of 15 October 2004 to December 2021. The disparity between these two dates hinges on whether the parties agreed that the pension interest would accumulate for each party from the date of their marriage, 15 October 2004, until the date of their divorce, 21 December 2021, or from the date of their marriage until the date of their separation in December 2013, as stated in the consent agreement. Having the consent paper being varied by the magistrate in terms of rule 49(7) of the Magistrates Court rules and discontented by this decision, the appellant appealed to this court against the judgment and order.

Issues to be decided

[11] Thus, the legal question that this court is enjoined to consider is whether the magistrate was correct in varying the consent paper as the lower court did in the circumstances. And if so, whether good reason existed for the magistrate to have varied its previous divorce order, which incorporated the consent paper concluded by agreement between the parties and which formed the basis of the decree of divorce. In addition, whether the respondent's cross-appeal for an order declaring that there was no agreement between the parties and that the issue of pension interest should be remitted back to the magistrate has merit. Moreover, whether the issue of maintenance which was not part of the magistrates' judgment that the cross-appeal rests on should be entertained.

Submissions by the parties

[12] At the hearing of this appeal, Mr Patel, who appeared on behalf of the appellant, argued that the magistrate was mistaken in varying a contract between the parties. Mr Patel further contended that there was no basis or good reason for the magistrate to alter the consent paper as it reflected the true intention of the parties.

[13] Mr Patel also denied the contention of the respondent's legal representative in his heads of argument that the date, as reflected in the consent paper, was a mistake common to both parties. Furthermore, the contention proceeded, the parties agreed that each party would be entitled to claim from the pension interest for the period between 15 October 2004 to December 2013. The end date of December 2013 was premised on the fact that the respondent left the matrimonial home in December 2013 and had not contributed financially to this marriage. It was submitted that this date was voluntarily agreed upon by the parties when the marriage was dissolved by the court *a quo*. As a result thereof, this court was implored to uphold the appeal with costs.

[14] Mr Mphahlwa, who appeared for the respondent, conceded at the hearing of this appeal that the magistrate was mistaken in varying the consent paper. However, he argued that there was no mutual agreement between the parties when the consent paper was concluded. According to Mr Mphahlwa, the parties did not agree that the pension interest of each party would be calculated from the date of marriage, 15 October 2004, to December 2013. It was submitted further that the parties intended that

the last day for purposes of calculating their respective pension interest would be the date of divorce and not December 2013. Mr Mphahlwa, therefore, submitted that there was a common mistake between the parties and requested the court to refer the matter back to the magistrate for reconsideration.

Applicable legal Principles and Analysis

[15] Before I deal with the legal question raised above, I consider it prudent to sketch out the law dealing with variation of orders, in particular, divorce orders in the Magistrates Court. Rule 49 of the Magistrates Court Rules and Rule 42 of the Uniform Rules of the High Court set out the procedure to be followed when an application for variation is considered. In the court below, the respondent applied for the variation of the said divorce order in terms of section 36 of the Magistrates Court Act read with Rule 49(7) of the Magistrates Court rules.

[16] For the sake of completeness, the relevant parts of section 36 of the Magistrates Court Act reads as follows: -

> **'36 What judgments may be rescinded**
>
> (1) The court may, upon application by any person affected thereby, or, in cases falling under paragraph (c), *suo motu* –
> (a) ….
> (b) rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties;
> (c) correct patent errors in any judgment in respect of which no appeal is pending;
> (d) rescind or vary any judgment in respect of which no appeal lies.'

[17] **Rule 49(7)** provides as follows:

> 'All applications for rescission or variation of judgment other than a default judgment must be brought on notice to all parties, supported by an affidavit setting out the grounds on which the applicant seeks the rescission or variation, and the court may rescind or vary such judgment if it is satisfied that there is good reason to do so.'

[18] As stated, Rule 49 of the Magistrates Court Rules and Rule 42 of the Uniform Rules of the High Court deals with the variation of orders. There is no provision in these rules that any party to the proceedings who is aggrieved by the agreement should bring the application unilaterally. It follows then that any change to the agreement should be brought by both parties.

[19] In common law, the general rule is that an order of the court, once pronounced, is final and immutable. The guiding principle of the common law is the certainty of judgments.[1] Once an order is pronounced, it may not, thereafter, be altered by the court that granted it. Its jurisdiction in the case, having been fully and finally exercised, means its authority over the subject matter has ceased.[2] The presiding officer becomes *functus officio* and may not ordinarily vary or rescind their own judgment.[3] That is a function of the Court of Appeal. However, notwithstanding the general rule, there are exceptions to the immutability of judgments.[4] First, after evidence has been led and the merits of the dispute have been determined, rescission is permissible in limited cases of a judgment obtained by fraud or, exceptionally, *justus error*. Secondly, the rescission of a judgment obtained by default can be rescinded where the applicant can show good cause or good

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[1] See *Colyn v Tiger Food Industries Ltd t/a Meadow Feeds Mills (Cape)* 2003 (6) SA 1 (SCA) at para 4.
[2] *De Wet v Western Bank Ltd* 1977 (4) SA 770 (T) at 780H-781A.
[3] *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A).
[4] *Zondi v MEC Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) at 12H-13A; See also *Colyn v Tiger Food Industries Ltd t/a Meadow Feeds Mills (Cape)* 2003 (6) SA 1 (SCA).

reason why such an order should be rescinded. Thirdly, a court may correct, alter, or supplement its judgment to give content and meaning to its order.

[20] It has always been the trend in divorce proceedings, more so than in other civil actions, for parties to elect to resolve their disputes in a non-adjudicatory manner.[5] To achieve this, it is an accepted practice in South Africa to regulate the consequences of divorce by means of a settlement agreement.[6] Spouses would ordinarily regulate matters such as division of assets, payment of maintenance, care and contact, and liability for the costs of the proceedings in the settlement agreement. It is trite that parties may include any provision in their settlement agreement which is not impossible, or contrary to public policy.[7] In terms of section 7(1) of the Divorce Act 70 of 1979 *("the Divorce Act")*, 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 the assets of the parties or the payment of maintenance by the one party to the other. Crucially, once the written agreement is incorporated into a divorce order, it acquires the status of a judgment. Thus, when a consent paper is incorporated in an order of court by agreement between the parties in a matrimonial suit, it becomes part of that order, and its relevant contents then form part of the decision of the court.[8]

[21] Reverting to the present matter, to determine the disputed issues, it is important for this court to consider the circumstances under which the consent paper came into

[5] *PL v YL* 2013 (6) SA 28 (ECG) at para 1.
[6] *Heaton J and Kruger H South African Family Law* 4ed (2017) at 127.
[7] *PL v YL* 2013 (6) SA 28 (ECG).
[8] *Hermanides v Pauls* 1977 (2) SA 450 (O) at 452G.

existence. in *Natal Joint Municipality Fund v Endumeni Municipality,*[9] the Supreme Court of Appeal recognised that the circumstances in which a document came into being, is one of the factors to be considered when interpreting a document. Wallis JA stated:

> '[W]hatever the nature of the document, consideration 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.'[10] (Footnotes omitted.)

[22] It is common cause that the parties entered into a written settlement agreement (consent paper) in contemplation of their divorce and in conformity with section 7(1) of the Divorce Act. Robust negotiations between the parties preceded the conclusion of the consent paper. In her founding affidavit, the applicant stated:

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[9] 2012 (4) SA 593 (SCA).
[10] At para 18.

'8. On the 6th December 2021, we appeared in court for the hearing of the divorce on the opposed roll.

9. It was on this day in court corridors (sic) the parties vigorously engaged in settlement negotiations to settle the matter without oral evidence being led.' (My emphasis)

[23] During the negotiations, both parties were assisted by legal representatives. It is incontestable that the parties and their legal representatives had their inputs in producing the consent paper. It is also irrefutable that the parties discussed the period on which each other's pension interests would be calculated and that was set out in clauses 5.1 and 5.2 of the consent paper. After reaching a negotiated settlement, the appellant's legal representatives prepared a typed agreement and presented it to the parties and their legal representatives. The parties read, amended, and initialed the agreement. Thereafter, the appellant and the respondent signed the consent paper with their legal representatives signing as witnesses. In the consent paper, the parties agreed, among other things, that they would claim from each other pension interests from 15 October 2004 to December 2013. The matter was subsequently heard and finalised in court in the presence of the parties and their legal representatives.

[24] The suggestion that there was no meeting of minds when the agreement was concluded is contrived, unsupported, and implausible. It must be stressed that when this agreement was signed, both parties enjoyed the services of their legal representatives. Their attorneys of many years in standing, whom I regard to have the necessary legal knowledge and thorough grasp of the law, were in attendance when the agreement was

negotiated, concluded, and signed. They read the consent paper, annotated the amendments, and advised their clients accordingly. It is reasonable to assume that the parties discussed the period mentioned in clauses 5.1 and 5.2 before they decided to amend them. It appears that it was only after the agreement was tendered at GEPF that the respondent back paddled. The reason stated that there was an error common to both parties was a mere afterthought to motivate for a variation order at the magistrates' court.

[25] During the hearing of the appeal, the legal representative of the respondent, who represented her during the finalization of the divorce, informed the court that he did not take note of the December 2013 cut-off date mentioned in the consent paper. I have some difficulty with this assertion, and I also find it disingenuous and opportunistic, to say the least. The following reasons bear out this finding.

[26] Before the typed agreement was incorporated into the final order of divorce, the parties with their legal representatives reviewed clauses 5.1 and 5.2 discussed above. They discussed it and made handwritten amendments to these clauses, specifically amending the start date for the calculation of pension interest from January 2004 to October 2004 in both clauses 5.1 and 5.2 and substituted the same with 15 October 2004. These amendments, as correctly pointed out by the appellant's legal representative, are located next to the December 2013 date on the consent paper.

[27] Furthermore, in his answering affidavit, the respondent averred that after the settlement negotiations at court, an agreement was reached, and an instruction was sent telephonically to the offices of the appellant's attorney to have the agreement typed. The agreement was typed and then read by all parties to ensure that they were satisfied with its contents.

[28] It is absurd and preposterous for the respondent and her attorney to claim that they were not aware of the cut-off date being December 2013. This claim goes against the overwhelming evidence that the parties intended to use that date. Importantly, the respondent's legal representative was present to protect the respondent's interests. It must be borne in mind that a legal practitioner acting in his professional capacity owes an undivided duty of care and loyalty to his client. This duty requires such legal practitioners to be diligent and be careful in performing work for clients. In performing his duty or mandate, a legal practitioner holds himself out to his clients as possessing adequate skill, knowledge and learning for conducting all business that he undertakes. In *Honey and Blanckenberg v Law,*[11] the court observed that if, a legal practitioner causes loss or damage to his client owing to a want of such knowledge as he ought to possess, or the want of such care he ought to exercise, he is guilty of negligence giving rise to an action for damages by his client.

[29] What compounds the difficulty with his contention is the paucity of information. As an attorney for the respondent, he fails to explain how he missed the date. He did not file a supporting affidavit stating the reasons why he did not take note of this date

[11] 1966 (2) SA 43 (R) at 46F-G.

after he read the consent paper. The respondent also cannot be considered unsophisticated, as she works as a ticket consultant for Metrorail. Surely, she read the consent paper before she signed it. She does not explain how the date escaped her as well. In my view, the contention that the respondent and her attorney did not see the date of December 2013 in the consent paper is an afterthought, which is far-fetched and unsustainable.

[30] Furthermore, the date of December 2013 was not just a wild guess or proverbially sucked out of one's thumb. It is the year that the parties separated from each other. That was not put in dispute by the respondent. In the summons, the respondent pleaded that since January 2013, the parties separated and have not lived together as husband and wife. In the Plea and the Counterclaim, the appellant averred that the parties separated in December 2013. It cannot be said that the inclusion of the date December 2013 in clauses 5.1 and 5.2 of the consent paper was a mistake. Ostensibly, this clause was incorporated in the consent paper by agreement after their vigorous negotiations.

[31] On the objective facts, it is distinctly discernible that the parties were conscious of December 2013 as a cut-off date for calculating their pension interest when they concluded the consent paper. It is worth noting that both the respondent and her legal representative were satisfied with the divorce order after it was granted. However, the respondent raised a complaint six months later when GEPF refused to pay her share. It

is thus fair to infer that if GEPF had paid her claim, she would not have applied for a variation or raised any concerns as she did later on.

[32] It bears emphasis that the consequences of the marriage in community of property entered into by the appellant and the respondent was that they became co-owners in undivided and indivisible half shares of all the assets and liabilities they had at the time of their marriage as well as the assets and liabilities they acquired during the marriage.[12] Expressed differently, upon marriage, the parties' separate estates automatically merged into one joint estate. Upon dissolution of the marriage, all liabilities had to be settled from the joint estate, and the balance of the joint estate, including their respective pension interests, had to be distributed equally between them or as they otherwise agree.

[33] The appellant and the respondent in this case signed a consent paper that limited the payment of each other's pension interest from the date of marriage to the date of separation. It is important to note that their agreement is not unlawful or contrary to public policy. They entered into this agreement freely and autonomously while in their sound and sober senses. A court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh.[13] It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to

[12] *Heaton J and Kruger H South African Family Law* 4ed (2017) at 62.
[13] *Beadica 231 CC and Others Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC) at 80.

enforce it. In *Barkhuizen v Napier,*[14] the Constitutional Court held that public policy requires parties to honour contractual obligations that have been freely and voluntarily undertaken. The court observed that the *pacta sunt servanda* principle gives effect to the central constitutional values of freedom and dignity. Thus, the contractual obligations between the appellant and respondent were undertaken freely and voluntarily when the consent paper was signed and must be respected.

[34] It is also essential to remind ourselves that a court's power to vary a consent paper incorporated into a final divorce order is limited. The consent paper signed by the parties was made an order of court when the divorce order was granted. The consent paper constituted a composite, final agreement entered into by the parties, purporting to regulate all their rights and obligations *inter se* upon divorce. In *Georghiades v Janse Van Rensburg*[15] Griesel J, noted that for a court to interfere in that arrangement (of a settlement agreement) by varying one component of the agreement, while leaving the balance of the agreement intact, flies in the face of the time-hallowed principle that the court cannot make new contracts for parties; it must hold them to bargains into which they have deliberately entered. Thus, the court *a quo* erred in varying a contractual term in a consent paper dealing with patrimonial consequences of marriage between the parties.

[35] That error was in fact downplayed by the respondent when they filed their cross-appeal that this Court should grant an order declaring that there was no agreement

[14] 2007 (5) SA 323 (CC).
[15] *Georghiades v Janse Van Rensburg* 2007 (3) SA 18 (C) at para 16.

between the parties; that the issue of pension interest should be remitted back to the magistrate and that the issue of maintenance should be entertained in this appeal. The respondent cannot approbate and reprobate at the same time. In my view, this cross-appeal is cunning and underhanded and does not deserve the attention of this Court.

[36] I am aware, however, that the order granted by the trial court is contradictory concerning the payment of pension interest to the respective parties in that it sets out explicitly the date when the pension interest should be calculated (15 October 2004 to December 2013). It also refers to the calculation of the pension interest as at the date of divorce. It also does not state the percentage at which the pension interest will be calculated. In *Natal Joint Municipality Fund v Endumeni Municipality,*[16] the Supreme Court of Appeal stated that where more than one meaning is possible in a contested document, each possibility must be weighed in the light of all the surrounding circumstances. The process is objective not subjective. The court also noted that a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

[37] Based on the objective facts, the only reasonable interpretation that can be ascribed to the consent paper is the intention of the parties which was also expressed by the handwritten amendments on the document. If the parties had intended the date of divorce to be determinative, they would not have included the two dates in the two clauses. Seemingly, the date from 15 October 2004 to December 2013 should be preferred.

[16] 2012 (4) SA 593 (SCA).

[38] As previously stated, the percentage of the pension interest that should accrue to each party operates *ex lege*. The parties were married in community of property, and there was no prayer or order for forfeiture of benefits made by the trial court. Thus, properly interpreted, each party is entitled to fifty percent of the other's pension interest. As agreed, each pension interest must be calculated from 15 October 2004 to 31 December 2013.

[39] Lastly, the respondent had a lot to say on maintenance. It must be accepted that the court below did not decide the issue of maintenance as it was abandoned by the respondent. In fact, it was rather misleading for the respondent to simply raise the issue in this manner without having complied with procedural requirements to do so. As stated above, the three issues, including maintenance that was raised by the respondent in the cross-appeal do not require this Court's attention. In my opinion, the maintenance dispute between the parties can be efficiently handled by the Maintenance Court, which is a specialist and dedicated court that is fully equipped to resolve maintenance disputes. In fact, the respondent should consider referring maintenance to the Maintenance Court.

Order

[40] In view of all these considerations, I would propose the following order:

40.1 That the appeal is upheld and that the variation order made by the magistrate is set aside.

40.2 That each party is entitled to 50 percent of the other's pension interest, calculated from 15 October 2004 to 31 December 2013 in terms clauses 5.1 and 5.2 of their consent paper.

40.3 That the cross - appeal is refused.

40.4 That the respondent is ordered to pay costs on a party and party scale.

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LEKHULENI J

JUDGE OF THE HIGH COURT

I agree and it is so ordered:

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MANTAME J

JUDGE OF THE HIGH COURT

APPEARANCES

For the Appellant:	**Mr Patel**
Instructed by:	**S Morgan & Associates**
For the Respondent:	**Mr Mphahlwa**
Instructed by:	**Mphahlwa Ndlamhlaba Inc**