

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

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

CASE NO: 26758/2014

3/7/2019

In the matter between:

L[....] L[....] P[....]

APPLICANT/PLAINTIFF

and

L[....] B[...] S[....]

RESPONDENT/DEFENDANT

JUDGMENT

LUKHAIMANE AJ:

INTRODUCTION AND BACKGROUND

- [1] This is an appeal to amend a court order that granted a partial forfeiture of matrimonial benefits without granting a decree of divorce dissolving the bonds of marriage between the parties and other ancillary issues.
- [2] The parties were married to each other in community of property on 4 February 2009. In April 2014, the applicant personally instituted divorce proceedings against the respondent and issued summons against him. Embodied in the summons included prayers for a decree of divorce and further and alternative relief, including a claim for forfeiture of benefits in terms of

section 9(1) of the Divorce Act 70 of 1979.

[3] The matter was set down for hearing on 1 November 2018 where the parties indicated that the only issue for argument was the claim for forfeiture of the following benefits:

- Applicant's pension benefits
- Immovable property situated at [....]
- Immovable property situated in Mafikeng

[4] An order pertaining to the claim for forfeiture of benefits was handed down on 13 December 2018 and is silent on the rest of the prayers.

[5] The application for the leave to appeal had as its premise, the patent error of the order granted as it did not pronounce on the rest of the issues prayed for.

[6] The applicant now seeks an appeal. On the date of the hearing, applicant's attorneys and counsel failed to appear. A decision was made to proceed with the matter in court, in terms of Rule 42, whose aim is to correct expeditiously an "obviously wrong judgement or order", an action the court can proceed with *mero motu*. The matter then proceeded with a view to supplementing the existing order which is silent on the dissolution of the bonds of marriage and the maintenance and care of the minor child.

II APPLICANTS VERSION

[7] It is the applicant's contention that the order granted by the court was patently erroneous in that it failed to deal with all the other issues prayed for except the forfeiture of benefits.

III RESPONDENT'S VERSION

[8] It is the respondent's contention that the order is indeed erroneous, however this can be corrected by the court in terms of the uniform rules of court and does not require an appeal as the parties had already agreed on those matters.

IV ISSUE

- [9] The issue for determination is whether it is open to whether this court is open to vary the existing divorce order by supplementing it with the other prayers especially that an order for the dissolution of the marriage was also not included by the court granting the forfeiture of benefits.

V APPLICABLE LAW

- [10] Both the Divorce Act 70 of 1979 and Rule 42 of the Uniform Rules of Court have application.¹ Rule 42(1)(b) provides that the court may rescind or vary any order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission.² A patent error or omission has been described as 'an error or omission as a result of which the judgment granted does not reflect the intention of the judicial officer pronouncing it, in other words, the ambiguous language or the patent error or the omission must be attributable to the court itself. The court is thus not entitled to revisit the whole of its order or judgment and its competence is limited to the interpretation of the order. This subsection effectively confines the powers of this court to the exclusion of the ambiguity, error or omission.
- [11] It is well established in our law that 'once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it - it becomes *functus officio*. its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased'.³ Other than in the circumstances specifically provided for in the Uniform Rules of Court or the common law, *prima facie* the inherent jurisdiction of the High Court patently does not extend to interference with a judgment once it is finalised.
- [12] Notwithstanding the general rule, our highest courts have also recognised a number of exceptions to the general rule which are not all inclusive and may

¹ Rule 42 of the Uniform Rules of Court Superior Court Practice Volume 2

1 The court may, In addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:

- (a) An order or Judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) An order or Judgment In which there is ambiguity, or a patent error or omission;
- (c) An order or Judgment granted as a result of a mistake common to both parties.
- (d)

² Rule 42(1)(b) of the Uniform Rules of Court.

³ *De Wet v Western Bank Ltd 1977 (4) SA 770(t) at 780H-781A.*

be extended to meet the constraints of the particular case.⁴ These courts weighed up the principle of finality of judgments against what is just, equitable and sound in law. These exceptions include:

- (a) *Supplementing of judgment: the principal judgment or order may be supplemented in respect of accessory or consequential matters, for example costs or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant,*
- (b) *Clarification of judgment" the court may clarify its judgment or order if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter the 'sense and substance' of the judgment or order.*

[13] It becomes patent that an order of the High Court could be interfered with under Rule 42 and the common law other than on appeal in that it effectively permits a judicial officer to amend, supplement or clarify⁵ its pronounced judgment, provided that the 'sense or substance' of the judgment is not affected or altered thereby. It is also patent that Rule 42 has as its purpose the expeditious correction of 'an obviously wrong judgment or order'. It is accepted that provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it on one or more of the following cases. However, the period within which to bring such an application is not regulated by the Rules of Court.⁶ Of course, what constitutes a reasonable time depends on the facts peculiar to the case.

[14] The present order as it stands does not grant the parties the divorce order sought nor does it deal with the issues pertaining to the custody, control and maintenance of the minor child; issues that the parties have actually reached agreement on. The applicant is thus entitled to supplement the decree of divorce so as to include an order for the dissolution of the marriage, costs and the custody, control and maintenance of the minor child.

⁴ *Zondi v MEC, Traditional and Local Government Affairs 2006 (3) SA 1 (CC) at 12 H-13A*

⁵ **Firestone South Africa (Pty) Ltd v Gentivuro Ag 1977 (4) SA 298 (A).**

VII ORDER

- [1] The appeal is dismissed with costs.
- [2] In the result, it is ordered that the order granted on 13 December 2018 be amended to reflect as follows:
 - [2.1] Decree of divorce is granted.
 - [2.2] The parental rights, responsibilities, rights and care as envisaged by the provisions of section 18, 19 and 20 of the Children's Act, Act 38 of 2005 in respect of the minor child, born from, the relationship between the parties shall be awarded to both parties with the specific proviso that:
 - [2.2.1] The primary residency in respect of the minor child, shall be awarded to the applicant subject to the respondent's rights of reasonable contact to the said minor child at reasonable times.
 - [2.3] That the respondent undertakes to pay maintenance in respect of the minor child at the rate of R3 000,00 per month from the 1st day of the month subsequent to the granting of a final decree of divorce and thereafter on or before the 1st day of each and every successive month which maintenance shall be paid by the respondent directly to the applicant or at such other place as the applicant may, from time to time, notify the respondent in writing where such maintenance is to be paid.
 - [2.4] The maintenance shall increase with an amount equal to the weighted average of the Headline Consumer Index [for all urban areas) as published by Statistics South Africa for the preceding 12 months, the first of such increase to be effected on the 1st day of December 2019 and annually thereafter.
 - [2.5] The joint estate of the parties shall be divided between the parties in equal shares, save for the immovable properties and the applicant's pension interest as more fully provided hereunder.
- [3] In terms of section 9(1) of the Divorce Act 70 of 1970 the Defendant forfeits 60% of his fifty percent entitlement to share in the pension interest of the Plaintiff in the Government Employees Pension Fund (membership number

⁶ Rule 42 of the Uniform Rules of Court.

[....] under names L[....] P[....] L[....] Id number [....]).

[3.1] Plaintiff is to pay the Defendant 20% of Plaintiffs pension interest in the Government Employees Pension Fund (membership number [....] under names L[....] P[....] L[....], ID number [....]) calculated as at date of divorce.

[3.2] An endorsement be noted against the records of the Government Employees Pension Fund in terms of paragraph 3.1 of this order and that such pension interest is payable to the Defendant.

[4] There shall be no order as to costs.

MA LUKHAIMANE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Appearances:

On behalf of the Respondent/Defendant : Adv Marx

Instructed by : Shapiro & Ledwaba Inc

There was no appearance on behalf of the Applicant/Plaintiff.

Date of hearing : 13 June 2019

Date of judgment : 3 July 2019