

SOUTH AFRICA / JUDGMENT

J.R v H.R and Others (17519/22 ; 5633/98) [2023] ZAWCHC 347 (8 December 2023)

[2023] ZAWCHC 347**COURT**

Western Cape High Court, Cape Town

BEFORE

De Wet

CASE / FILE NUMBER

17519/22 ; 5633/98

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(WESTERN****CAPE DIVISION, CAPE TOWN)****Case****No: 17519/22****read****with Case No.: 5633/98****In****the matter between:**

J[...]
R[...]
Applicant
and
H[...]
L[...] R[...] N.O.
In
her capacity as Executrix of Estate
Late
J[...] N[...] R[...]
Identity
number: 5[...]
First

Respondent
H[...]
L[...] R[...]
Second
Respondent
THE
REGISTRAR OF DEEDS
CAPE
TOWN
Third
Respondent
THE
MASTER OF THE HIGH COURT
CAPE
TOWN
Fourth
Respondent

Coram: De Wet AJ
Date of Judgment: This
judgment was handed down electronically by circulation to the
parties' legal representatives by email.
The date and time of
handing down judgment is deemed to be 8 December 2023.

JUDGMENT

DE WET AJ:

Introduction:

- [1] This is an opposed application for the variation of an order granted by Davis J under case number 5633/98 on 17 May 1999 (“the divorce order”) in terms of Rule 42 of the Uniform Rules of Court.
- [2] The applicant, who was the plaintiff in the divorce action, issued summons against her former husband, the late J[...] N[...] R[...] (“the deceased”), and in the prayers she claimed inter alia forfeiture of the patrimonial benefits of the marriage in community of property.[1]
- [3] The divorce order mirrored the relief requested by the applicant in her particulars of claim and contained, inter alia, the following orders:

“ ...

Verbeurtverklaring van die voordele van die gemeenskaplike boedel; [2]

Dat die helfde van die Verweerder se pensioenbelang, soos op datum van die egskeiding, aan die Eiseres toegeken word;[3]

...“

- [4] The divorce order did not specify which assets were forfeited and the applicant requests that the following words be included after the forfeiture order:

“ten gunste van die eiseres, insluitend die verweerder se 50% onverdeelde aandeel in die onroerende eiendom geleë te Erf 8[...]

Worcester, Breede Valley Munisipaliteit, Worcester, Wes-Kaap Provinsie, bekend as 2[...]

V[...]laan, Worcester, Wes-Kaap

(“die eiendom”).

Die eiendom is dus verklaar as die uitsluitlike eiendom van die eiseres.”[4]

- [5] The relief claimed is opposed by the first respondent in her capacity as the executrix of the late estate of the deceased and by the second respondent as the surviving spouse of the deceased. The second respondent was married in community of property to the deceased at the time of his death. For ease of reference I refer to the first and second respondent herein as the respondent.

Relevant facts:

- [6] The applicant and the deceased were married in 1974 in community of property. During 1984 they purchased the property known as 2[...] V[...]laan, Worcester, Western Cape (“the property”) and they were registered as co-owners of the property. The property is still so registered and forms the subject matter of this application.
- [7] As aforesaid the applicant instituted divorce proceedings against the deceased during 1999. The relief claimed was not opposed and the court granted the divorce order.
- [8] The deceased was in a relationship with the respondent from about 2004 but only moved in with her during 2017. After the divorce order was granted, the deceased still stayed in the property from time to time.
- [9] After the divorce order was granted, the property was extended with funds received from the deceased’s pension fund. The applicant states that the extensions to the property were affected with her 50 % of the proceeds of the deceased’s pension fund.
- [10] During 2018 the applicant decided to take steps to have the deceased’s half share in the property transferred into her name. Her attorney submitted to the third respondent an application in terms of section 45bis of the Deeds Registries Act No 47 of 1937, to transfer the deceased’s half share in the property to her.
- [11] The applicant’s attorney was advised by its correspondent, that the third respondent would not affect the endorsement as the divorce order did not make specific mention of the property and hence the application had to be signed by both parties. Since the applicant’s attorney was of the view that the order for forfeiture made provision for the transfer of the

deceased undivided half share in the property, the application was nevertheless submitted without the deceased co-signing. The application was rejected in July 2019 by the third respondent as according to it, the order did not indicate whether it was the applicant or the deceased who forfeited their half share in the property.

- [12] The deceased was then requested to co-operate with the applicant's attorney to have the endorsement affected which he refused to do.
- [13] The deceased passed away on 4 October 2019 without leaving a valid will. The applicant requested the respondent to assist her to have the endorsement affected which she refused to do. There is a dispute whether the second respondent initially agreed to do so. The applicant consequently launched this application.

Grounds of opposition:

- [14] The respondent raised the following defenses: she was advised that a party cannot forfeit what he/she had brought into a marriage or obtained during the course of the marriage; that the grounds for a forfeiture order was not properly set out in the divorce action and hence the order should not have been granted; that the deceased "always said that 50% of the immovable property belonged to him."; that the deceased expanded the property with the pension money he had received from his employer; that the deceased had continued to pay the rates and taxes in respect of the property and that the deceased only became aware of the divorce order during 2017.
- [15] I shall deal with the factual disputes first. It is common cause that the respondent has no personal knowledge of the circumstances surrounding the purchase of the property or when and under which circumstances the order of divorce was granted. What the deceased may or may not have told her during their marriage amounts to hearsay, is inadmissible and does not take the matter any further. But, even if I do have regard to what the respondent states, it appears that her contention that the deceased was not aware of the divorce order cannot be correct as he utilised pension money which he received pursuant to the divorce order to extend the property. This shows that he must have been aware of the divorce order long before 2017. She further states that the deceased during 2017, took steps to have the property transferred into his name but was advised that he would, at best, only be entitled to half

of the property. On this version he must have known about the divorce order since 2017. It is further common cause that in 2019 the deceased refused to co-operate to sign documents to effect transfer of his half share in the property to the applicant. Whether the deceased became aware of the divorce order in 1999 or in 2017 is in my view irrelevant. He undoubtedly was aware of the order and took no steps to have the order set aside. The order consequently stands.

- [16] Whether the deceased paid the rates and taxes in respect of the property after the divorce order was granted is in my view irrelevant. There may have been countless reasons, if it was indeed so, why he paid the utilities. It does not change the fact that a forfeiture order was granted.
- [17] In light of the aforesaid, the respondent in my view did not raise any factual disputes which would disentitle the applicant to a final order on the application of the well-known principle laid down in *Plascon- Evans*[5].
- [18] This brings me to the legal defences raised by the respondent.

The divorce order:

- [19] Section 9 of the Divorce Act 70 of 1979 (“the Divorce Act”) enables a court granting a decree of divorce to order forfeiture of patrimonial benefits of a marriage in community of property on certain specified grounds[6]. There can be no dispute that the court indeed granted a forfeiture order on 17 May 1999.
- [20] It is trite that the powers of the Court to amend orders are extremely limited. In this regard it was held in *Firestone South Africa (Pty) Ltd v Gentiruco* that:[7]
- “The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased.*
- [21] Considering this well-established legal position[8], the respondent cannot question the validity or the correctness of the divorce order in these proceedings. Whether the court granting the divorce order had exercised its discretion in terms of section 9 of the Divorce Act correctly is not for this court to decide. At the time of the divorce, the court was satisfied on consideration of the allegations contained in the particulars of claim and after hearing the evidence presented by the applicant, that it, in the exercise of its discretion, could grant the forfeiture order.
- [22] Insofar as it was argued that the property (or the deceased’s half share in the property) was not a benefit that could be forfeited in favour of the applicant, it was conceded at the hearing that the deceased had not brought the property into the marriage for purposes of section 9(1) of the Act. It could further not be disputed that the applicant, who was working during the marriage, made patrimonial and non-patrimonial contributions to the property and further invested her 50 % share of the deceased’s pension benefit into the property. Even if this court was at liberty to re-consider the forfeiture order, the facts of this matter is clearly distinguishable from the facts in *JW v SW* 2011(1) SA 545 (GNP) relied on by the respondent. As to the respondent’s reliance on the matter of *Engelbrecht v Engelbrecht* 1989(1) SA 597, I agree that the party seeking a forfeiture order has the burden to prove what the nature and extent of the benefit was and that it is for the court to decide whether the benefit was undue whereafter it would consider the factors listed in s 9(1) of the Act to determine the inequity.

[9] As remarked previously, it is not for this court to decide whether the divorce order was correctly granted.

[23] In terms of Uniform Rule 42(1)(b), a court may vary an order or judgment in which there is an ambiguity, patent error or omission, but only to the extent of such ambiguity, error or omission. A court may further clarify an order if the meaning of an order is uncertain and clarification is sought pertaining to the true intention of the order. Such exercise must naturally be done on the basis that the sense and substance of the order should not be altered.[10]

[24] It is trite that the meaning of an order should be ascertained from reading the order or judgment as a whole and by giving words their natural and ordinary meaning.[11] The Court per Trollip JA pointed out in this regard as follows[12]:

“...The basic principles applicable to the construction of documents also apply to the construction of a court’s judgment or order. The Court’s intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules.”

[25] The divorce order must therefore be read with reference to its context and objects. If the meaning is clear and not unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it.[13]

[26] The approach to interpretation is now mostly settled and “(the) inevitable point of departure is the language of the provision [or order] itself” as it was explained by the SCA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*. [14]

[27] Recently in the matter of *Z v Z* [15] the SCA, in the context of the interpretation of statutes, reiterated that words must be given their ordinary grammatical meaning, unless to do so would result in absurdity.

[28] In the matter of *Tshwane City v Blair Atholl Homeowners Association* [16] the SCA explained that the court has moved away from a narrow peering at words in an agreement and has stated on numerous occasions that words in a document must not be considered in isolation. Restrictive consideration of words without regard to context should therefore be avoided. It was consequently held that the “distinction between context and background circumstances has been jettisoned with reference to the matter of *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) at 409I -410A.

[29] It is unfortunate that the court hearing the unopposed divorce action did not clearly spell out that it had ordered that the deceased forfeit his half share in all the assets of the joint estate, including the property but excluding his half share in his pension fund as the meaning of the divorce order in this regard is now in dispute and causes uncertainty.

[30] There can in my view be no doubt that the court had granted the applicant the relief that she had claimed: that the deceased forfeit his half share in the assets of the joint estate save for his half of his pension benefit. To suggest otherwise is simply nonsensical.

[31] As to the issue of costs, I have considered the fact that the applicant would have had to bring an application to amend the court order in any event given the attitude of the deceased and the third respondent. The deceased further could have brought the respondent under the mistaken impression that he still had a 50 % interest in the property and was not aware of any forfeiture order against him, hence her opposition to the relief sought. In the circumstance and in the exercise of my discretion, I am of the view that each party should be liable for their own costs in this application.

[32] In the circumstances the following order is made:

1. The following words to be inserted after the forfeiture order in the divorce order dated 17 May 1999 granted by Davis J under case number 5633/98: :

“ten gunste van die eiseres, insluitend die verweerder se 50% onverdeelde aandeel in die onroerende eiendom geleë te Erf 8[...]

Worcester, Breede Valley Munisipaliteit, Worcester, Wes-Kaap Provinsie, bekend as 2[...]
V[...]laan, Worcester, Wes-Kaap

(“die eiendom”) en die eiendom is dus verklaar as die uitsluitlike eiendom van die eiseres.

2. Each party to pay their own costs.

A De Wet

Acting Judge of the High Court

Date of hearing: 24 October 2023 On behalf of the applicant: Adv. S Bosch Instructed by: Meyer & Botha Attorneys Email: steynprok@mweb.co.za On behalf of the first and second respondent:

Per: B Nduli Legal Aid, Cape Town bonginkosiN@legal-aid.co.za

- [1] The prayers read as follows: “DERHALWE VORDER EISERES: 1. Egskeidigsbevel; 2. ...; 3.; 4. Verbeurtverklaring van die voordele van die gemeenskaplike boedel;”

- [1] The prayers read as follows:

“DERHALWE VORDER EISERES:

1. Egskeidigsbevel;
2. ...;
3.;
4. Verbeurtverklaring van die voordele van die gemeenskaplike boedel;”

- [2] The English translation being: Forfeiture of the patrimonial benefits of the marriage in community of property.

- [3] The English translation being: That half of the defendant's pension interest as at date of divorce, be awarded to the plaintiff.
- [4] The English translation being: ...in favour of the plaintiff, including the defendant's undivided 50 % share in the immovable property situated at Erf 8[...] Worcester, Breede Valley Municipality, Worcester, Western Cape, and known as 2[...] V[...]laan, Worcester, Western Cape ("the property") and that the property therefor be declared the exclusive property of the plaintiff.
- [5] Plascon-Evans Paints (TVL) Ltd. V Van Riebeeck Paints (Pty) Ltd 1984 (s) SA 623
- [6] 9. Forfeiture of patrimonial benefits of marriage: (1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited. (2) In the case of a decree of divorce granted on the ground of the mental illness or continuous unconsciousness of the defendant, no order for the forfeiture of any patrimonial benefits of the marriage shall be made against the defendant.
- [6] 9. Forfeiture of patrimonial benefits of marriage:
- (1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.
- (2) In the case of a decree of divorce granted on the ground of the mental illness or continuous unconsciousness of the defendant, no order for the forfeiture of any patrimonial benefits of the marriage shall be made against the defendant.
- [7] AG [1977] 4 All SA 600 (A) 606 – 609; 1977 (4) SA 306F – 308F: See also, West Rand Estates Ltd v New Zealand Insurance Co. Ltd, 1926 AD 173 at pp 176, 186 – 7 and 192; Estate Garlick v Commissioner of Inland Revenue, 1934 AD 499 at p 502.
- [8] See Freedom Stationary (Pty) Ltd v Hassam 2019 (4) SA 459 (SCA) at 465A-B and Swart v ABSA Bank Ltd 2009(5) SA 219 (C) at 221 B-D and 223 A-B
- [9] Also see KT v MR 2017 (1) SA 97 (GP) and Botha v Botha 2006(4) SA 144 (SCA)

- [10] See *Mostert NO v Old Mutual Assurance Co (SA) Ltd* 2002 (1) SCA at 86 D
- [11] *Sonnenberg v Shwababa* (3814/09) [2010] ZAFSHC par 12.
- [12] *Firestone South Africa (Pty) Ltd Genticuro AG* 1977 (4) SA 298 (A), page 304, par D-H.
- [13] *Simon NO and other v Mitsui & Co. Ltd and others* 1997(2) SA 475 (WLD) as referred to in *Sonnenberg v Shwababa* (3814/09) [2010] ZAFSHC par 13
- [14] 2012
- (4) SA 593 (SCA) at para 18 it was held that: “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 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 weighted in 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. 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”.
- [15] (556/2021
- [2022] ZASCA 113 (21 July 2022) at paragraphs 7 and 15.
- [16] 2019
- (3) SA 398 (SCA).

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