

SOUTH AFRICA / JUDGMENT

M.B v R.B (CIV/APP/RC05/2022) [2023] ZANWHC 20 (28 February 2023)

[2023] ZANWHC 20

COURT

North West High Court, Mafikeng

BEFORE

M Malowa, JT Djaje

CASE / FILE NUMBER

CIV/APP/RC05/2022

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION –
MAHIKENG

CASE

NO. CIV/APP/RC05/2022

Reportable: YES / NO

Circulate to Judges: YES

/ NO

Circulate to Magistrates:

YES / NO

Circulate to Regional

Magistrates: YES / NO

In

the matter between:-

M

[....] B [....]

Appellant

And

R

[....] B [....]

Respondent

Heard: 11 NOVEMBER 2022

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses.
The date for the hand-down is deemed to be 28 FEBRUARY 2023
ORDER
The following orders are

made: 1.
The appeal is dismissed.

JUDGMENT

MALOWA AJ

INTRODUCTION

- [1] This appeal emanate from a divorce matter where a Deed of Settlement between the parties was made an Order of Court on the 9th March 2021 in the Klerksdorp Regional Court. However, subsequently thereafter, the Respondent had become an applicant in the proceedings when he filed a variation application on the 1st July 2021 against the aforesaid order. The basis for the variation application by the Respondent was that the aforesaid Deed of Settlement was signed on the basis of common mistake or error between parties. The variation application was intended to reduce the amount of money payable by the Respondent to the Appellant. The Respondent submitted that there was a miscalculation of payable amount of money. He averred that through a common mistake he created for himself an erroneous payment obligation within the Deed of Settlement which was made a court order.
- [2] The application by the Respondent was opposed by the Appellant on the basis that there was no common mistake between the parties and the division was made properly. However, the Respondent was successful in varying the Court Order as per court Judgement of the 17 February 2022, save to state that the said Court order was not complete as the Court ordered the parties to provide names of the liquidators of
- their choice before the 22 February 2022 for one of the liquidators (once appointed by the court) to can determine the appropriate property division between the parties. The respondent argued that the Appellant had prematurely appealed against the Court's decision to have parties submitting the liquidators' names before parties can submit names and liquidator be appointed and or to determine the division of the assets and liabilities.

- [3] The Appellant's case is against Court's course to have original parties' settlement court order varied based on alleged common mistaken fact within the judgement or order. The said order of variation sought to be appealed was reserved on the 11 February 2022 and reasons for the said judgment were delivered on the 17 February 2022 by the Regional Court and it was ordered thus:-

"1. The court order dated 9 March 2021 is amended as follows:

2. Paragraph 3.2 is varied by removing the words "the amount of R 2 650 000,00" and replacing it with the words "to be determined by a liquidator to be appointed by the parties within 2 weeks, or if the parties cannot agree, by the court".
3. The order in respect of paragraphs 3.2.1 to 3.27 and 3.5 is held over pending the determination of the accrual by the liquidator;
4. The warrant of execution dated 18/5/2021 is set aside;
5. The parties must provide the name of a liquidator on / before 25/2/2022;
6. Failing which, the court shall appoint a suitable person as liquidator;
7. The question of costs is held over;

The matter is remanded to 25/2/2022 at 8:30".

- [4] The Appellant delivered the notice of appeal against the variation order on the 22 March 2022. The Appellant had stated that the respondent was throughout the main legal proceedings including the signing of the Deed of Settlement represented by counsel and an attorney to can claim a common mistake or error by the parties.
- [5] The Appellant argued that the parties' Deed of Settlement does not overstate the amount due to her as alleged by the Respondent. She further submitted that there is no basis that existed for an application in terms of section 36(1) (b) of the Magistrates' Court Act 32 of 1944 to have been granted by Court a quo. Section 36(1)(b) provide for judgement which may be rescinded and the relevant subsection is; "rescind or vary any judgement granted by it which was void ab origine or was obtained by fraud or by mistake common to the parties". The Appellant argued that Deed of Settlement as concluded by the parties was in line with legal principles of fairness and equity.
- [6] The issue at hand for determination is not that there is or no mistake common to parties at this stage, but whether the order of court a quo is appealable in light of the fact that it was brought prematurely. The submission of the Appellant that parties were legally represented during the signing of the Deed of Settlement to can claim common mistake may not be relevant for determination at this stage. However, the requirement for variation under common mistake is not limited to only the common mistake committed in circumstances where a litigant has no legal representative or circumstances where litigant is legally represented.

- [7] The appointment of a liquidator by the Regional Court is said by the Appellant to be embarking "... on a frolic of his own and granted relief that neither party sought". The incorporation of a prayer of "further and/or alternative relief" in a respondent's notice of motion for variation application may on its own read or be interpreted to mean authorisation and acceptance of the Court's jurisdiction to include any relief which may give solution to the dispute even if it is not specifically requested. The appointment of a liquidator is not a final order as among other things still pending, was the name of the appointed liquidator, which were to happen after the parties' submissions. Furthermore the rights of the parties' are to be determined by the said liquidator. The appointment process of a liquidator by court a quo should have been first allowed to give clarity on the parties' rights. As to whether the Respondent could not have succeeded with the variation application on the facts before court, it is pre-mature to deal with it.
- [8] The appeal process is in itself a distinct and separate legal process at a different forum than the court of first instance. Wherefore, the matter should be concluded or exhausted before it can be heard at appeal level. If it is not concluded, the appeal forum is entitled to dismiss it because the legal process is still pending at a court of first instance.
- [9] The crust of the matter herein is whether the Court a quo's court order has the effect or it disposed of any issue, or any portion of any issue, in the main action, or irreparably anticipates

or precludes some of the relief which would, or might, be given at the main hearing. If the effect of a rule or order is final, this means that the matter has ended for one of the parties. Therefore, he or she can appeal against that order or rule. In the matter of Pretoria Garrison Institute vs Danish Variety Products Ltd 1948

(1) SA 839 (A) at 867 – 869, Schreiner JA ruled to that effect.

[10] In *Zweni vs Minister of Law & Order* 1993 (1) SA 523 (A), 531 J – 532 A, Harm AJA said:-

"The emphasis is now rather on whether an appeal will necessarily lead to a more expenditures and cost-effective final determination of the main dispute between the parties and as such, will decisively contribute to its final resolution".

Judgment or order is a decision which as a general rule has three attributes, i.e. it should;

-be final in effect and not susceptible to alteration by the Court of first instance;

-be definitive of the rights of parties;

- have the effect of disposing of at least a substantial portion of the relief claimed in the main proceeding".

[11] It is important to note that Courts, including this one is reluctant to deal with issues in dispute in a peace-meal manner, which peace-meal approach is normally caused by circumstances like in casu where a party brought appeal on one issue to the exclusion of other issues that are still under the process of determination by

Court of first instance. See *Beinash vs Wixley* [1997] ZASCA 32; 1997 (3) SA 721 (SCA) at 730-D.

[12] The question in casu may be looked at through a less rigid and modern or new flexible and pragmatic approach in order to determine the effect of the order. Bringing of an appeal prematurely at this stage will not lead to a more and cost-effective final determination of the main dispute between the parties. In the present case, the major substantive dispute is still pending before Court a quo and not yet ventilated by the Court, being how much is due to either of the parties from the division of assets and liabilities, as the liquidator has not yet appointed and decided.[1]

[13] What the Court does is to have regard to all the relevant factors impacting on the issue. It asks whether the decision sought to be corrected would, if decided in a particular way, be decisive of the case as a whole or substantial portion of the relief claimed, or whether such decision anticipates an issue to be dealt with in the main proceedings. The objective is to ascertain what course would best bring about the just and expeditious decision of the major substantive dispute between the parties. [2]

[14] In *SA Druggists Ltd vs Beecham Group Pic* 1987 (4) SA 876 (T) at 880 B – C, the Court held that:-

“Interlocutory orders are equated to rulings”, wherefore the order of court a quo is an interlocutory and not appealable.

[15] In *Mofokeng Jantje & 12 Others vs JAC Pallets Africa CC & 7 Others*, AC Basson J, indicated in a leave to appeal that, where a party have been ordered to amend its papers that does not have the effect of a final order. “... By no stretch of the imagination can it be argued that this order disposes of the main dispute between the parties. In fact, this order has the effect of assisting the parties to bring the main dispute to a procedural point where this court may be placed in a position where it can hear the merits of the dispute. It is for the Applicants to decide whether or not they want to amend their papers. The mere fact of their failure to amend their papers does not, in itself, dispose of the application. At the very worst it may lead to the ultimate dismissal of the matter, but this consequences does not flow from this order. Even where the parties ultimately comply with the order, they still have the remedy of applying for condonation of the late compliance of the order”.

Equally in this case the order for appointment of a liquidator and the calling of parties to identify the said liquidator does not bring to finality the disputed issues and the order need to be complied with first and issues in dispute be determined before the matter can be brought on appeal.

CONCLUSION

- [16] The appeal was launched prematurely because there is no final order on the pronouncement of issues between the parties. There is no definitive results on the dispute regarding parties' rights or substantial portion thereof. Although an order for the variation of the parties' Deed of Settlement was granted, the extent of such variation and prejudice, if any, or the lack of prejudice, is not yet determined.
- [17] It is not necessary to evaluate the merits of the matter in light of the conclusion that the order of court a quo is not appealable for the reasons shown in the subsequent paragraphs.
- [18] In view of all the above, I come to the conclusion that the Appellant should not have brought an appeal against the interim order of the Regional Court for the appointment of the liquidator, but await the appointment of a liquidator and determination of parties' rights by the liquidator.
- [19] The judgment sought to be appealed by the Appellant was not brought at the end of the matter and also the order granted by the court a quo did not have a final effect on either of the parties or both parties to can be appealed. The decision of court a quo is not definitive of the parties' rights and is susceptible to alteration by the court. Furthermore the decision in issue did not have the effect of disposing of a substantial portion of the relief sought to be appealed.

Costs

- [20] It is trite that costs follow the results and as such, it is for those reasons that costs are ordered against the Appellant on a party and party scale.

Order

- [21] The following orders are made

M. MALOWA

Acting Judge of the High Court of South Africa

North-West Division, Mahikeng

I agree

J.T. DJAJE

Deputy Judge President of the High Court of South Africa

APPEARANCES

Date of hearing

: 11 November 2022

Judgment

Reserved

: 11 November 2022

Date of Judgment :

28 February 2023

Counsel for the Appellant : Adv J. Lubbe SC

Counsel for the Defendant : Adv.C.R. Du Plessis

- [1] See also paragraph 9; See also in Beinash vs Wixley [1997] ZASCA 32; 1997 (3) SA 721 (SCA) at 730 D – F by Mahomed CJ
- [2] In Van Streepen & Germs (PM Ltd) vs Transvaal Provincial Administration 1987 (4) SA 569 (A), 585 E-J
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Prepared on 9 October 2026 · Esheria