

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2985/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
_____	_____
DATE	SIGNATURE

In the matter between:

CARIKE MEIRING N.O.

First Applicant

NISHAN MAIBCHUND N.O.

Second Applicant

and

CARLA MARIA JONES (formerly JANMAAT)

Respondent

JUDGMENT

D T v R DU PLESSIS, AJ

[1] The applicants, in their capacities as the joint executors of the estate of the late BAREND MEIRING, apply for the variation of a court order granted on

12 September 2019 to reflect the correct policy number. In terms of the said order, the respondent was ordered to pay the proceeds of a Brightrock buy and sell agreement policy in the sum of R2 215 428,00 to the banking account of the estate within five days of the date of the order.

- [2] The deceased and the respondent jointly owned a company named Nouveatopia (Pty) Ltd (“the company”) with each owning 50% of the shares. During or about 2016 the deceased and the respondent entered into an oral buy and sell agreement in terms whereof each would take out a buy and sell policy on the life of the other. The intention was to provide the surviving co-owner with enough money to buy the shares of the other in the event of one passing away.
- [3] In order to achieve that intention each nominated the other as the beneficiary. The premiums of both policies were paid by the company.
- [4] The deceased passed away before the respondent and the applicants, as the appointed executors of his estate, demanded payment of the full proceeds of the policy of which the deceased was the beneficiary. The respondent disputed that the estate was entitled to the full proceeds but argued that the value of the shares had to be determined at the share market value on the date of death of the deceased.
- [5] The applicants then launched the main application where the issue on the papers was the amount that had to be paid to the estate. The respondent opposed the application on that basis but the learned Judge found that the parties intended for the full proceeds of the respective policies to be paid to the estate of the party who passed away first. The order was granted on that basis.
- [6] After the order was granted, the respondent filed an application for leave to appeal but withdrew the application on the day before it was to be heard. It is important to note that it was not a ground for the application that the order referred to the incorrect policy number.

- [7] When the respondent failed to comply with the order, the applicants launched an application for contempt of court about a year after the order was made, i.e. during September 2020. In response to the application the respondent addressed an email to the applicants' attorney of record on 1 October 2020 in terms whereof she *inter alia* stated that she intended to fully perform her obligations in law and that it was never her intention to disobey the judgment of the court.
- [8] Some further correspondence followed in terms whereof the respondent *inter alia* made certain settlement proposals. On about 26 November 2020 the respondent caused R75 000.00 to be paid into the trust account of the applicants' attorney of record.
- [9] During about December 2020 the respondent apparently obtained legal advice to the effect that the policy number on the order was incorrect and it was therefore impossible for her to comply with the order. A letter to that effect was addressed by her attorneys to the applicants' attorneys on 17 December 2020.
- [10] The policy of which the deceased was the beneficiary was numbered [...] ("the correct policy number") and the other was numbered [...] ("the incorrect policy number"). The order contained the incorrect policy number which corresponded with the relief sought in the notice of motion, although the respondent had referred to the correct policy number in her answering affidavit.
- [11] The applicants' attorneys maintained that the error on the order was simply typographical and that the respondent was bound thereto. On or about 11 March 2021 the applicants launched an application for the variation of the order to reflect the correct policy number. This application was opposed by the respondent and was argued as an opposed application before the Honourable acting Judge Movshovich on about 21 February 2022.

- [12] The learned acting Judge found that Rule 42(1)(c) was not applicable as the order was not the product of a mistake common between the parties. The application was dismissed on the basis that it was brought in terms of the said sub-rule but the learned acting Judge mentioned that he did not exclude the possibility that there may be other grounds on which the judgment may be varied or rescinded.
- [13] The present application was then launched on 3 May 2023. The basis of this application is Rule 42(1)(b), alternatively the common law, alternatively such other basis as the court may deem fit.
- [14] From the history set out above it is clear that all the parties were aware which policy the main application related to, namely the policy of which the deceased was the beneficiary. The respondent did not oppose the application on the basis that the incorrect policy was being referred to in the notice of motion and founding affidavit, nor was this the basis of her application for leave to appeal. The first time any mention was made of the fact that the order referred to the incorrect policy number was in December 2020 when her attorneys addressed a letter to that effect to the applicants' attorneys.
- [15] If one has regard to the judgment of the Honourable acting Judge Sibuyi, who granted the order, it is clear that the only issue was how much of the respective policies had to be paid to the estate of the deceased in return for the deceased's 50% shareholding in the company. He granted the order on the basis that the full proceeds of the policy had to be paid to the estate of the deceased.
- [16] In *Firestone South Africa (Pty) Ltd v Genticuro AG* ("*Firestone*")¹ it was found that in interpreting court orders, the same principles apply as for construing documents. Thus:

“... [T]he 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.

¹ 1977 (4) SA 298 (A) at 298E and 304E.

...

Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention."

[17] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*² the following was held:

"Interpretation is the process of attributing meaning to the word 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 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',³ read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[18] Taking the abovementioned authorities into account it would, in my view, make a mockery of the judgment and the order if the learned acting Judge in the main application in fact intended the respondent to pay the proceeds of the policy of which she was the beneficiary to the estate. That policy has not been paid out as the respondent is still alive. It will only have proceeds on her

² [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.

³ *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) at para 98.

death. It must therefore follow that the learned Judge made an error in referring to the incorrect policy number in the order.

[19] It matters not that the learned Judge followed the wording of the notice of motion when granting the order. What matters is what he intended when making the order. The intention was clearly to order the respondent to pay the proceeds of the policy with the correct policy number, as that was the policy in terms whereof the deceased was the beneficiary and that was in fact paid out on the deceased's death.

[20] The order therefore contains a patent error, which falls squarely within the provisions of Rule 42(1)(b).

[21] Adv Schafer, who appeared for the respondent before me, argued the opposition to the variation order on three bases, namely:

21.1. The application is out of time and the only explanation for the delay is contained in the replying affidavit. In terms of the common law such an application has to be brought on the same day that the order was granted;

21.2. No case was made out in terms of Rule 42 or the common law and the applicants cannot rely on *iustus error* for a variation;

21.3. The applicants cannot rely on the court's discretion as there is no inherent discretion to rectify a judgment. The interest in the finality of judgments is also paramount and should trump any interference at such a late stage.

[22] In respect of the time that has elapsed before the present application was launched, the respondent relied on *First National Bank of Southern Africa Ltd v Van Rensburg NO and Others: In Re First National Bank of Southern Africa Ltd v Jurgens and Others*⁴ where Eloff JP concluded that "[a] reasonable time in this case is substantially less than the three years referred to".⁵

⁴ 1994 (1) SA 677 (T).

⁵ At 681G.

[23] The full bench in *Money Box Investments 268 (Pty) Ltd v Easy Greens Farming and Farm Produce CC*⁶ held, in an application under Rule 42 launched some six months after the applicant had obtained knowledge of a default judgment:

“I agree with the respondent that in bringing an application for rescission of the judgment under Rule 42(1) and at common law, the appellant had to bring the application within a reasonable time. The appellant brought the application more than 6 (six) months after it became aware of the judgment. The appellant concedes that the application was not brought within a reasonable time, the reason why it applied for condonation for the late filing of the application.”⁷

[24] On the basis of these judgments the respondent argued that the court should exercise its discretion to dismiss the application.

[25] I have set out above the history to the present application. This is not an application for the rescission of a judgment, but one to vary an order that clearly contains a patent error. The applicants first became aware of the error when it was brought to their attention in terms of the letter on 17 December 2020. In fact, it seems as if the respondent also only became aware thereof during about December 2020 when there was an application for contempt of court pending. Prior to that all the parties assumed the order to be correct and acted on such assumption.

[26] The first application was launched on 11 March 2021 when it became clear that the respondent had no intention of honouring the order and that her reason for this stance was the incorrect policy number in the order. In my view this was within a reasonable time after the applicants became aware of the error, especially as the respective attorneys were exchanging correspondence in the interim period in an attempt to resolve the dispute.

⁶ [2021] ZAGPPHC 599.

⁷ At para 7.

- [27] The judgment in that application was handed down on 13 July 2022 and the present application was launched on 3 May 2023. This delay is explained in the applicants' replying affidavit. It seems that the applicants did not have the funds to continue with the litigation after the dismissal of the first variation application and that the present application was only launched after their attorney and counsel agreed to act on a *pro bono* basis. The process commenced in about October 2022 and the application was only finalised in about April 2023 due to, *inter alia*, the fact that counsel who was involved in the matter from the outset was on maternity leave during December 2022.
- [28] It is unfortunate that this explanation only appears in the replying affidavit, but it was done in response to the respondent's criticism about the expiry of time. The applicants apply for condonation insofar as it is necessary.
- [29] It is trite that a court has a discretion to grant condonation, which must be exercised judicially on a consideration of the facts of each case. In essence it is a matter of fairness to both sides. A judicial discretion is not an absolute or unqualified discretion but must be exercised in accordance with recognised principles.
- [30] Certain factors are usually relevant but the weight to be given to any factor depends on the particular circumstances of each case. These factors are not individually decisive but must be weighed against each other. In each case the question is whether good or sufficient cause has been shown for the relief sought. Sufficient cause includes the applicant's prospects of success.⁸
- [31] Among the factors that the court has regard to are the degree of non-compliance; the explanation of the delay; the prospects of success; the importance of the case; the nature of the relief; the other party's interest in finality (an inordinate delay induces a reasonable belief that the order had become unassailable); prejudice to the other side; the convenience of the

⁸ *Express Model Trading 289 CC v Dolphin Ridge Body Corporate* [2014] ZASCA 17; 2015 (6) SA 224 (SCA).

court; the avoidance of unnecessary delay in the administration of justice; and the degree of negligence of the persons responsible for the non-compliance.

- [32] A court may condone non-compliance with time limits even where no application for condonation has been brought.⁹ Condonation will be granted if it is in the interests of justice to do so. It is trite that the interests of justice require that all issues pertaining to a matter be ventilated fully and for all parties to be given the opportunity to state their case as comprehensively as possible.
- [33] In my view the delay has been explained. I am also convinced that in light of the applicants' prospects of success in this matter it will be in the interests of justice to grant condonation. It will be a travesty of justice if the respondent escapes her obligations in terms of an agreement reached with the deceased and a court order granted thereafter, only on the basis that the applicants have taken too long to enforce their rights. Any prejudice that the respondent may have suffered as a result of the delay is of her own doing.
- [34] For these reasons I grant condonation to the applicants for the delay in launching the present application.
- [35] As far as a case based on Rule 42(1)(b) is concerned, I have already set the reasons why such a case has been made out above. The error in the order is clearly a patent error and the court may vary same in terms of the said sub-rule.
- [36] The discretion that the applicants want the court to exercise is the one granted to a court in terms of Rule 42. Once the applicants have made out a case that the order contained a patent error and that all parties whose interests may be affected have notice of the proposed order, the court may vary the order. In *Firestone*¹⁰ the following was said:

⁹ *De Lange and Another v Eskom Holdings Ltd and Others* 2012 (1) SA 280 (GSJ) at para 27.

¹⁰ Above n 1 at 306F-307G.

“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. See *West Rand Estates Ltd v New Zealand Insurance Co Ltd.*, 1926 AD 173 at pp 176, 178, 186–7 and 192; *Estate Garlick v Commissioner of Inland Revenue*, 1934 AD 499 at p. 502.

There are, however, a few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this Court. Thus, provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter, or supplement it in one or more of the following cases:

...

- (iii) The Court may correct a clerical, arithmetical or other error in it (sic) judgment or order so as to give effect to its true intention (see, for example, *Wessels & Co. v De Beer*, 1919 AD 172; *Randfontein Estates Ltd v Robinson*, 1921 AD 515 at p. 520; the *West Rand* case, supra at pp. 186 – 7). This exception is confined to the mere correction of an error in expressing the judgment or order, it does not extend to altering its intended sense or substance. KOTZÉ, J.A., made this distinction manifestly clear in the *West Rand* case, supra at pp. 186 – 7, when, with reference to old authorities, he said:

‘The Court can, however, declare and interpret its own order or sentence, and likewise correct the wording of it, by substituting more accurate or intelligent language so long as the sense and substance of the sentence are in no way affected by such correction; for to interpret or correct is held not to be equivalent to altering or amending a definitive sentence once pronounced.’

Again, this exception is inapplicable in the present proceedings since neither the T.P.D. nor this court committed any error in expressing its relevant orders; those orders reflected respectively the intention of

each Court. The error related to the sense or substance of the relevant orders due to the T.P.D.'s erroneously assuming, and this Court's erroneously affirming, that the Fourth Schedule does prescribe a tariff for counsel's fees."

[37] The incorrect policy number in the order is a clerical error and the correction thereof is so as to give effect to the true intention of the court that granted it.¹¹ This falls squarely within the exception to the general rule as set out above.

[38] For the reasons set out herein it follows that the applicants are entitled to an order as sought in the notice of motion. I accordingly make an order in the following terms:

38.1. The incorrect policy number in paragraph 1 of the Court Order handed down on 12 September 2019 under the abovementioned case number is varied to reflect the correct policy number, being [...].

38.2. The respondent is ordered to pay the costs of the application.

D T v R DU PLESSIS
Acting Judge of The High Court
Johannesburg

Date of Hearing: 31 January 2024

Date of Judgment: 26 February 2024

Counsel for Applicant: Adv R Andrews

Instructed By: HJW Attorneys

¹¹ *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* [2001] ZASCA 101; 2002 (1) SA 82 (SCA) at para [5].

Counsel for Respondents: Adv L Schafer

Instructed By: Amod & Van Schalk Attorneys