

REPUBLIC OF SOUTH AFRICA

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

CASE NUMBER: 2018/39527

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
3 January 2022

In the matter between:

N[....] Q[....] M[....]

Applicant

and

N[....] W[....] M[....]

First Respondent

REGISTRAR OF DEEDS JOHANNESBURG

Second Respondent

Delivered: 3 January 2022 - This judgment was handed down electronically.

JUDGMENT

Karachi AJ:

1. This is an application in terms of which the applicant seeks the upliftment of a bar in order to enable her to file a plea and conditional counterclaim in the main

action. The first respondent, the plaintiff in the main action, opposes the application and has filed a counter application in terms of which he seeks an order that a receiver and liquidator be appointed to wind up their joint estate.

2. The applicant and first respondent were married in community of property. Their marriage was dissolved by divorce on 6 June 2012. The court granting the order of divorce ordered *“Forfeiture of the benefits arising from the marriage in community of property in favour of the [applicant]”*. Pursuant thereto, the second respondent made an endorsement on the deed of transfer in terms whereof the first respondent’s right, title and interest in the property were transferred to the applicant. The first respondent subsequently instituted the main action wherein he seeks orders that the second respondent cancel the endorsement, that the joint ownership be terminated, that the property be sold and that the nett proceeds of the sale be divided equally between the applicant and first respondent. The first respondent argues that the order made by the court granting the divorce was not made in respect of any particular asset and that *“the order is in fact an order for the division of the joint estate”*.

3. The applicant opposes the main action and filed her plea. Soon thereafter, the first respondent took an exception to the applicant’s plea. The exception was opposed and on 5 September 2019, the exception was upheld whereafter the applicant failed to amend her plea.

4. On 6 February 2020, the first respondent filed a notice of bar in terms of which the applicant was given 5 days to file her amended plea. The applicant however failed to do so and the first respondent applied for default judgment. Prior to the hearing of the application for default, the applicant brought this application to uplift the bar. The application for default judgment was accordingly postponed.

5. Rule 27 of the Uniform Rules of court provides that:

“27 Extension of time and removal of bar and condonation

- (1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.*
- (2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to the recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these rules.*
- (3) The court may, on good cause shown, condone any non-compliance with these rules.*
- (4) After a rule nisi has been discharged by default of appearance by the applicant, the court or a judge may revive the rule and direct that the rule so revived need not be served again.”*

6. In order to succeed, the applicant must show good cause. The court has a wide discretion. In principle that discretion should be exercised upon consideration of all of the merits of the case.

7. The courts have refrained from attempting to formulate an exhaustive definition of what constitutes good cause however two principal requirements for the favourable exercise of the court's discretion have crystallized. The first is that the applicant must furnish an explanation of his/her default sufficiently. The court will refuse to grant the application where there has been a reckless or intentional disregard of the rules of court. The second is that the applicant should satisfy the court that he/she has a bona fide defence, that the defence is not patently unfounded and that it is based upon facts which, if proved, would constitute a defence.

8. In most of the authorities a third requirement is also laid down, namely, that the grant of the indulgence sought must not prejudice the plaintiff (or defendant) in any way that cannot be compensated for by a suitable cost order.

9. When determining prejudice, a common-sense analysis of the facts is required.

10. The reasons advanced by the applicant's attorneys for the delay in filing an amended plea is that:

10.1. Counsel was instructed to prepare the amended plea and counterclaim and required additional information;

10.2. They were unable to obtain a copy of the court proceedings when the divorce was granted due to the fact that the court file was water damaged;

10.3. They had several consultations with the applicant in order to obtain necessary details including payments made;

10.4. The notice of bar only came to their attention on 24 February 2020;

10.5. The applicant was of the opinion that the matter could be settled but was unable to pay the taxed costs in respect of the exception;

10.6. During March 2020 their offices closed until May 2020 as a result of the lockdown;

10.7. The candidate attorney was under the mistaken belief that she served and filed the amended plea and counterclaim and that the matter was on the trial roll for 25 August 2020;

10.8. The candidate attorney relocated and resigned from the firm in July 2020;

10.9. When Mr Van Heerden took over the file, he found that the matter was in fact not on the trial roll for 25 August 2020 but was an application for

default judgment as a result of the amended plea and counterclaim not being filed;

10.10. This application was brought soon thereafter.

11. Having regard to the explanation for the delay, I am satisfied that the delay has been sufficiently explained and that there was no reckless or intentional disregard of the rules by the applicant.

12. Turning to the issue of whether the applicant has a bona fide defence, attached to the applicant's application to uplift the bar is the applicant's amended plea and conditional counterclaim in terms of which the applicant alleges that the endorsement by the second respondent was lawful *"in that upon the unequal division of the joint estate whereby the plaintiff forfeited his entire share in the joint estate in favour of the first defendant, the first defendant became the sole owner of the immovable property"*. The applicant avers that the effect of the order by the court granting the divorce was that the court was satisfied that an equal division of the joint estate would result in the first respondent receiving an undue benefit and that accordingly, the court ordered that the first respondent forfeit the whole of the benefit that he would receive from a division of the joint estate. In the alternative the applicant's defence is that if the court should find that there has not been a division of the joint estate, a receiver and liquidator be appointed with specified powers after regard is had to the forfeiture.

13. Section 9(1) of the Divorce Act, 70 of 1979 empowers a court which grants a decree of divorce on the ground of an irretrievable breakdown of the marriage to make an order that the patrimonial benefits of the marriage be forfeited, wholly or in part, by one of the spouses in favour of the other if the court, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and any substantial misconduct of either of the parties, is satisfied that, unless the order for forfeiture is made, one party will in relation to the other be unduly benefited.

14. When the nature and extent of the benefit has been proved, the court will consider the factors which determine whether the benefit is undue or not.¹ The party alleging that his/her spouse would acquire an undue benefit bears the onus of proving the nature and extent of the alleged benefit which is to be forfeited. The first step is to determine whether the spouse concerned will in fact be benefited. This determination relates to a purely factual issue.² The court may order forfeiture only if it is satisfied that the one party will, in relation to the other, be unduly benefited. A party claiming forfeiture must plead the necessary facts to support that claim and formulate a proper prayer in the pleadings to define the nature of the relief sought. Thus, the onus is on the applicant for a forfeiture order to prove the nature and the ambit of the benefit to be forfeited, and in so doing the applicant must prove the extent to which it is an undue benefit. Similarly, the allegation of undue benefit must be pleaded and proven. In exercising the discretion to order forfeiture, the court is enjoined to ask itself whether one party would be unduly benefited were such an order not be made. The court may order forfeiture only if it is satisfied that the one party will, in relation to the other, be unduly benefited. It is only after the Court has concluded that a party would be unduly benefited that it is empowered to order a forfeiture of benefits and in making this decision the Court is exercising a discretion in a narrow sense.

15. As appears from the order of the court granting the divorce, the court was so satisfied and ordered forfeiture of benefits in favour of the applicant. This order can therefore not be ignored and the joint estate cannot be divided in equal proportions since the court granting the decree of divorce was satisfied on the facts before it that an equal division of the joint estate would result in the first respondent receiving an undue benefit.

16. In light thereof, the applicant has shown that it has a bona fide defence. The applicant's defence is not patently unfounded. Furthermore, regard must be had to the importance of the issues raised in this case and that it is in the interests of justice that the trial court adjudicate the matter.

¹ Engelbrecht v Engelbrecht 1989 (1) SA 597 (C)

² Wijker v Wijker 1993 (4) SA 720 (A)

17. In the result, I make the following order:

17.1. The bar is uplifted;

17.2. The time period for the delivery of the applicant's amended plea and conditional counterclaim is extended for a period of 5 (FIVE) days from 17 January 2022.

17.3. The applicant is ordered to pay the costs of the application.

F KARACHI

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicant: Adv West

For the first respondent: Adv Bruwer

Date of the hearing: 27 October 2021

Date of the judgment: 3 January 2022