

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

CASE NO: 5214/2013

REPORTABLE: **NO**
OF INTEREST TO OTHER JUDGES: **NO**

REVISED:

Date: 08/03/2022

In the application of

S[....], I[....]

Defendant

Applicant/

and

S[....], M[....] T[....]

(Born D[....])

Respondent/ Plaintiff

JUDGEMENT

MAHOMED AJ

There are three applications before this court. I am to decide on:

A. An application to strike out the respondent's defence for failing to file her comply with order granted in terms of the practise manual of this Division,

B. An application for condonation, for late filing of motion,

C. An application in terms of Rule 42 (1) (b) of the Uniform Rules of Court to vary an order of court.

A. NON-COMPLIANCE WITH PRACTISE MANUAL

1. On 3 August 2021, the respondent was ordered to file her heads of argument within 3 days of the order, granted by my brother Wright J, in terms of the practise manual applicable to his division.

2. Advocate Peter appeared on behalf of the applicant and submitted the respondent's defense stands to be struck, for failing to file her heads of argument in terms of the order.

3. The practise manual and directives have been published to supplement the Uniform Rules of Court to ensure the efficient disposal of matters.

4. The Registrar is authorised to furnish a trial date only upon both parties filing their respective heads of argument, practise notes, chronology, and list of authorities.

5. The applicant is unable to proceed to finalise his matter due to the respondent's dilatory/negligent conduct in the prosecution of this matter.

6. Parties are entitled to the efficient prosecution and finalisation of matters.

7. To date no heads of argument have been filed, despite the 3 days allowed by the order of court.

8. Accordingly, the respondent's defence is struck off.

9. This application must proceed on the applicant's version only.

THE MAIN APPLICATION

10. On 26 July 2013, an order of divorce was granted under case number 5214/2013, which provides:

“1. The marriage is dissolved.

2. Each party is to remain with the property in his or her possession.”

11. Earlier, on 21 May 2013 by my brother Sutherland J, as he was then, granted the respondent/plaintiff leave to serve by substituted service under case number 15712, and a notice to defend was to have been filed a month later, as per annexure B to the papers.

B. CONDONATION

12. The applicant seeks condonation for the late filing of this application and proffered that he was unable to bring this application any earlier, in that,

12.1. the judgement and advertisement as provided for in the Rules, and furthermore,

12.2. he was unable to afford the legal costs to prosecute the matter any earlier.

12.3. Counsel for order came to his attention only in 2018, he had not read the

12.4. the applicant, proffered that his client suffered a long and life-threatening illness and has been unemployed for a long time.

13. He submitted that the applicant has a direct and substantial interest in the matter and further submitted that had he known of the divorce proceedings he would have opposed the matter, regarding the division of their joint estate, which in any event, must occur by operation of law.

14. The applicant argued that the court order does not reflect the division of the joint estate upon dissolution of their marriage in community of property.

15. The matter is of importance to him given that he has a right to the half share in the joint estate and it is common cause he did not relinquish that right.

16. He argued that the court ought not to view his delay as acquiescence, as he acted within a reasonable time of his knowledge of the divorce.

16.1. He submits he has good prospects of success if he were to apply for a rescission of the judgment.

17. Therefore, the applicant submitted, he has demonstrated good cause for the court to grant a condonation for the late filing of this application.

C VARIATION IN TERMS OF THE UNIFORM RULES

18. It is common cause that the parties were married in community of property.

19. Mr Peter submitted that his client suffers prejudice in that the “effect” of the order in paragraph 10 above is that the applicant has been “forced by the court” to forfeit a benefit in the marriage.

19.1. He submitted that there are no grounds for such a forfeiture and furthermore, his client has not had an opportunity to dispute those allegations, if any.

20. He submitted that the respondent has not set out any grounds that will sustain an order for forfeiture.

20.1. Mr Peter submitted that in 2011 his client was “locked” out of the marital home and was forced to live in his motor vehicle for a few weeks, when the respondent, his former wife, refused to allow him access to their home.

20.2. Mr Peter proffered that the parties had become estranged after the death of their eldest daughter and were unable to reconcile their differences for a long while.

20.3. The applicant does not dispute the divorce but argues for his right in community of property, to his half share of the joint estate.

20.4. The parties were married for almost 26 years at the date he was forced out of the marital home and the applicant contributed most toward the purchase price of the home.

20.5. He paid over all proceeds from the sale of his own home to pay for their marital home.

21. The application is in terms of Rule 42(1) (b) of the Uniform Rules, as the applicant submits the order set out above is ambiguous.

22. Mr Peter submitted that the court could not have intended the order to apply to the immovable property which formed part of the joint estate of the parties who were married in community of property. By the date of the divorce, his client had set up his own home.

23. He submitted the order is ambiguous and should read to apply only to movable property that is in the possession of the parties.

24. The applicant learnt of his divorce only in 2018, when he applied for car finance.

25. He and the respondent were married for 26 years and had contributed together toward their home, albeit in unequal parts, but were both clearly of the belief that they owned their home in the joint estate.

26. Mr Peter submitted that although the advertisements of the divorce appeared in newspapers, the applicant had not read them.

27. Advocate Peter submitted that the respondent suffers no prejudice, as the value of the applicant's share in the joint estate will be calculated only from the date of the divorce and that his client cannot be denied his right to his half share.

THE LAW

28. Rule 42 (1) (b) provides:

“A court may, in addition to any other powers it may have, mero motu or upon application of any party affected, rescind, or vary:

(a)

(b) An 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;

(c) ...”

29. The order that is ambiguous is noted as an order that does not reflect the real intention of the judicial officer pronouncing it.

30. The general principle is that once a court has duly made a final judgment or order has no authority to correct as the court is said to be *functus officio*, regarding the matter. **(See Erasmus, Uniform Rules of Court at D1-570).**

31. In **Firestone SA (Pty) Ltd v Gentiruco AG 1977 (4) SA 298 (A) at 306-7 and recognised in Zondi v MEC Traditional and Local Government Affairs 2006 (3) (CC) at 12 G-H**, the courts have stated certain exceptions to the general rule.

32. A court may clarify, its judgment or order if, on a proper interpretation, the meaning of the order remains obscure, ambiguous, or uncertain, that its effect would not be the true intention.

33. The court in providing clarity is not to alter the “sense or substance” of the order.

JUDGMENT

34. I am satisfied that the applicant has met the requirements for condonation and that he has shown good cause for his delay in prosecuting this application.

35. The application for condonation must succeed and the late filing is condoned.

36. It is common cause that the parties were married in community of property and a joint estate is established, see Matrimonial Property Act 88 of 1984.

37. There is no evidence that the applicant had abandoned or relinquished his share in the joint estate.

38. It is common cause that the applicant had not been living in the marital home for a long time and that the respondent was living in the marital home at the time that the divorce was granted.

39. There is no evidence before this court that there were any grounds for forfeiture and in any event, no such order could have been properly made in the absence of the applicant.

40. By way of operation of the law on marriage in community of property, the parties share a joint estate. The marital home is the asset in that joint estate, regardless of each parties' contributions or residence.

41. The court on granting of the divorce, could not have intended to denude the applicant of his rights in the joint estate. The order is ambiguous as it refers to "property in the possession of each party," it must relate to movable property only.

42. A clarification to include the word "moveable" cannot be seen to alter the sense and substance of the order.

43. Accordingly, the order must read to include the word "moveable" in referring to property to be retained by each party.

I make the following Order:

1. The respondent's defense is struck off.
2. The late filing of the papers is condoned.
3. The order of 26 July 2013, shall read:

“1. The marriage is dissolved.

2. Each party is to remain with the moveable property in his or her possession.”

4. The respondent is to pay the costs of this application.

S MAHOMED

ACTING JUDGE OF THE HIGH COURT

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Case lines. The date for hand-down is deemed to be 8 March 2022.

Appearances

For the Applicant: Mr L Peter

Instructed by: MC Kruger Attorney

Tel: 011 482 6235/6

Email: mariette@mckrugerattorney.co.za

For Respondent: Mr Nduna

Instructed by: AM Nduna Attorneys

Tel: 011 492 1333

Email: abramnduna@gmail.com