REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case no: 3248/2014
Date heard: 12th May 2016
Date delivered: 23rd June 2016

In the matter between:

B. L. T.	**Plaintiff**
vs	
G. V. T.	**Defendant**

Mr Nepgen - *For plaintiff/respondent in the rescission application*
Ms Veldsman - *For defendant/applicant in the rescission application*

JUDGMENT

TSHIKI J:

[1] In the current proceedings being the application for rescission of judgment of the order in Rule 43 proceedings, the parties herein will be referred to as the plaintiff and the defendant respectively. For clarity purposes, the plaintiff is *B. L. T.* and the defendant is *Gary Vaughn T.n* the husband of the plaintiff.

[2] On the 26th September 2014 the plaintiff approached this Court for an application in terms of which she, *inter alia*, sought the following relief:

[2.1] for maintenance *pendente lite* in the amount of R22 750.00 per month;

[2.2] a contribution towards her legal costs in an amount of R50 196.00.

[3] The application was opposed by the defendant, as a result the application was argued in the above honourable Court on the 4th November 2014 and judgment was reserved.

[4] *Ms Veldsman* for the defendant approached her client's case by applying for rescission of judgment which judgment was granted by the Court on the 18th November 2014.

[4.1] On the 18th November 2014 this Court issued an order in favour of the plaintiff which incorporated the following terms:

[4.2] defendant was ordered to contribute towards the plaintiff's costs in the sum of R10 000.00;

[4.3] he was further ordered to contribute to the maintenance of the plaintiff *pendente lite* in an amount of R8 000.00 per month with effect from the 1st December 2014 and thereafter on or before the third day of each consecutive month.

[5] The matter was again set down for argument for various issues, the main issue being the variation of and/or payment of maintenance *pendente lite*. The defendant resorted to filing an application for rescission of default judgment which was set down on several dates dating from the 7th October 2015 until it was argued before me on the 12th May 2016 when judgment was reserved.

[6] On the date of argument, *Ms Veldsman* appeared for the defendant in the divorce matter as well as the application for rescission of judgment. *Mr Nepgen* represented the plaintiff. However, on the day of the argument of rescission of judgment being the 12th May 2016 we were only able to argue the application for

rescission of judgment. When we left the Court room it was already after 17h00, the Court having listened to argument which lasted for about three hours.

[7] In the current proceedings, the plaintiff is requesting that this Court should set aside the whole order relating to the maintenance for the plaintiff, alternatively only part of the order in the amount of R5 000.00 relating to the maintenance that the plaintiff is supposed to pay to the defendant in terms of the Rule 43 order. The Rule 43 order only became effective from the 1st December 2014.

[8] According to the plaintiff in the affidavit she deposed to on the 22nd September 2014 she alleged that she sold her business known as Walmer Gardens to one *Kirsty Riley* and *Damian* in the amount of R75 000.00, the amount that was to be paid to the seller was a sum of R5 000.00 per month. She also contended in the Rule 43 application that it was the only amount at her disposal which was available to maintain herself pending the outcome of the divorce action. She also mentioned that she has a bric-a-brac dressmaking business but at the time of the deposing to the Rule 43 application that business was not very lucrative. She also listed her expenses. Notwithstanding her contention the Court ordered the plaintiff to pay R8 000.00 per month effective from the 1st December 2015. Later and after their case was postponed in February 2015 and in March 2015 *Kirsty Riley* contacted the respondent, *Mr T.*, and informed him that she did not buy the business for R75 000.00 but that she and her business partner bought the business for R150 000.00. She also informed the defendant that the monthly payments of the business were R10 000.00 and not R5 000.00 per month as earlier alleged by her in the Rule 43 application proceedings.

[9] *Mrs Riley* also informed the defendant that the plaintiff refuses to disclose the full extent of the sale of the business to the defendant.

[10] *Mrs Riley* also informed the Court that the reason he wanted to disclose the full extent of the sale of the business to the defendant is that the plaintiff refused to disclose the purchase price of R150 000.00 to the defendant. According to *Mrs Riley* the first agreement would be R75 000.00 payable in instalments of R5 000.00 and the second agreement will also be an agreement for the sale of the business of R75 000.00 and was also payable in instalments of R5 000.00. *Mrs Riley* also informed the defendant in March 2015 that the R5 000.00 payable towards the R75 000.00 was paid into the plaintiff's bank account so as to get the legitimacy to the sale of the plaintiff. However, they then decided that the remaining R5 000.00 in terms of the second agreement would be paid in cash to the plaintiff "without paper trail".

[11] The salient clauses of the agreement between the plaintiff and *Kirsty Riley* are confirmed by plaintiff's daughter in the following terms as follows:

> "During or about June/July 2014, my mother indicated that she wished to dispose of the property, referring to Walmer Gardens. She had an offer on the table for R150 000.00 from the owner of Salt Restaurant in Richmond Hill, Port Elizabeth."
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> ….
>
> Paragraph 6
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> "My business partner, Damian van der Hogen, and I decided that we wished to purchase the business and would match the offer of R150 000.00. As we did not have the full purchase price upfront, we requested to settle the purchase price in instalments of R10 000.00 per month".
>
> Paragraph 7

> "My mother accepted the offer but requested that we conclude two sale agreements of R75 000.00 each, the one of which she would produce during the divorce proceedings and the other she would conceal. I was specifically advised by my mother that she intended concealing the second deed of sale, as she did not want to share more than she needed to with Gary T.n in terms of the division of the joint estate. In addition, my mother wanted to create the impression that the purchase price was R75 000.00 payable at R5 000.00 per month thereby showing a lesser income than it was in reality.
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> ….
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> However, when my mother moved to Johannesburg, this became problematic and the agreement was that we would pay R10 000.00 per month into her banking account. We were told by my mother that if it was ever a question why she was now receiving R10 000.00 instead of R5 000.00 we had to say that we were attempting to accelerate the payment of the purchase price of R75 000.00.
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> …
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> The truth of the matter is that we had paid R10 000.00 from August 2014 to February 2015 and R5 000.00 for the month of July 2014. The total amount is thus R65 000.00. We still owe my mother R85 000.00 payable at R10 000.00 per month." (See also pages 46-49 of the record).

[12] The plaintiff annexed to the papers a copy of the agreement "BT2" which is a copy of the agreement entered into between the plaintiff and Cork Wine (Pty) Ltd who was duly represented by plaintiff's daughter and her business partner, known as *Damian van der Hogen*. The plaintiff, even at that stage was still adamant that her only income at the time was R5 000.00 per month from the sale of her business. She maintained this as the truth, even on the date of argument of the application. On the 22nd March 2015 the defendant was contacted by *Kirsty Riley* who advised him that the plaintiff had in fact purchased the plaintiff's business at a purchase price of R150 000.00 and not R75 000.00 as it is indicated by the plaintiff in her affidavit in the Rule 43 application. My close observation of the two agreements they appear to me to be identical. Their wording shows clearly that they are agreements between the sole entity and between the same purchaser and the same seller. In

other words, their wording exhibits a conclusion that they are agreements for exactly the same price the only difference being that of the word “second agreement” which is underlined. *Mrs Riley* says that those contracts were concluded and her mother is in possession of the other signed copy and she has both signed copies. In other words, those two agreements bind her and *Van der Hogen* to purchase the business for R150 000.00. In my view, it cannot be true that they were binding because if they were signed you would have two agreements for the identical thing which is a business for the amount of R75 000.00.

[13] Therefore, according to the defendant it is abundantly clear that the plaintiff had intentionally misled this Court with regards to her financial position when the Rule 43 application was drafted, deposed to and subsequently argued. According to the defendant this conduct constitutes fraud.

[14] The plaintiff has now realised that she was supposed to proceed in these proceedings by way of a Rule 30 notice and thereafter request a rescission of judgment in terms of the Rule 43 order in accordance with the uniform rules of this Court or under common law.

[15] In response to the defendant’s argument, *Mr Nepgen* for the plaintiff decided to catch the bull by the horns. In doing so, he correctly criticised the defendant’s delay in its application for rescission of judgment. The order that the plaintiff sought to rescind by way of its application and in terms of the common law on the 12th May 2016 was granted on the 18th November 2014, more than two years after it was granted. This was an order granted against the defendant for the maintenance of plaintiff *pendente lite.*

[16] The order was in the amount of R8 000.00 against the defendant and was granted in the following terms:

[16.1] The defendant (applicant herein) shall pay the applicant (the plaintiff) maintenance in the amount of R8 000.00 *pendente lite*, commencing from the 1st December 2014 and thereafter on or before the third day of each successive month.

[16.2] The defendant shall retain the plaintiff on his medical aid scheme *pendente lite* and is to bear all costs in respect thereof.

[16.3] The defendant shall make a contribution towards the applicant's costs in the amount of R10 000.00.

[16.4] The costs of the application are to be costs in the divorce action.

[17] The general well established rule is that once a Court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it and in that case the final judgment becomes *functus officio*. It follows, therefore, that the Rule 43 order itself is an interlocutory order which has final definitive effect in the pending matrimonial proceedings, even though it might be interlocutory in the wide sense. In other words, once that order is made and the decision is taken it is still *res judicata.* The inherent jurisdiction of the High Courts does not include the right to interfere with the principle of finality of judgments, other than in the circumstances specifically provided for in the rules or the common law (***De Wet v Western Bank Ltd*** 1977 (4) SA 770T at 780H-781A; see also ***Swart v Absa Bank Ltd*** 2009 (5) SA 219 (C) at 221B-D and 223A-B).

[18] In ***Swadif (Pty) Ltd v Dyke NO*** 1978 (1) SA 928 (AD) at 939 D-E Trengove AJA has this to say about rescission of a judgment at common law:

> "However, I do not consider it necessary to enter upon a discussion of the grounds upon which the rescission of a judgment may be sought at common law because, whatever the grounds may be, it is abundantly clear that at common law any cause of action, which is relied on as a ground for setting aside a final judgment, must have existed at the date of the final judgment. There must be some causal connection between the circumstances which give rise to the claim for rescission and the judgment ..."

[19] It follows from what has been stated above that the negligence of the defendant will always be regarded as relevant and may, depending on the circumstances of the case that an applicant who was negligent and the author of his or her problem will not succeed with an application to have the judgment set aside. (***Bakoven Ltd v GT Howes (Pty) Ltd*** 1992 (2) SA 466 (ECD) at A-B).

[20] What is important though is that the purpose of the rule is to correct expeditiously an obviously wrong judgment or order (***Bakoven Ltd v GJ Howes (Pty) Ltd*** 1992 (2) SA 466 (E) at 471E-F.) The Court will not hesitate to dismiss the application for a variation of an order of Court if the application for variation has been brought to Court after the lapse of a reasonable time (***Firstrand National Bank of Southern Africa Ltd v Van Rensburg NO in re First National Bank of Southern Africa Ltd v Jurgens*** 1994 (1) SA 677 (T) at 681B-G). It should also be noted that the general well established rule is that once a Court has duly pronounced the final judgment order, it has itself no authority to correct, alter or supplement such order which becomes *functus officio* (***Firestone SA (Pty) Ltd V Gentiruco AG*** 1977 (4) SA 298 (A) at 306F). In the present case, the application for rescission of judgment was, although known for some time since 2014 was only argued on the 12th May

2016. In my view, there is no acceptable explanation for defendant's failure to apply for rescission of judgment within a reasonable time. When the application for rescission of judgment was argued more than two years had lapsed and no doubt the parties' circumstances would have changed and therefore, the defendant's application even for that reason alone should not have been entertained.

[21] Rule 43 is designed to regulate the procedure to be followed in applications for ancillary relief of an interim nature particularly in matrimonial matters. The rational behind the rule is that applications of the kind contemplated by the rules should be dealt with as inexpensively and expeditiously as possible. Prolixity in averments and the unnecessary proliferation of papers including the affidavits should be avoided. Rule 43 deals only with pending matrimonial disputes and has no application to any matrimonial dispute which has come to an end by a final divorce.

[22] In this case, the defendant seeks an order of this Court to rescind or vary its own order which came as a result of alleged fraud on the part of the plaintiff in circumstances where the latter had deliberately misrepresented facts to the Court in the Rule 43 application. The application for condonation has to be brought within a reasonable time and without undue delay. In this case the defendant's case has been brought after a long time and after an undue delay and was granted on the 18th November 2014 long after she had become aware of the existence of the judgment. In order to succeed on a claim that a judgment be set aside on the grounds of fraud as *Mr Nepgen* has also submitted, it is necessary for the applicant to allege and prove the following:

[22.1] that the successful litigant was a party to the fraud;

[22.2] that the evidence was in fact incorrect;

[22.3] that it was made fraudulently and with intent to mislead; and

[22.4] that it diverged to such an extent from the true facts that the Court would, if the true facts had been placed before Court, have given a judgment other than that which it was induced by the incorrect evidence to give;

[22.5] but for the fraud, the Court would not have granted the judgment.

[23] It follows that on the probabilities the plaintiff's version must be accepted and therefore the defendant has failed to prove on a balance of probabilities that:

[23.1] the plaintiff was a party to any crime;

[23.2] that the evidence presented in the Rule 43 application was in fact incorrect;

[23.3] that the evidence was given fraudulently or with intent to mislead;

[23.4] that there was evidence which diverged to any extent from the true facts so as to conclude that the true facts had been placed before Court, or have given judgment other than that which the Court was induced by incorrect evidence.

[24] In my view, the evidence placed before this court does not conclusively satisfy this Court that the evidence adduced on behalf of the plaintiff was tainted with fraud. *Ms Veldsman* for the defendant during her argument tried to make a big case about the various amounts of money for which the property in issue was purchased. The deponents in the affidavits have in fact clarified the reason why there were different amounts of R150 000.00 as against R75 000.00. In my view, even if the defendant holds the view that there are different amounts which indicate the various purchase prices, that does not conclusively prove that the deponents in the various affidavits

have told lies. In any event, the defendant has elected to proceed by way of argument and not called *viva voce* evidence which would have given the parties an opportunity to cross-examine the various witnesses. The proceedings on the 12th May 2016 took more than three hours yet the matter has been on the roll for more than two years. On page 191 of the papers it is stated that originally the plaintiff wanted R150 000.00 which she says in her own affidavit was the amount she wanted for the business. Apparently, *Mrs Riley* agreed to put this in writing and she was subsequently advised she could only afford R75 000.00 for the business and on those terms the contract was concluded. In my view, on the facts there is no conclusive evidence that the plaintiff had committed fraud in the circumstances of this case.

[25] In the result, I am of the view that the application should be dismissed with costs.

P.W. TSHIKI
JUDGE OF THE HIGH COURT

For the plaintiff/respondent	:	Adv Nepgen
Instructed by	:	De Villiers & Partners Port Elizabeth Ref: Mr C de Villiers/ss

For the defendant/applicant	:	Adv Veldsman
Instructed by	:	Joyzel L Obbes Port Elizabeth Ref: Jl Obbes/hr