IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case number: 3149/2013

In the matter between:

W. P. B.	**1st APPLICANT**
M. O. CC	**2nd APPLICANT**

and

D. L. B.	**RESPONDENT**

In re

D. L. B.	**PLAINTIFF**

and

W. P. B.	**DEFENDANT**

CORAM:	**NAIDOO, J**
HEARD ON:	**29 OCTOBER 2015**
DELIVERED ON:	**11 FEBRUARY 2016**

[1] This is a bitter matrimonial dispute arising from a final order of divorce obtained by the respondent against the applicant, on an unopposed basis. Mr S Tsangarakis represented the applicant and Mr HJ Benade represented the respondent in this court. There are three applications which serve before this court. They are:

(i) The current application, bearing the abovementioned case number, where the applicant seeks an order rescinding the final order of divorce and the ancillary orders related thereto;

(ii) an application, bearing case number 4299/2015, which was brought on an urgent basis by the applicant, to prevent the respondent from making withdrawals from the bank account of one of their businesses, and

(iii) an application against the applicant, bearing case number 4578/2015, brought on an urgent basis by the respondent and a close corporation, which also formed part of the businesses that the parties ran together. The relief sought was in essence to prevent the applicant from making further withdrawals from the bank account of the close corporation and to initiate a forensic investigation into the business affairs of the parties.

I will deal further with these applications in the body of this judgment

[2] The background in this matter is, briefly, that the applicant and respondent were married to each other since 3 August 1996.

They have two daughters, the older one being W., a twenty year old university student at the date of the hearing of this matter, and the other, M., who was15 years old at the date of this hearing. The parties conducted three successful businesses together, the applicant attending to the operational side of such businesses while the respondent attended to the bookkeeping and administration. The living expenses of the parties were paid by the businesses. From the papers, it is clear that the parties have substantial assets, and that they and their children enjoyed a very high standard of living. However, there was clearly trouble in paradise.

[3] The respondent issued summons against the applicant in August 2013, in which she sought an order of divorce and other relief, including maintenance for herself and her two daughters, both of whom were minors at that time. The summons was served on the applicant on 30 August 2013, which he did not defend. The final order of divorce, together with the other relief sought by the respondent, was granted on 3 October 2013. It appears that both parties continued to live in the matrimonial home, a farm in Douglas Valley, Free State.

At the beginning of 2015, the respondent became involved in a relationship with another man. She moved out of the matrimonial home with her younger daughter in July 2015 and took up residence elsewhere. This appears to have escalated the acrimony and bitterness between the parties, culminating in the three applications now before this court.

[4] On 7 September 2015, the applicant brought the application for rescission under case number 3149/2013. On 8 September 2015, the applicant launched the application mentioned under

paragraph 1(ii) above, and obtained an interim order, which I will deal with later. On 25 September 2015, the respondent brought the application mentioned under paragraph 1(iii) and she too obtained the interim order that she sought. I will now deal with each of the applications I have mentioned earlier.

Case Number 4578/15

[5] The respondent sought an order against the applicant and the close corporation known as M. O. CC (M.), in essence interdicting the applicant and M. from making further withdrawals against the bank account of a close corporation known as Free State Creative Interiors BK (the second applicant in this application), and one in which the respondent is the sole member. The respondent further sought an interdicting the applicant and M. from debiting any further expenses against the account of Free State Creative Interiors. She also sought orders against the applicant relating to other business activities and an order that their (her and the applicant's) business activities be subjected to a forensic audit.

[6] The court hearing the matter on 25 September, granted an order in the following terms:

"1. 2.2 Die respondent verbied word om enige verdere onttrekkings te maak uit die bankrekeninge van onderskeidelik die tweede applikant.

2.3 Dat respondent verbied word om enige verdere uitgawes te debiteer teen die rekening van tweede applikant.

2. Paragrawe 2.2 tot 2.3 hierbo sal geld as tussentydse interdik met onmiddelike regskrag en werking en dat indien enige van die partye sou weier en/of versuim om onmiddelik die rekenaarstelsels and

boekhouding aan die forensiese ouditeurs te oorhandig, die Balju van die Agbare Hof geregtig sal wees om daarop beslag te lê en dit aan die forensiese oudituers te oorhandig. (The reference to paragraphs 2.2 and 2.3 relates to the numbering of those paragraphs in the Notice of Motion)

3. Beide aansoeke 4299/2015 en 4578/2015 was saam geargumenteer”

The court does not appear to have made any separate or specific order in respect of case 4299/2015, even though it was argued. The two counsel who appeared before me did not elaborate on the content or extent of the argument before the court granting the order referred to above.

[7] During the proceedings before me, I was advised that both parties agreed, and requested, that the interim order mentioned above, granted by the court on 25 September 2015, be made final. It was accordingly made final.

Case Number 3149/2013

[8] As indicated above, the respondent obtained a final order of divorce, together with other relief against the applicant on 3 October 2013 (the divorce order). The divorce order provided for the parental rights and duties pertaining to the minor children, maintenance for the children and respondent, and for the division of the joint estate. The part of the order that appears to be the bone of contention is that pertaining to maintenance. The applicant was ordered to pay an amount of **Twenty Five Thousand Rand (R25 000.00)** per month in respect of W. and **Twenty Thousand Rand (R20 000.00)** per month in respect of

M., such payments to commence on the first day of the month following the date of the final order of divorce. Thereafter payments were to be made on or before the first day of each succeeding month. The applicant would also be responsible for the children's reasonable, fair and necessary medical, dental and ophthalmological costs. The applicant was furthermore ordered to pay maintenance in an amount of **Twenty Five Thousand Rand (R25 000.00)** per month in respect of the respondent, on the same payments terms as those relevant to the children. In addition, the applicant was ordered to pay the respondent's reasonable, fair and necessary medical costs. The maintenance orders were subject to a yearly increase of ten percent (10%). The court also ordered the division of the joint estate. The order provided for costs to be costs in the action.

[9] The respondent launched this application for rescission on 7 September 2015, in which he sought an order:

(i) setting aside the divorce order,

(ii) granting him leave to defend the divorce action, and

(iii) costs in the event of opposition.

The respondent opposed this application on the basis that the applicant did not make out a case for the relief that he sought, and included in her opposing affidavit a great deal of detail and information in support of her contention that she and the applicant did not live as man and wife before or after the divorce, that it was an unhappy marriage and that she entered into a relationship with another person, after informing the applicant of her intention to do so. The respondent's Replying Affidavit served largely to deny the respondent's allegations, and added to the already large amount of information in the Opposing Affidavit.

[10] Rule 27(1) of the Uniform Rules of Court provides:

> "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"

The requirement of "good cause" to be shown is repeated in sub-rule (3) which provides that "The court may, on good cause shown, condone any non-compliance with these rules".

These two sub-rules of Rule 27 provide the court with a wide discretion to condone non-compliance with the Rules. It is clear, however, that an important safe guard is that good cause must be shown.

[11] Rule 31, Rule 42(1) and the common law make provision for the rescission of a judgment. Rule 31(2)(b) provides that "A defendant may within twenty one days after he or she has knowledge of such judgment apply to court on notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet". Rule 41 makes provision for the setting aside of a judgment which is erroneously granted, where it contains an ambiguity, patent error or omission, or where it is obtained as a result of a mistake common to the parties. Neither of these Rules is applicable to the present matter. The application must, therefore, be dealt with in terms of the common law, which

obliges the applicant to have brought the application for rescission within a reasonable time. As I indicated, Rule 31(2)(b) stipulates a period of 21 days within which an application for rescission may be brought, and this, in my view, is a good guide as to what may be considered a reasonable time for a rescission application in terms of the common law. The requirement to show "good cause" must similarly be complied with whether the application for rescission is brought under Rule 31, Rule 42 or the common law.

[12] Both counsel referred to a number of cases in their Heads of Argument, which state similar principles to those set out in **Smith NO vs Brummer No. 1954 (3) SA 352 (OPD**), where compliance with certain requirements was stipulated in order for a court to grant removal of Bar. These bear mentioning and are set out on p358A:

(a) The Applicant has given a reasonable explanation for his delay

(b) The application is bona fide and not made with the object of delaying the opposite party's claim.

(c) There has not been a reckless or intentional disregard of the Rules of Court

(d) The Applicant's action is clearly not ill-founded

(e) Where prejudice has been caused to the opposite party it must be capable of being compensated for by an appropriate order as to costs.

Exactly the same considerations apply when a rescission of judgment is sought. Mr Tsangarakis, in his Heads referred to **Silber v Ozen Wholesalers (Pty) Ltd 1954(2) SA 345 (A)**, where the court said at page 352 that “good cause” includes, but is not limited to the existence of a substantial defence.

[13] The applicant in this matter knew about the divorce action on 30 August 2013, when the summons was served on him personally. He alleges that he did not defend the action because the respondent assured him that he need not worry about it. Even if there was an attempt at reconciliation, it seems that such attempt was not very successful, as the respondent proceeded to obtain a final order of divorce two months later. She brought such order to the applicant’s notice, according to him, shortly after 3 October 2013. Although they lived together in the same house, the papers clearly speak of discord between them. Contrary to the allegations by the applicant that the parties shared a bed and conducted their lives in a normal family relationship, the affidavit by the domestic helper, Ms M. supports the respondent’s denial that this was so, and her contention that the parties lived in separate bedrooms prior to August 2013.

[14] The applicant alleges he was misled by the respondent into believing that there was no need for him to defend the matter, and that he believed that they had reconciled their differences. The applicant is an astute and successful businessman, who owns considerable assets. This speaks of a certain level of intelligence and sophistication which belies the image that he attempts to portray of himself as the unsuspecting and trusting husband who was so gullible that he was taken in by his wife’s wicked ways. He is clearly also a person with the resource of legal representatives at his disposal. If the amounts claimed in respect of maintenance were so much out of his reach, it is difficult to believe that he

would not have, at the very least, sought an opinion with regard to the possible consequences for himself. I am constrained to accept that that he was not alive to the fact that there were serious problems in his marriage that necessitated his taking action in respect of the summons and the consequent final order of divorce. The respondent took up a relationship with another man in February 2015. This must surely have been the clearest indication that there was a complete and irretrievable breakdown of the marriage relationship. I find that the applicant's version that the parties continued to live together as husband and wife until April 2015 is not credible. I, therefore, do not accept the applicant's explanation for the delay in bringing the rescission application within a reasonable time.

[15] The applicant does not, in fact, take issue with the fact that the marriage between him and the respondent has broken down irretrievably. He also appears to agree that the joint estate should be divided as provided for in law, and hence indicates his acceptance of the court order for the division of the joint estate. His only issue therefore, is with the maintenance order. The applicant attempts to argue that it will be appropriate for this court to grant a partial setting aside of the divorce order by allowing the divorce to remain intact but setting aside only the order in respect of maintenance. This, in my view, is opportunistic and an untenable proposal. The applicant seeks not only to avert payment of the substantial arrears that have accumulated in respect of maintenance, but clearly to disadvantage the respondent in that she will be obliged to start at the proverbial square one in respect of maintenance. The applicant ought to, more appropriately, have approached this court for a variation of the divorce order with regard to maintenance, alternatively the

Maintenance Court for a decrease in maintenance. In my view, the respondent has failed to show that he has a *bona fide* defence to the action instituted by the respondent. Similarly, I find that this application is ill-founded and lacks *bona fides*, and that the respondent has failed to make out a case for the relief he seeks.

Case Number 4299/2015

[16] The applicant moved this application on an urgent basis. The second applicant is M. O. CC. The applicant sought and obtained an interim order, calling on the respondent to show cause why an order in the following terms (loosely translated) should not be granted (for the sake of clarity, I shall use the numbering employed in the Notice of Motion):

2.1 The respondent is prohibited from making any further withdrawals from the bank account of the second applicant;

2.2 The respondent is ordered to hand over to the applicant, the computer system and the entire accounting system of the second applicant, including all documentation relevant to the accounting system of the second applicant;

2.3 The respondent to pay the costs of the application.

3. An interim order, with immediate effect, is issued authorising and directing the Sheriff of the Court to take possession of the computer system and accounting system of the second applicant, and to hold it in safekeeping until the finalisation of this application.

[17] The applicant’s founding affidavit sets out in detail the manner in which he and the respondent ran their business operations. He confirmed that the respondent is the sole member of the close corporation known as Free State Creative Interiors CC while he is the sole member of the second applicant, M. O. CC. He also confirmed that the businesses were run by them jointly as one entity. He attended to the operational side of the business while the respondent took care of the accounting and administrative side. When the respondent moved out of the matrimonial home in July 2015, she took with her the entire computer and accounting systems of both close corporations and despite repeated requests, failed to return them to the applicant.

[18] The applicant also included a great deal of information relating to the withdrawal of funds by the respondent from certain of the business accounts, without his knowledge, and accuses the respondent of fraud and theft. In my view, this information was irrelevant to the order he sought, and is not within the purview of the issues that this court is tasked with adjudicating. Bearing in mind that the businesses were run jointly by the parties as one business, from which all their living expenses were drawn, such allegations and the terminology employed in the founding affidavit are an illustration of the bitterness and acrimony that exists between the parties. The applicant accused the respondent of polluting the papers with unnecessary information in the rescission application, but has himself done just that in this application. It is unnecessary for this court to deal with the allegations of “theft” and “fraud” or the manner in which the businesses were run.

[19] The respondent for her part, answered the founding affidavit with an equal amount of (often unnecessary) detail. When regard is had to the order sought, only two issues become relevant. The first is the respondent's access to the bank accounts of the second applicant (M. O. CC) and the second issue is the return of the computer and accounting systems relevant to the second applicant. The respondent alleged that her signing powers in respect of the second applicant's bank accounts were cancelled and that a separate or new bank account appears to have been opened. The respondent does not dispute this. The first order prayed would effectively have been addressed by the cancellation of the respondent's signing powers and/or the opening of another bank account. She no longer has access to the second applicant's bank accounts and is therefore unable to make withdrawals against such bank accounts.

[20] With regard to the return of the computer and accounting systems, the respondent admits that she took these with her when she moved out of the matrimonial home. In view of her being replaced as the second applicant's bookkeeper, there is no need for the respondent to have these systems in her possession. In any event, the court order granted under case number 4578/2015 specifically makes provision for the parties to submit their business records for forensic audit and such records as are in her possession would have to be surrendered. My view is, therefore, that the interim order granted in respect of the return of the second applicant's computer and accounting systems should be made final. With regard to the issue of costs, the usual practice is that costs follow the result. Although the applicant is partially successful in this application, the conduct of the parties in this application, namely in unduly burdening the papers with

unnecessary and unsavoury information, with the clear intention of discrediting each other, persuades me that a costs order indicating the displeasure of this court is called for.

ORDER

[21] In the circumstances, I make the following orders:

In respect of Case Number 3149/2013:

21.1. The application for rescission of the divorce order is dismissed with costs.

In respect of Case Number 4299/2015:

21.2 The rule nisi in respect of paragraph 2.1 of the Notice of Motion is discharged;

21.3 Paragraphs 2.2 and 3 of the Notice of Motion are confirmed

21.4 Each party is to pay his/her/its own costs

S. NAIDOO, J

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