IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

DATE: 15/05/2009

CASE NO: 55989/07

UNREPORTABLE

In the matter between:

E H S **PLAINTIFF**

And

A L S **DEFENDANT**

JUDGMENT

MAVUNDLA J.:

[1] The applicant seeks an order compelling the respondent to sign transfer documents to have the respondent's share in an immovable property they jointly own, transferred into the applicant's name, with ancillary relief.

2] The only issue to be determined in this matter is whether the settlement agreement which was made an order of the divorce order of the parties on 6 November 2006 was signed by the respondent under duress

BACKROUND FACTS

[3] The parties were married to each other for the second time, by way of Antenuptial Contract in terms of which the Accrual System as provided fore in Chapter 1 of Matrimonial Property Act No 88 of 1984 was expressly excluded from the marriage.

[4] According to the applicant the parties entered into a settlement agreement on 20 October 2006 (on 19 October 2006 according to the respondent. On October 2006). The respondent then instituted a divorce action in the Central Divorce Court of Johannesburg under case number 12013/2006. On 6 November 2006 the respondent proceeded to obtain the divorce order and the settlement agreement was incorporate in the divorce order

[5] The terms of the aforesaid settlement agreement are reflected on annexure ES1 attached to the papers[1]. I cite herein below only what is, in my view, relevant for this matter the following paragraphs:

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[1] Pagianated pages 11-15
Titled ‘CONSENT ORDER”

"DIVISION OF THE ESTATE

4.1 Each party shall be entitled to all the assets which he or she presently has in his or her lawful possession and shall become owner thereof;

4.2 The plaintiff further acknowledges having removed all her and the minor children's clothing and personal belongings from the common home;

4.3 The Defendant shall become the exclusive owner of the property situated at […]. The parties hereby nominate and appoint Laubscher Attorneys as the Attorneys who will attend to the registration of the transfer of the Plaintiff's interest in the immovable property onto the name of the Defendant. The Defendant shall contribute 50% of the registration costs."

5….

"6.1 Both parties hereby irrevocably and unconditionally waive all lawful claims that they both may have against one another whether the claim arose out of the marriage between them or otherwise. The parties furthermore acknowledge that this agreement is the full and final agreement on all lawful matters between them."

[6] It is common cause that the respondent was served with the relevant documents pertaining to this application on 4

December 2007. A notice to oppose was filed on 10 December 2007. The answering affidavit was only filed on 29 April 2008. It is common cause that the respondent refused or failed to sign the transfer documents relating to the immovable property in issue herein.

[7] The respondent in her answering affidavit alleges *inter alia* that the agreement was signed under duress, after the applicant had intimidated her. She says that, even after the divorce, she was so much under duress that she had to seek a protection order against the applicant in order stop the intimidation.

AD CONDONATGION

[8] In her answering affidavit, under the heading 'CONDONATION" she advances as her reasons for the late filing of her answering affidavit. She concedes that she was served with this application during December 2007. After she had consulted an advocate, she gave instructions to attorneys Rossouw to oppose the application and that necessary steps be taken to have the settlement agreement amended and the divorce order set aside. She does not know why an answering affidavit was not filed nor the instructions to rescind the divorce order were not executed. However, she does not state when were these instructions given to Attorneys Rossouw. She says that she has always been serious to have the divorce order rescinded.

[9] The respondent, says that she only came to know on 15 April 2008 that this application was set on the roll for hearing of 21 April 2008. She attempted to no avail to contact Ms Sandy du Plessis of Kort du Plessis Inc, and only managed to secure an appointment with her on 17 April 2008. Because Ms Sandy du Plessis was on 18 April 2008 departing on an over seas trip, the latter requested Ms Van Olst to stand in for her. Ms Van Olst directed a letter to the applicant's attorneys, seeking indulgence for the late filing of her answering affidavit and tendered costs. The respondent is reiterating that she is tendering costs on a party and party scale.

[10] She further states that she has good prospects of success on the merits. She says that she never dealt with the applicant when she eventually signed the settlement agreement. She says that she was never granted an opportunity to consider or read the settlement agreement before she signed it. She says that the agreement was drafted by the applicant's brother, Oliver. She says that she signed the agreement out of fear after Oliver informed her that the applicant would harm their children should she not signed the agreement. She says that she does not know the witnesses who signed the settlement agreement.

[11] The respondent further confesses to having had an adulterous relationship with her dentist employer of since 2002 -2006. She says that she signed the settlement agreement on 19 October 2006. Her dentist paramour,

unbeknown to her, was forced to reach a settlement agreement with the applicant for payment of an amount of R100 000, 00 for the adulterous relationship with the respondent. According to her, she was given documents by Oliver to sign under the threat of fraud criminal charges being preferred against her for the amounts she had withdrawn from the bonds account. She was forced by Oliver to agree to pay the applicant an amount of R50 000, 00 under the threat of fraud criminal charges being brought against for the moneys she had withdrawn from their bond . She signed the documents without reading them. He father paid the amount of R50 000, 00.

[12] She was further informed by Oliver that a divorce action been instituted on her behalf in the Central Divorce, Johannesburg and that she must attend court on 6 November 2006. She denies that the divorce action was settled amicably. She says she and Tersa were pressurised to pay the amounts I have referred to herein above.

[13] The respondent was the plaintiff and the applicant was the defendant in the divorce action. On 6 November 2006 the presiding officer requested her to call her attorney to request the applicant to initial certain corrections in the settlement agreement. She had to telephone Oliver to request the applicant to attend court. Indeed the applicant arrived at court and attended to the initialling of the settlement agreement, where after a divorce order was granted.

[14] She points out that she and the applicant were married to each other out of community of property with exclusion of accrual system. They nonetheless agreed to purchase immovable property jointly and register it in both their names. She subsequently learnt that shortly after the divorce, their joint immovable property was valued at about R1, 2 million and the outstanding bond amount was R350 000, 00.

[15] She points out that in the settlement agreement she signed, she completely did away with any benefit she had in the joint immovable property. She says that when she signed the settlement agreement it was the intention of the applicant to deprive her of her interest in the immovable property. She further points out that Laubscher Attorneys were to deal with the transfer of the immovable property into the names of the applicant. She says that the said attorneys are the very attorneys the applicant's brother Oliver is employed at.

[16] I consider it not necessary to deal with the rest of the contents of the affidavits of the respective parties.

[17] In casu, the respondent was served with the application in casu in on 4 December 2007. Her notice to oppose was filed on 6 December 2007. She was supposed to have filed her answering affidavit within fifteen days thereafter. She only did so on 29 April 2008, four months out of time. A party who is out of time in complying with the court rules, must approach the court within reasonable time to seek its indulgence; vide *Wolgroeirs Afslaer (Edms) Bpk v*

Municipaliteit van Kaapstad 1978 (1) SA 13 (A) 39-42D. In casu the delay of four months is unreasonable.

[18] An indulgence is a matter of the discretion of the Court. Where there is a sufficient and reasonable or "good cause" explaining the delay, the court may condone the delay, vide Saravaiva Contructions (Pty) Ltd v Zululand Electrical & Engineering wholesalesrs 1975 (1) SA p615. The respondent seems to be attributing the delay to her attorneys, implicitly, because she says that she does not know why the answering affidavit and her instructions to rescind the divorce order were not executed; vide Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape 2003 (2) ALL SA; Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 765A-C.

[19] The courts have in many instances said that remissness of an attorney, depending on the particular circumstances of the case may be condoned. In casu, there is no affidavit filed by the attorneys the applicant had instructed, explaining the delay in filing the answering affidavit. In casu the delay on the part of the attorneys has not been explained. This is an important fact in the consideration whether I must exercise my discretion and condone the late filing of the answering affidavit. I must also consider the strength and weakness of the case of the respondent on the merits and whether the

resistance of the order sought by the applicant is done bona fide or not.

[20] In casu, the respondent, obtained the divorce order, which has the settlement agreement the respondent alleges that she signed under duress. The order was obtained on 6 November 2006. These proceedings were initiated on the 30 November 2007, according to the date stamp reflected on the face of the notice of motion, which is a year after the divorce decree was obtained, it would seem that the respondent has not taken any steps to bring an application for the rescission of the settlement agreement that was made an order of the divorce order. Again as at the date of the filing of the answering affidavit, on 29 April 2008, there is as yet no application to have the divorce order rescinded. Had there been such application the respondent would have made mention thereof in her answering affidavit. Again, in this regard, there is no explanation filed from the attorneys she had instructed to bring such application. Again in this regard there is no reasonable explanation proffered why she did not bring such application within reasonable time.

[21] Where a party attaches his signature to a document, it is assumed that he intended to be bound by such agreement. For the respondent to come, after more that twelve months that the agreement which she signed, which she personally moved the court to make an order of the court, and allege

that she was coerced to sign, does not tally with the objective facts. The first objective fact is the very period she was comfortable to live with such an order. The second objective fact, is that her own father paid the amount of R50 000, 00 in respect of the moneys she had withdrawn from the joint bond account with the applicant. Surely, if she had been coerced to make such payment, she at least could have confided to her father, or reported the “blackmail” to the police during October, November and December 2006. Looking at these facts, in my view, the applicant cannot succeed with the application for rescission of the settlement agreement.

[22] Having regard to what I have stated herein above, the answering affidavit was filed out of time without prior consent of the court. There are no sufficient reasons advanced for the late filing of the answering affidavit. There are no prospect of success in the belated envisaged application for rescission. Further, in my view, the allegation that the agreement was signed under duress, is a mere ploy to frustrate the applicant in enforcing the agreement, and it stands to be rejected as I do. In the premise. I find that the agreement is enforceable and the applicant has made a case for the order sought. It is not disputed that the respondent has refused to sign the transfer documents.

[23] The applicant seeks that the respondent be ordered to pay the costs of this application on an attorney and client scale. The opposition to the application , in my view, has no merit and is *mala fide*. Where a party opposes or defends an

action without any good cause, and is also dilatory in doing so, such party must be mulcted with a punitive costs. The circumstances of this case warrants a punitive costs order.

[24] In the result I make the following order:

1. The Respondent be and is hereby ordered to sign all necessary documentation in order to give the transfer of the Respondent's half share of the immovable property situated at [….] Gauteng also known as Erf […] Registration Division I.Q., Gauteng into the name of the Applicant.

2. That, in the event of the Respondent failing and or refusing to sign the aforesaid documentation, the Sheriff for the district of Roodepoort North be and is hereby authorised and ordered to sign such documentation on the Respondent's behalf.

3. That the Respondent be and is ordered to pay the costs of this application on the scale as between attorney and client.

<u>N.M. MAVUNDLA</u>

<u>JUDGE OF THE HIGH COURT</u>

DATE OF HEARING : 21/ 04 / 2009

DATE OF JUDGMENT: 15 /05/ 2009

PLAINTIFFS' ATT   : SHAPIRO & SHAPIRO INC

PLAINTIFFS' ADV   : MR. M L HASKINS

DEFENDANT'S ATT   : CLIFFORD LEVIN ATTORNEYS.

DEFENDANT'S ADV : ELANE BOTHA.