

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 77365/2019

(1) REPORTABLE: YES/**NO**

(2) OF INTEREST TO OTHER JUDGES: YES/**NO**

(3) REVISED.

SIGNATURE

DATE: 19/4/2024

In the matter between:

S[...] **S[...]** **S[...]**

Applicant

and

C[...] **T[...]** **S[...]**

Respondent

JUDGMENT

LABUSCHAGNE AJ

[1] The applicant and the respondent are parties to a pending divorce action. No trial date has yet been fixed despite the action having commenced in 2019.

[2] The applicant and the respondent were married on 17 March 2003 in community of property. Three children were born of the marriage. Only one, a girl of 13, **T[...]** **M[...]** **S[...]**, born on 13 December 2010, is still a minor.

[3] The applicant seeks an order for leave to withdraw admissions made in his plea and counterclaim in the divorce action and that the applicant be granted leave to file the amended plea and counterclaim.

[4] The following timeline pertains to the proceedings:

- 4.1 Summons was issued on 22 October 2019 and the summons was served on 25 October 2019;
- 4.2 On 7 November 2019 the applicant appointed his former attorney, Errol Ntuli Attorneys;
- 4.3 A notice of intention to defend was delivered on 8 November 2019;
- 4.4 On 10 November 2019 Mr Ntuli sent a proposed plea to the particulars of claim to the applicant and he made comments that were sent back to his attorney on 11 November 2019;
- 4.5 On 20 December 2019 the applicant's plea and counterclaim were filed. It is this plea and counterclaim that the applicant contends does not reflect his instructions as per his comments on the issue of primary place of residence of the minors and the issue of forfeiture of benefits;
- 4.6 On 15 May 2020 the respondent filed her plea to the counterclaim;
- 4.7 On 22 June 2020 the applicant addressed an email to his attorney, enquiring about the final plea;
- 4.8 On 9 September 2020 Mr Ntuli, the applicant's former attorney, wrote a letter to the respondent's attorney advising that the applicant intends amending his plea and counterclaim;

- 4.9 On 12 October 2020 the applicant's attorney advised him that he would file papers to amend the plea;
- 4.10 The former attorneys were replaced by Sekati Monyane Attorneys on 6 April 2021;
- 4.11 On 24 May 2021 the applicant's new attorneys served a notice of intention to amend;
- 4.12 On 7 June 2021 the plaintiff delivered a notice of objection;
- 4.13 This notice of objection was not timeously noticed and the applicant's attorneys filed the amended papers on 24 June 2021;
- 4.14 The substantive application for leave to amend was subsequently served on 27 August 2021.

- [5] The application for amendment has been pending since 2021. There is no explanation before me as to why the matter has only now been enrolled. The applicant's condonation application and the merits of the application for withdrawal of admissions were argued together as the prospect of the success of the withdrawal application is an important consideration in respect of condonation.
- [6] The applicant contends that his previous attorneys did not follow his instructions in formulating his defence and counterclaim. This resulted in two admissions, which he applies to withdraw by means of an amendment.
- [7] The first is an admission that the primary residence of the minors should be with their mother, the respondent. The second is an admission that there should be a division of the joint estate.
- [8] The applicant's instructions to his former attorneys are reflected in comments that he made on a draft of the plea that was submitted to him.

The draft provided for an admission of paragraph 5.2.2 relating to the primary residence. In his notes the applicant stated: *“I do not agree with 5.2.2 for primary residence and that she should have my children ...”*.

[9] A similar averment is made in paragraph 5.2 of the applicant’s counterclaim. In the counterclaim the draft plea stated: *“The minor children reside with the plaintiff.”* The remarks of the applicant indicate that he disagreed and replaced *“plaintiff”* with *“defendant”* in the aforesaid averment.

[10] In the draft, the applicant made no comments next to the prayer in his counterclaim for division of the joint estate. However, in his comments to the plea, the applicant did make the following comment to the first paragraph thereof:

“I therefore would grant the division of the rest of the estate, which in my view should be given to my children.”

[11] The applicant contents that the aforesaid can only be achieved by means of a forfeiture of the benefits of the marriage in community of property, being the amendment which he now seeks. It however involves a withdrawal of the admission pertaining to the division of the joint estate.

[12] The applicant contends that the two admissions which he seeks to withdraw were made in error. The respondent objects to the amendment sought, contending that the amendment requires the withdrawal of the concessions pertaining to primary care and residence of the minor child and the division of the joint estate.

[13] The applicant’s comments to the draft plea and counterclaim that were supplied to his erstwhile attorneys bear out the contention that he did not intend making the admissions in question.

[14] It is competent to withdraw an admission that was made in error. In **President Versekeringsmaatskappy Bpk v Moodley** 1964 (4) SA 109 (T) the court stated the following regarding the withdrawal of an admission:

“The approach is the same, but the withdrawal of an admission is usually more difficult to achieve because:

- (i) It involves a change of front which requires full explanation to convince the Court of the bona fides thereof; and*
- (ii) It is more likely to prejudice the other party who had by the admission been led to believe he need not prove the relevant fact and might, for that reason, have omitted to gather the necessary evidence.”*

[15] I am satisfied that the applicant's instructions to his former attorney are not reflected in the plea and counterclaim that were filed. Insofar as he seeks to correct them, the corrections are in line with his previous instructions to his attorneys. I am therefore satisfied that the application for the amendment is *bona fide*. An admission made in error may be withdrawn on application. (**Gordon v Tarnow** 1947 (3) SA 525 (A), p 531 *in fine* to 532.

[16] The objection to the withdrawal is that it introduces a new cause of action.

[17] Even the contention that a new cause of action is being introduced is insufficient reason to refuse an amendment.

[18] In **Trans-Drakensberg Bank Limited (under judicial management) v Combined Engineering (Pty) Limited and Another** 1967 (3) SA 632 (D) at 643 the court found that a new cause of action may be introduced by amendment, provided it is *bona fide* and it is desirable that the real dispute between the parties is ventilated before court.

- [19] If I erred in finding that the withdrawal of the admissions is based on a *bona fide* error, it bears noting that even where the admission was deliberate and not an error, the court could still grant an amendment for the withdrawal of the admission. In **Amod v South African Mutual Fire and General Insurance Co Ltd** 1971 (2) SA 611 (N) at 614 C the following was stated:

“Insofar as I am aware it has never been laid down that a court will only permit the withdrawal of an admission where there has been a mistake in the narrow sense. Indeed a consideration of the case has satisfied me that the learned authors of Herbstein and Van Winsen are perfectly correct in stating (at page 239): ‘It is submitted that, while in most cases the reason for wishing to withdraw an admission may be due to some mistake of fact or law, the court’s discretion to grant an amendment involving a withdrawal is not fettered by the necessity to find that there has been an error before it can allow such amendment’.”

- [20] A further objection to the amendment was that the forfeiture was not competent because one cannot forfeit one’s own property.

- [21] What may be forfeited is the benefit from the marriage in community of property, i.e. that which a party received over and above his/her contribution to the joint estate. In **Engelbrecht v Engelbrecht** 1989 (1) SA 597 (C) at 601 F – H the court stated:

“Mede-eienaarskap van die ander gade se goed is ‘n reg wat elk van die egliede by die huweliksluiting verwerf. Tensy die partye (hetsy voor of tydens die huwelik) presies gelyke bydraes tot die boedel gemaak het, sal die een wat minder bygedra het by ontbinding van die huwelik bo die ander bevoordeel word as verbeuring nie beveel word nie. Dit is ‘n onafwendbare gevolg van die partye se huweliksgoedereregbedeling. Die Wetgewer gee dan ook nie e aan die groter bydraer die geleentheid om hom hieroor te bekla nie. Hy kan hom slegs oor onbehoorlike bevoordeling bekla. Tensy bewys word – en dit is myns insiens duidelik dat die bewyslas rus op die gade wat die verbeuringsbevel aanvra – wat die aard en omvang van die bevoordeling

was, kan 'n Hof nie beslis of die bevoordeling onbehoorlik was of nie. Eers as die aard en omvang van die bevoordeling bewys is, word dit nodig om te kyk na die faktore wat by die beoordeling van die onbehoorlikheid daarvan in aanmerking geneem moet word.”

- [22] The issue of forfeiture therefore relates to preventing one party to a marriage in community or property benefitting unduly.
- [23] The counterclaim makes it clear that the issue of forfeiture is related to specific properties. It is therefore not to my mind vague and embarrassing as pleaded. The respondent's contention that the amendment is excipiable is based on an allegation that the substantial misconduct referred to in section 9(1) of the Divorce Act, has not been pleaded.
- [24] This is factually not correct. The grounds were pleaded in paragraph 9.1.9 of the counterclaim.
- [25] In **Brummer v Gorfil Brothers Investments (Pty) Ltd and Others** 2000 (2) SA 837 (CC) the Constitutional Court found that condonation must be granted if it is in the interests of justice to do so. This is determined by considering all the factors, which includes, but is not limited to, the reasons for the delay and the prospects of success.
- [26] The delay has not specifically been explained for the full duration thereof. The application for amendment had to be filed within ten days in terms of Rule 28(10). However, the applicant's former attorneys failed to notice that there was a notice of objection, and that an application in the opposed motion court was necessary to adjudicate the amendment.
- [27] The explanation of the delay till now, three years later is is not before me. This is unsatisfactory. Despite this, mere lateness is an insufficient ground for refusing an amendment, where the amendment will facilitate the ventilation of the true disputes between the parties in the trial. The court enjoys a wide and generous discretion to order an amendment to ensure

such proper ventilation of the disputes (**Macsteel Tube and Pipe, a division of Macsteel Service Centres SA (Pty) Ltd v Vowles Properties (Pty) Ltd** 2021 JDR 3367 (SCA) at par [24]).

[28] In the pending trial, discovery has not yet been finalised and there is not yet a trial date. The respondent has not pointed out any specific prejudice caused by the delay and the amendment.

[29] An amendment must be applied for and pursued as soon as the need for the amendment arises. Whilst the applicant's attorneys filed the notice of amendment in August 2021, the failure to pursue that application for three years remains unexplained.

[30] The applicant contends that the opposition to the application is frivolous. Based on this contention the applicant seeks an order for costs. I cannot find that the opposition is not *bona fide*.

[31] As the applicant is seeking an indulgence both in respect of condonation and for leave to withdraw admissions, the applicant should bear the costs of this application.

[32] In the premises I make the following order:

1. The late filing of this application for amendment is condoned.
2. The applicant is granted leave to withdraw the admissions pertaining to the primary residence of the minor children and in respect of division of the joint estate.
3. The applicant is granted leave to file an amended plea and counterclaim.
4. The applicant is to pay the costs of this application.

LABUSCHAGNE AJ

ACTING JUDGE OF THE HIGH COURT