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

Case Number: 44343/2015

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES/NO

DATE **09/01/25**

SIGNATURE

In the matter between:

B, D.

Applicant

and

B, S. P.

Respondent

JUDGMENT

Joyini J

INTRODUCTION

[1] The parties were cited in court papers by their full names. It is now standard practice in our courts that in order to give effect to the paramountcy principle entrenched in section 28 of the Constitution, the interests of minor children must be protected in legal proceedings, including, divorce proceedings. In this case, the parties have a minor child. I accordingly deem it appropriate to refer to the parties and their child by their initials only.

[2] This is an application in respect of which the applicant seeks rectification of clause 9.3 of the parties' divorce settlement agreement which was made an order of court on 8 March 2021¹ and incorporated into the Divorce Decree.

[3] I am indebted to the counsel for both parties for their contribution to this judgment through their submissions, oral arguments, Heads of Argument, affidavits, etc. In crafting this judgment, I have relied a lot on them.

BACKGROUND FACTS AND RELIEF SOUGHT

[4] Clause 9.3 of the parties' divorce settlement agreement currently reads as follows:

"Furthermore, and with regards to the property better known as Erf 8[...], M[...] T[...], Pretoria, Gauteng, the Plaintiff and the Defendant will be responsible for the following payments on a monthly basis:

9.3.1. Each party will pay 50% of the monthly bond instalment;

9.3.2. Each party will pay 50% of the monthly levies;

*9.3.3. The Plaintiff will be responsible for the direct payment of the water and electricity, together with the property rates and taxes, on a monthly basis."*²

[5] The relief sought by the applicant is rectification of clause 9.3 to read as follows:

"9.3 Furthermore, with regards to the accommodation and related day to day expenses of L., the Defendant will pay maintenance in respect of L. and in the following manner:

9.3.1 By contributing towards the Plaintiff's mortgage bond instalment in an amount equal to 50% of the monthly bond instalment of Erf 8[...], M[...] T[...], or any other property occupied by the Plaintiff and the minor child with a value equal to the bond instalment of Erf 8[...], M[...] T[...], Pretoria until the minor child has become self-supportive and/or is not residing with the applicant, whichever event occurs first.

¹ Caselines 17-12, para 93.

² Caselines 17-12, para 93.

9.3.2 Each party will pay 50% of the monthly levies of the property occupied by the Plaintiff and the minor child.

9.3.3 The Plaintiff will be responsible for the direct payment of the water and electricity, together with the property rates and taxes, on a monthly basis.”³

ISSUES REQUIRING DETERMINATION

[6] The issues that require the court’s determination are as follows:

[6.1] Whether condonation for the late filing of the applicant’s replying affidavit should be granted;

[6.2] Whether the affidavits disclose real, genuine or *bona fide* disputes of fact;

[6.3] Whether a case has been made out for rectification of the divorce settlement agreement. Specifically, two aspects in respect of the applicant’s rectification claim are in dispute and need to be adjudicated upon:

[6.3.1] The common continuing intention of the parties that existed when the agreement was reduced to writing needs to be established; and

[6.3.2] It needs to be considered whether the actual wording of the rectification conforms with the common continuing intention of the parties when the agreement was reduced to writing.

[6.4] Whether rectification is the appropriate remedy; if so:

[6.4.1] Whether the applicant has made out a proper case for the relief sought; and

[6.4.2] Whether the matter ought to have been brought by way of action proceedings and whether a genuine, real, *bona fide* factual dispute exists between the parties; and

[6.5] The issue of costs.⁴

[7] In assessing this matter, I shall first consider the point *in limine* raised by the respondent.

POINT IN LIMINE

[8] The respondent raised a point *in limine* arguing that the applicant filed her replying affidavit approximately seven months late on or about 15 July 2024. According to the applicant, counsel that assists her with this matter was on

³ Caselines 41-2 to 41-3.

⁴ Caselines 35-7 to 35-9.

leave from 8 December 2023 to 8 January 2024. She was also unable to place her legal representative in funds to proceed with (this application. On 23 February 2024, a payment arrangement was made. Counsel was briefed on 27 February 2024 but was unable to assist due to an urgent matter in Mahikeng. On 18 April 2024, counsel requested several documents, which were provided on 22 April 2024. The replying affidavit was ostensibly settled on 14 May 2024, whereafter a consultation was held on 17 May 2024. On 23 May 2024, a letter was sent to the respondent's attorney requesting a round table meeting, which the respondent refused.

[9] The applicant allegedly became financially able to institute this application during August 2023 and well after the respondent allegedly stopped paying the bond and levies since March 2023. No explanation has been provided as to what occurred between the period of 27 February 2024 and 18 April 2024. The applicant does not state that the urgent application in Mahikeng endured for a period of seven weeks. There are many counsel practising at the constituent Bars who could have assisted the applicant. After the documents were provided on 22 April 2024, the applicant is silent as to what occurred between the period of 22 April 2024 and 14 May 2024 when the replying affidavit was settled. On the applicant's own version, after consultation on 17 May 2024 was held between the applicant and her legal representatives, the proposal made to the respondent by the applicant on 23 May 2024 to yet again convene a round table conference was rejected. No explanation is provided as to why the replying affidavit was then only filed on 15 July 2024, and approximately seven weeks after the above-mentioned proposal was made and rejected.

[10] The respondent argues that the applicant has not provided a detailed or satisfactory explanation for the late filing of the replying affidavit and the explanation does not cover the entire period of the delay. The respondent further argues that it falls dismally short of what is required of an applicant to show good cause for the court to exercise its discretion in its favour and to grant the indulgence. According to the respondent, the excuses made by the applicant is with respect unconvincing. It is denied that a genuine and valid

reason has been advanced as to why the replying affidavit was filed at such a late stage.

[11] The respondent further argues that the inordinate delay induces a reasonable belief that the opposition of the respondent to the main relief sought in this application had become unassailable. To grant condonation after such an inordinate delay and in the absence of a reasonable explanation, would undermine the principle of finality and cannot be in the interest of justice. Insofar as the applicant's prospects of success are concerned, the respondent argues that the applicant should have rather instituted an application for variation and the applicant allegedly conceded in her attorney's letter dated 26 April 2023.⁵ The respondent is of the view that seeking rectification of the divorce settlement agreement is simply not the appropriate remedy having regard to the prevailing legal principles, and the facts and disputes between the parties in this matter. The respondent also argues that the applicant has not made out a case for the relief sought by her for the rectification of the settlement agreement, even if the court finds that rectification is the appropriate remedy. According to the respondent, the matter should have been brought by way of action and not motion proceedings as is trite in claims for rectification. The respondent is of the view that the applicant's prospects of success in this application are non-existent. The respondent argues that the application for condonation in respect of the applicant's late filing of the replying affidavit must be dismissed with costs.

[12] The respondent supported his argument above with the following authorities on condonation:

[12.1] The primary principles governing consideration of condonation applications were confirmed, as follows, in *Melane v Santam Insurance Co Ltd*:⁶ "In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of

⁵ AA: Annexure SB13 and Annexure SB13.

⁶ 1962 (4) SA 531 (A), at 532C-G.

all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

[12.2] In *Van Wyk v Unitas Hospital and Another*⁷, the court held, "[22] An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable. The explanation given by the applicant falls far short of these requirements. Her explanation for the inordinate delay is superficial and unconvincing. It amounts to this. During the entire period of approximately eleven months she was considering whether or not to appeal the decision of the Supreme Court of Appeal. During this period she sought advice from a number of individuals whom she has not disclosed. In addition she alleges that she does not have unlimited funds although she admits that this is not a compelling reason for the delay. She has not furnished any explanation as to why it took approximately eleven months for her to decide whether or not to appeal. Nor has she furnished any explanation how she overcame her funding difficulty."

[13] In terms of Rule 27, the applicant is required to show good cause which gives the court a wide discretion to grant condonation for the non-compliance with the court rules. The applicant argues that the court has a wide discretion which

⁷ (CCT 12/07) [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) (6 December 2007).

must, in principle, be exercised with regard also to the merits of the matter seen as a whole.⁸ The applicant, in support of her argument, cited *Du Plooy v Anwes Motors* (Edms) Bpk⁹ in that rule 27(1) of the uniform rules of court requires good cause to be shown. The graver the consequences which have already resulted from the omission of the applicant, the more difficult it will be to obtain the indulgence. There is an interdependence of, on the one hand, the reasons for the delay, and on the other hand, the merits of the case. The application must be *bona fide* and not made with the intention of delaying the opposed party's claim. The other requirement is that the applicant should satisfy the Court that it has a *bona fide* defence.

- [14] The applicant also cited *Smith No v Brummer NO*¹⁰ and this is where the court stated that the courts have shown a tendency to grant a removal of bar where: The applicant has given a reasonable explanation for his delay; the application is bona fide and not made with the object of delaying the opposite party's claim; there has not been a reckless or intentional disregard of the rules of the Court; the applicant's action is clearly not ill-founded; and any prejudice caused to the opposite party could be compensated for by an appropriate order as to costs.

LEGAL PRINCIPLES APPLICABLE TO CONDONATION

- [15] Since the *Melane* judgment, the test has been slightly broadened. Now the test for determining condonation is whether it would be '*in the interests of justice*' to do so. The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances.

- [16] The Supreme Court of Appeal (SCA) in *Mulaudzi v Old Mutual Life Assurance Company (SA) Limited*,¹¹ restated the factors that are to be given due consideration in a condonation application as stated in *Melane*. It is stated: "*Factors which usually weigh with this court in considering an application for*

⁸ *Du Plooy v Anwes Motors* (Edms) Bpk 1984 (4) SA 213 (O) that rule 27(1) of the uniform rules of court requires good cause to be shown.

⁹ 1984 (4) SA 213 (O).

¹⁰ 1954 (3) SA 352 (O) at 358A.

¹¹ 2017 ZASCA 88.

condonation include the degree of non-compliance, the explanation thereof, the importance of the case, the respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.”

- [17] In *Grootboom v National Prosecuting Authority*,¹² the following is stated: “It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.”

LEGAL PRINCIPLES APPLICABLE TO RECTIFICATION

- [18] Rectification of a written agreement is a remedy available to parties in instances where an agreement, reduced to writing, through a common mistake, does not reflect the true intention of the contracting parties. A mistake is a *sine qua non* for rectification. In *Brits v Van Heerden*¹³ it was held that: “... the mistake does not have to relate to the writing itself, but might relate to the consequences thereof. The mistake may be that of only one party; the mistake may be induced by misrepresentation or fraud. But there must be a mistake. In my view, the crux of the matter is that the mistake, be it a misunderstanding of fact or law or be it an incorrect drafting of the document, must have the effect of the written memorial not correctly reflecting the parties' true agreement.”

- [19] In *Weinerlein v Goch Buildings Ltd*,¹⁴ which dealt with a contract of sale of fixed property required to be in writing by law, De Villiers JA, referred to some of the old authorities as follows: “Semper veritati errorem cedere oportet, says Faber in his Code, 4.16. def. 10, the mistake must yield to the truth. ‘In contracts regard must be had rather to the truth of the matter (*rei veritas*) than

¹² 2014 (2) SA 68 (CC) at paragraph [23].

¹³ [2001 \(3\) SA 257](#) (C) at 282 C.

¹⁴ 1925 AD 282.

to what has been written,' is laid down in C. 4.22. L. 1; and Gothofredus notes: 'for there may be mistakes in the writing.' ”¹⁵

- [20] Melamet J in *Leyland (SA) (PTY) LTD v Rex Evans Motors (PTY) LTD*¹⁶ held as follows regarding rectification of a written agreement: “A written agreement which fails to express accurately the true intention of the parties may be rectified so as to make it accord with the parties’ common intention. If the party seeking rectification can prove an actual agreement anterior to or contemporaneous with the writing with which the written agreement, owing to a mutual mistake, fails to conform, the Court will rectify the erroneous instrument.”
- [21] It is trite that the onus is on the party claiming rectification to show, on a balance of probabilities, that the written agreement does not correctly express what the parties had intended to set out therein.¹⁷ As to the moment in time that is relevant, it was held that the following has to be proved: “... the written document does not reflect the true intention of the parties – this requires that the common continuing intention of the parties, as it existed at the time when the agreement was reduced to writing be established.”¹⁸
- [22] In *Petzer v Dixon*,¹⁹ the court held: “[36] The predominant requirement for rectification is a common continuing intention of the parties, which is not reflected in the agreement. See *B v B* [2014] ZASCA 14 para 20. In *Tesven CC v South African Bank of Athens* [1999] 4 All SA 396(A) para 16, the Appellate Division, as it then was, held that ‘to allow the words the parties actually used in the documents to override their prior agreement or the common intention that they intended to record is to enforce what was not agreed, and so overthrow the basis on which contracts rest in our law.’ [37] The onus is on the party claiming rectification, in this case, the appellant, to show, on a balance of probabilities, that it should be granted. In *Soil*

¹⁵ at p 289.

¹⁶ [1980 \(4\) SA 271](#) (WLD) at 272F-G.

¹⁷ *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* [2004 \(6\) SA 29](#) (SCA) at para [21] *Levin v Zoutendijk* [1979 \(3\) SA 1145](#) (W) at 1147 H – 1148 A

¹⁸ *Propfokus 40 (Pty) Ltd v Wenhandel 4 (Pty) Ltd* [\[2007\] 3 All SA 18](#) (SCA) at 22 a.

¹⁹ (A07/2023) [2023] ZAWCHC 31 (24 March 2023).

Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd 2004 (6) SA 29 (SCA), the Supreme Court of Appeal held that such an onus is difficult to prove and a party seeking to obtain a rectification must show the facts entitling him to obtain that relief in the clearest and most satisfactory manner.”

CONCLUSION

- [23] In determining this matter, I must be guided by the well-established principles referred to above applicable to both condonation and rectification respectively. In this regard, I need to draw certain inferences and weigh probabilities as they emerge from the parties' respective submissions, affidavits, heads of arguments and oral arguments by their counsel.
- [24] On whether condonation for the late filing of the applicant's replying affidavit should be granted, I am of the view that an applicant for condonation must give a full explanation for the delay. The applicant, in this case, failed to give a full explanation. The applicant's explanation must cover the entire period of delay and it must be reasonable. In *casu*, the applicant's explanation did not cover the entire period. It is my considered view that the explanation given by the applicant falls short of these requirements. In other words, it does not meet the requirements referred to above. In view of these considerations, it follows that the applicant's application for condonation must fail.
- [25] On whether a case has been made out for rectification of the divorce settlement agreement, the onus is on the applicant seeking rectification to show, on a balance of probabilities, that it should be granted. In *casu*, the applicant has failed to discharge this onus. The applicant therefore failed to meet this requirement. As a party seeking rectification, the applicant must show the facts entitling her to obtain that relief in the clearest and most satisfactory manner. The applicant has failed to show the facts entitling her to obtain rectification in the clearest and most satisfactory manner. Therefore, the applicant also failed to meet this requirement. On a conspectus of all the evidence placed before court, I am satisfied on a holistic evaluation of the evidence presented that the applicant has not made out a case for the relief

that she seeks. In view of these considerations, it follows that the applicant's application for rectification of clause 9.3 of the parties' divorce settlement agreement must fail.

COSTS

[26] I have considered both parties' argument relating to the costs of this application. I am accordingly not inclined to grant costs in either party's favour.

ORDER

[27] **In the circumstances, I make the following order:**

[27.1] The application by the applicant for condonation for the late filing of the replying affidavit is dismissed.

[27.2] The application by the applicant for rectification of clause 9.3 of the parties' divorce settlement agreement is dismissed.

[27.3] No order as to costs.

T E JOYINI
JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

For the applicant: Adv K Fitzroy

Instructed by: Van Heerden & Krugel Attorneys

Email: lenay@vhkp.co.za or litsec@vhkap.co.za

For the respondents: Adv J Stroebe

Instructed by: Raubenheimers Attorneys Inc.

Email: helgard@raulaw.co.za or mea@raulaw.co.za

Date of Hearing:

19 November 2024

Date of Judgment:

9 January 2025

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 9 January 2025 at 10h00.

