

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 2022/17221

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
<u>13 Mar 2025</u>	
DATE	SIGNATURE

In the matter between:

E[...] S[...]

Plaintiff / Applicant

and

J[...] H[...] C[...] S[...]

Defendant / Respondent

JUDGMENT

Introduction

[1] This is an application by the applicant (whom I will refer to as Mrs S[...]) for an order that -

- a. a notice of bar delivered on 19 September 2023 by the respondent (whom I will refer to as Mr S[...]) be uplifted (the “notice of bar”); and

- b. Mrs S[...] be permitted to amend her particulars of claim in accordance with her notice of intention to amend dated 27 September 2023.

Background

[2] At the heart of this dispute is an order made by Fevrier J on 13 August 2004¹ in which the learned judge ordered that -

- a. the marriage between Mrs S[...] and Mr S[...] be dissolved; and
b. a deed of settlement (which was attached to the order and marked “X”) *“is made binding”*.(the “deed of settlement”).

[3] On 5 May 2023, more than 18 years after the order made by Fevrier J, Mrs S[...] launched proceedings against Mr S[...] by way of a combined summons and particulars of claim (the “original particulars of claim”).

[4] In the original particulars of claim, Mrs S[...] asked for an order that a certain paragraph 3. of the deed of settlement be deleted and replaced by other wording formulated by her.

[5] In the deed of settlement Mr S[...] was the plaintiff and Mrs S[...] was the defendant. The relevant provisions of clause 3.1 provide (replacing the “Plaintiff” and “Defendant” with the terminology used in this judgment) –

3.1.1 The aforementioned property is currently registered in the name of [Mrs S[...]]. It is hereby agreed that this property be transferred to [Mr S[...]] within a period of ten (10) years and that all Transfer fees be paid by [Mr S[...]] subject to the following conditions.

3.1.1.1. that the bond currently registered against the property be paid in full by [Mr S[...]]

3.1.1.2. and that monthly instalments be paid before the 5th of each month

¹ On the face of it the order was granted on 13 August 2004. There is a stamp by the registrar on the copy of the court order forming part of this record which is dated 4 April 2008. Mrs Sasser alleges in her particulars of claim that the divorce order was granted on 4 April 2008. This seems wrong and I assume for the purposes of this judgment that the order was granted on 13 August 2004. Nothing turns on this.

3.1.1.3 that no further bonds be registered against the property within the aforementioned period

3.1.1.4. in the event [Mr S[...]] settling the bond within a period of ten (10) year, he shall be entitled to transfer the property into his name under the conditions set.

3.1.2 ...

3.1.3 Upon transfer of the property into the name of [Mr S[...]] shall make payment to [Mrs S[...]] of one third of the total rental income in respect of the property (excluding disbursements) on a monthly basis.

[6] The genesis of the current proceedings was a successful exception Mr S[...] took to Mrs S[...]’s original particulars of claim. This exception was brought on the basis that the particulars of claim did not disclose a valid cause of action. This exception was upheld by Mdalana-Mayisela J on 1 August 2023 and Mrs S[...] was given 30 days to amend her particulars of claim. The 30 day period expired on 13 September 2023.

[7] The notice of bar referred to in para [1]a above was delivered on 19 September 2023. In the notice, Mr S[...] called upon Mrs S[...] to deliver her amended particulars of claim (as she had been ordered to do by Mdalana-Mayisela on 1 August 2023) within 5 days from the date of the notice, failing which Mrs S[...] was to be ipso facto barred from doing so.

[8] Mrs S[...]’s notice (in terms of rule 28(1)) of her intention to amend her particulars of claim was delivered on 27 September 2023. Mr S[...] objected to the proposed amendment on 5 October 2023 on the basis that proposed amendment was excipiable.

[9] On 4 December 2023, Mrs S[...] launched her application to seek upliftment of the notice of bar and to be granted leave to effect her proposed amendment.

[10] In the meantime, on 26 October 2023, Mr S[...] had delivered to Mrs S[...] an application for absolution from the instance. In Mrs S[...]’s application of 4 December 2023, Mrs S[...] also opposed the application for absolution.

Preliminary issue

[11] Mrs S[...] requests an order that the notice of bars should be uplifted and her proposed amendment be allowed and the matter thereafter proceed on its merits.

[12] In so doing, Mrs S[...] relies on rule 42(1)(b) which provides –

The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary—

...

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission ...

[13] In the alternative, Mrs S[...] argues that the court has inherent jurisdiction to clarify or supplement its orders where necessary.

[14] Mr S[...] argues that Mrs S[...]’s reliance on the provisions of rule 42(1)(b) is misplaced. Mr S[...] argues that the deed of settlement was not the product of any judicial pronouncement but was rather a private agreement that was concluded between the parties to regulate the proprietary consequences of their intended divorce at the time.

[15] I do not think this is correct. Clause 7 of the deed of settlement provides –

7. ORDER OF COURT

Subject to and conditional on the granting of a final Order of Divorce and subject to the above honourable Court so ordering, this agreement is to be made an Order of Court.

[16] In the court order Fevrier J stated –

IT IS ORDERED –

- 1. The marriage is dissolved,*
- 2. The deed of Settlement (marked “X”) is made binding.*

[17] Given the context and the wording of the deed of settlement itself, it is my opinion that the deed of settlement was made an order of court by the learned judge. The order meant that the deed of settlement was made binding 'as an order of court'.

[18] I therefore proceed with this judgment on the basis that Mrs S[...] is correct in relying on Rule 42(1)(b) as the basis for seeking an amendment to the court order and deed of settlement.

Removal of the bar

[19] It is trite that a party who has been barred from pleading may apply to court for a removal of bar and, in such a case, the provisions of rule 27 apply.

[20] A court has a wide discretion to remove a bar but a defaulting party cannot claim as of right to be allowed to remove a bar. It is an indulgence resting in the discretion of the court on good cause shown.

[21] The courts have not attempted to formulate an exhaustive definition of what constitutes good cause because to do so would hamper unnecessarily the exercise of the discretion.

[22] In the leading case of *Smith NO v Brummer NO*² the court, after a review of the authorities and a reaffirmation of its wide discretion, stated that the courts are inclined to grant applications for removal of bar where -

- a. a reasonable explanation for the delay is forthcoming;
- b. the application is bona fide;
- c. there has not been a reckless or intentional disregard of the rules of court;
- d. the applicant's case is not obviously without foundation and facts must be set out that demonstrate this;
- e. the other party is not prejudiced to an extent which cannot be rectified by a suitable order as to costs.

² 1954 (3) SA 352 (O)

[23] 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 and the applicant must file an affidavit dealing with all the matters which the applicant wishes the court to take into account in deciding whether or not to remove the bar.

[24] Bearing all these factors in mind I am not satisfied the bar should be removed. In coming to this conclusion I take into account the following matters:

a. There has been an 18 year delay between the granting the divorce order and the institution of court proceedings to attempt to vary that order.

b. Mrs S[...], in her proposed replacement particulars of claim, requests an order, under the auspices of rule 42(1)(b), to introduce a new clause 3.1.4 to the deed of settlement –

Should [Mr S[...]] fail to Comply with any of the terms stipulated in Paragraph 3.1, the property described as Eagle's Nest 3 will remain the exclusive property of [Mrs S[...]] and [Mrs S[...]] will be entitled to any and all income generated by and on the property.

In order to succeed under rule 42(1)(b), the omission of this clause 3.1.4 must be attributable to the court. In other words, the judgment must not reflect the court's intention and that fact must be patent³. This clause 3.1.4 is a clause to be included in the deed of settlement. Its omission cannot be attributed to the court. In addition, it is simply not a patent omission.

c. One of the conditions in clause 3.1 was that Mr S[...] settle the bond over the property within a period of ten years. The uncontroverted evidence under oath by Mr S[...] in these proceedings is that he did pay off the bond within 10 years.

d. Mrs S[...]’s founding affidavit in the application to uplift the notice of bar was deposed to by Mrs S[...]’s attorney. There was no confirmatory affidavit by Mrs S[...] herself. Mrs S[...]’s attorney alleges that a letter (which she attaches as annexure “E4” to her affidavit) was crucial as far as proceeding with the application to effect the amendment of Mrs S[...]’s particulars of claim. Mrs S[...]’s attorney alleges that she only managed to recover a copy of the

³ Erasmus, Civil Procedure in the Superior Courts, B42.5

letter over the weekend of 2 December 2023. This letter, from Mr S[...]’s attorneys to Mrs S[...], is dated 8 October 2021. It is a letter of demand requiring Mrs S[...] to comply with her obligations under the deed of settlement. It is not apparent nor is it explained why this letter was crucial to proceeding with the application for amendment. The letter is not referred to in Mrs S[...]’s proposed amended particulars of claim. No other reason is given why the application for leave to amend was not brought timeously.

[25] In summary, Mrs S[...] has not set out facts to support and has not convinced me that -

- a. there is a reasonable explanation for the delay;
- b. the application is bona fide;
- c. Mrs S[...]’s case made out in the proposed amendment has even an arguable foundation.

[26] I therefore decline to uplift the notice of bar.

Absolution from the instance

[27] Mr S[...] submits that, should Mrs S[...] not succeed in her application for removal of the bar, then Mr S[...]’s application for absolution from the instance must succeed. This is because Mrs S[...]’s particulars of claim dated 22 May 2022 have been struck out. Mrs S[...] has been barred from amending her pleadings further and there is accordingly no pleading supporting Mrs S[...]’s claim. This situation is similar to the case where a party had been ordered to deliver a pleading within a specific period of time but then fails to do so. In such a situation the opposing party’s remedy is to deliver a Notice of Bar followed, in the event of continued inaction, by an application for absolution. For this proposition Mr S[...] relies on *Woolf v Zenex Oil (Pty) Ltd*⁴.

[28] In *Woolf*, the court was dealing with the situation where a party was in default in filing the declaration. The court was dealing with a (simple) summons for a debt or

⁴ 1999 (1) SA 652 (W) at 654F-G

liquidated amount. In such a case, the summons itself sets out, in concise terms, plaintiff's cause of action. When absolution is granted here, it is absolution from the concise cause of action set out in the summons. The position is different with a combined summons because, when the particulars of claim are set aside, there is nothing in the summons to identify the cause of action from which absolution is granted.

[29] This issue was raised in a different context in *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)*⁵ where the court held –

.... an exception successfully taken to a declaration may leave the summons standing as an “empty husk” to sustain the action; but that in the case of a combined summons the setting aside of the particulars of claim as a consequence of a successful exception causes the whole action to fall away because the summons can have no existence independent of the particulars of claim. It would seem to be a corollary (sic) to these propositions that when an exception is successfully taken to the particulars of claim in a combined summons on the ground that no cause of action is disclosed, there is no room for the grant of leave to amend the particulars. This, in my opinion, does not constitute the law and practice of our courts ...

The court went on to grant the appellant leave to amend.

[30] In the present case, Mrs S[...] is barred from amending her particulars of claim. This may mean that the whole cause of action falls away because the summons can have no existence independent of the particulars of claim. This has the result that the granting of an order of absolution from the instance would have no practical effect.

[31] Despite this, in the circumstances of this matter where a plaintiff has been barred from amending the particulars of claim, it does seem to be the practice of the courts to grant an order of absolution from the instance. The effect is the same -

⁵ [1993] 2 All SA 127 (A)

either the order renders the summons non-existent or the summons ceases to exist by operation of law.

Costs

[32] Mr S[...] has requested that Mrs S[...] be ordered to pay the costs of the suit, including the costs of her application for the removal of the notice of bar and for leave to amend, as well as of Mr S[...]’s application for absolution from the instance, such costs to be taxed on the party and party scale, with the costs of counsel to be taxable on scale B.

[33] Mr S[...] has been successful in these proceedings and is entitled to costs.

[34] Rule 67A permits a court to exercise control over the maximum rate at which counsel’s fees can be recovered under a party and party costs award. As stated by Wilson J⁶ –

the approach to setting a scale of costs under Rule 67A (3) should be, first, to identify the appropriate scale (“A”, “B” or “C”) in light of the importance, value and complexity of the case, and then consider whether, because of inartful or unethical conduct of the nature identified in Rule 67A (2), that scale should be reduced, such that the successful party should not be able to recover counsel’s costs to the extent that they would otherwise have been entitled.

[35] Taking these factors into account I do not think an award of costs on scale B is justified in this case.

Order

In the result I make the following order –

A. Mrs S[...]’s (plaintiff / applicant) application for the removal of the notice of bar and application for leave to amend are hereby dismissed;

⁶ Mashavha v Enaex Africa (Pty) Ltd and Others 2025 (1) SA 466 (GJ)

B. Absolution from the instance is hereby granted in favour of Mr S[...] (defendant / respondent) in respect of the action Mrs S[...] (plaintiff / applicant) has instituted against him under the above case number;

C. Mrs S[...] (plaintiff / applicant) is ordered to pay the costs of the suit, including the costs of her application for the removal of the notice of bar and for leave to amend, as well as of Mr S[...]’s (defendant / respondent) application for absolution from the instance, such costs to be taxed on the party and party scale, with the costs of counsel to be taxable on scale A

A MITCHELL

Acting Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 13 March 2025.

HEARD ON: 19 February 2025

DECIDED ON: 13 March 2025

For Plaintiff

Counsel

Adv L K Van der Merwe

082 747 4287

Attorneys

Van Andel Brink Attorneys

012 335 4464

vabatt@gmail.co.za

Ref: Mrs E Van Andel-Brink

For Defendant:

Counsel

Adv M W Verster

082 885 7323

marius@lawmva.co.za

Attorneys

Marius Verster & Associates Inc

011 453 0125

james@lawmva.co.za; tershelene@lawmva.co.za

Ref: Mr J Mannering / Ms T Rajkumar