



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

Case Number: 2022-034959

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
DATE: **26 FEBRUARY 2026**
SIGNATURE

In the matter between:

R[...] B[...] D[...]

Born M[...]

(ID number: 6[...])

Applicant / Defendant

and

Z[...] A[...] D[...]

(ID NUMBER: 6[...])

Respondent / Plaintiff

Coram: B R Kahn AJ

Date of argument: 30 October 2025

Further chronology of common cause facts as per the request of the court delivered by the parties on 15 December 2025.

Delivered: 26 February 2026

JUDGMENT

B R KAHN AJ

Introduction

1

- 1.1 The Uniform Rules of Court (the 'Rules') are not writ in stone and therefore inviolate; subject to judicial oversight and proper discretion, they form a platform or roadmap for equal and fair jousting between litigants. They are far more than just indicative, but less than inviolate. This however does not allow litigating parties to disregard them; on the contrary, their purpose and adherence thereto is crucial to and for the proper administration of justice and to enable parties in a litigious environment to be able to address their affairs and allocate their capacities and resources in anticipation of their opponents complying with the Rules.
- 1.2 Of course, the Rules do not exist in a vacuum, nor do they exist in a perfect world; litigants as well as their legal representatives (which, to be clear, includes both attorneys and advocates), often require extensions of time to produce a document (or undertake some or other activity referred to in the Rules) in which event, they should at the earliest opportunity seek an extension of time from their colleagues (opponents) which requests need to be considered by the parties themselves (and their legal representatives) who will act having regard to their own peculiar circumstances as well as their strategies and other influences (including practicalities and reasonableness) all of which will impact on their response to any such request. It is, as far as the parties are concerned, a delicate balancing act. The court however is in a somewhat different position to the parties who often, if not invariably, are guided by considerations that when a similar request is to be determined by a court, is viewed through a somewhat different lens.

Reference to the parties

- 2 For the sake of convenience, I will refer to the parties as they are cited in the action (the 'Action') not in the application. In the Action (in which a divorce is sought), the applicant is the Defendant and the respondent is the Plaintiff.

Relief sought

- 3 In this application the Defendant seeks to set aside the Plaintiff's notice of bar and to uplift same in terms of Rule 27 of the Uniform Rules of Court.

- 4 The Plaintiff's response is that the Defendant has failed to:-

4.1 provide an adequate explanation for her delay in delivering her plea;
and

4.2 set out a bona fide defence to the main action,

and therefore vigorously opposes any attempt by the Defendant to further delay the granting of an order of divorce in accordance with a Settlement Agreement that the parties concluded on 22 September 2022 (the 'Settlement Agreement') prior to the institution of the divorce action – ie, the Action – by the Plaintiff.

- 5 In this matter therefore, the court is required to determine whether:-

5.1 the bar served by the Plaintiff is to be uplifted; and

5.2 the Defendant is to be granted leave to file her plea and counterclaim,

and therefore essentially convert what the Plaintiff asserts should be an unopposed divorce action (which includes the Settlement Agreement being made an order of court) into a defended divorce action. For context purposes, it is clear that the marriage has broken down irretrievably and neither of the parties suggest that an order of divorce should not be granted.

Legal principles

- 6 Before dealing with the facts (some common cause and others not), it would be helpful to identify a number of legal principles and imperatives that are binding on me which I identify hereunder, but in no order of importance, simply because they all co-exist and constitute an amalgam to which I must have due regard.
- 7 That the Rules must be adhered to and respected is trite; it should be a guiding light for all litigants and more particularly their legal representatives as officers of the court, but the Rules must be administered in the interests of justice and fairness. In *Federated Trust Ltd v Botha*¹, van Winsen AJA stated that the court does not encourage formalism in the application of the Rules, noting that the Rules are not an end in themselves to be observed for their own sake. They are, says the learned Judge, provided to secure what he described as the inexpensive and expeditious completion of litigation before the courts (sadly, the Rules by and large, do not really achieve either of the objectives the Learned Judge referred to – but it remains nonetheless a noble and worthy aspiration / pursuit).
- 8 I am also very mindful of s 34 of the Constitution of the Republic of South Africa, 1996 (the ‘Constitution’) which states that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial Tribunal or forum.
- 9 In *Sasol South Africa t/a Sasol Chemicals v Penkin*² (quoted with approval in *Van der Linde v Ben Groot TA GVS Law and another*³) it was held that the right to have access to the court ‘is an embodiment of an ancient common law principle that a person has a right to a proper and fair hearing, which has as its core, the right to a litigant to tell his or her side’.

¹ 1978(3) SA654 (A) at 654D

² [2023] ZAGPJHC 329 at para 6

³ A decision of the High Court of South Africa, Western Cape Division, Cape Town judgment, appeal case number: A1772025

- 10 Without putting the matter too simplistically, a court's primary *raison d'être* is to determine disputes, uphold justice and ensure parties are treated fairly and in a way that mirrors the constitutional imperatives that cloak the manner in which courts are to discharge their duties and responsibilities.
- 11 Notwithstanding the above imperatives as commanded by the Constitution and the case law, the right for a 'litigant to tell his or her side' is not absolute. Litigants do not enjoy a license to abuse or manipulate the Rules, or to simply assert that unless the relief they seek is granted, the administration of justice will be impaired or fall short of the world that our Constitution strives to create – a world in which (in the context of the courts' functioning and the administration of justice) the justice to be had is not in favour of one litigant, but in favour of all litigants (in this instance, the Plaintiff and the Defendant) who come before court. Whilst justice strives to treat all litigants fairly (and I make so bold as to suggest - with relief, pride and pleasure – that save in the rarest of circumstances justice achieves this objective), inevitably one litigant must of necessity lose (and perhaps feel that justice has not been done) whilst another wins (and feels that justice has been done). And so it is in life and in all things and pursuits where there is a contest in which there is a winner and a loser.
- 12 In the judgment of *Msibi v Road Accident Fund*⁴ in the High Court of South Africa, Gauteng Division, Johannesburg, Raubenheimer AJ assembled what he described as 'the broad and general principles in dealing with procedural technical points' by quoting from various judgments and I am thankful to the learned Judge for making my task easier. Raubenheimer AJ (in paragraph 36 of the aforesaid judgment) states that these principles are as follows:
- '(a) The court does not generally encourage a formalistic approach in the application of the rules as the rules should not be regarded as an end in themselves .

⁴ [2025] ZAGPJHC 1084

- (b) Technical objection based on procedural defects should not be permitted unless the other party would suffer prejudice as a result.
- (c) the superior court may in the exercise of their inherent power adjust the rules depending on the circumstances of a given case.
- (d) The rules of court are designed to achieve justice and thus courts will in the exercise of their inherent power, relax the application of the rules where the strict application thereof may result in substantial injustice.

[37] The mentioned principles have to be balanced against the foundational purpose of the rules as well as the time periods therein prescribed of which the purpose is to assert the control of the court over its processes and speedy resolution of disputes.

[38] in *Grootboom v National Prosecuting Authority*⁵ the Constitutional Court held that court rules serve a necessary purpose namely that the business of the courts run effectively and efficiently.

[39] In its judgment the Court expressed its concern with a trend of non-compliance with the rules and stated unequivocally that such practice should be stopped. The Court referred to the non-compliance with time periods without seeking condonation beforehand.

[40] The principle that courts are entitled to protect itself and others against an abuse of its process has been recognised for a very long period of time.

[41] This inherent power to protect and regulate their own process is conferred by s 173 of the Constitution on the Constitutional Court, the Supreme Court of Appeal and the High Court.

[42] In *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd*⁶ this inherent power was described as a mechanism to prevent abuse of

⁵ [2013] ZACC 37

process and to prevent the court's procedure from being used for purposes foreign to its design.'

- 13 Raubenheimer AJ also refers to *Beinash v Wixley*⁷ in which, and to quote Raubenheimer AJ again:

'the court held that an abuse of process occurs where the procedures are used for a purpose other than that for which they were intended such as when proceedings are initiated with an improper and ulterior motive or when the process is used to achieve something that is not permissible or for which the process was not designed. The determination of an abuse is determined by the circumstances of each case the fundamental question to be answered deals with the lack of bona fides in the use of the court's procedures' (paragraph 43) and paragraph 44 states as follows:

'Litigation consumes a public resource and the abuse thereof is harmful not only to the litigants but to the entire justice system. The court emphasises that its processes should be used for the resolution of genuine disputes and not for tactical purposes.'

- 14 The legal principles referred to above deal with compliance with the Rules in general and how courts should approach non-compliance. I now deal more pertinently with the legal principles regarding the upliftment of a bar which is the relief sought in this matter by the Defendant. The authorities reveal, and it is trite law that:

14.1 the Defendant is required to show good cause as to why an order uplifting the bar should be granted; *Du Plooy v Anwes Motors (Edms) Bpk*⁸ sets out that the court has a wide discretion which must be exercised with regard to the merits of the matter seen as a whole;

14.2 where the delay is unacceptably excessive and there is no explanation – or no satisfactory explanation – for the delay, there may be no need

⁶ [2015] ZASCA 2

⁷ [1997] ZASCA 32

⁸ 1983 (4) SA 212 (O)

to consider prospects of success but if the period of the delay is short and there is a satisfactory explanation together with reasonable prospects of success, condonation should be granted; and

14.3 despite the presence of a reasonable prospect of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party – the Plaintiff in this instance;

15 Put another way, if there is no reasonable and acceptable explanation for a lengthy delay, the applicant's prospects of success are material when considering the relief sought, but without prospects of success then no matter how good the explanation for the delay may be, condonation ought to be refused.⁹

16 There are three principal requirements for this court to come to the assistance of the Defendant. being the following:

16.1 the Defendant must provide a full explanation for the delay; and

16.2 the Defendant must satisfy the court that she has a *bona fide* defence and the application to uplift the bar was not made with the intention of delaying the Plaintiff's claim¹⁰; and

16.3 the grant of the indulgence sought must not prejudice the Plaintiff in a way that a suitable order cannot compensate in regard to costs.

17 The SCA in *Ingosstrakh v Global Aviation Investments (Pty) Ltd and Others*¹¹ reaffirmed these trite principles, and the following was held:

'Generally, the concept of 'good cause' entails a consideration of the following factors: a reasonable and acceptable explanation for the default; a

⁹ *Abrahams v EOH Mthombo (Pty) Ltd* [2021] ZALCJHB 313

¹⁰ *Silverthorne v Simon* 1907

¹¹ [2021] ZASCA 69 at para 21

demonstration that a party is acting *bona fide*; and that such party has a *bona fide* defence which *prima facie* has some prospects of success. Good cause requires a full explanation of the default so that the court may assess the explanation.'

- 18 In the matter of Junkeeparsad v Solomon¹², the position was stated as follows:-

'Factors which usually weigh with a court in considering an application for condonation include the degree of non-compliance, the explanation therefore and an applicant's prospects of success on the merits. (See Ferris and another v Firststrand Bank Ltd 2014 (3) SA 39 (CC) para 10; Federated Employers Fire & General Insurance Company Limited & another v McKenzie 1969 (3) SA 360 (A) at 362F-G; Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and others {2013} All SA 251 (SCA) para 11.) In Valor IT v Premier, North West Province and Others 2021 (1) SA 42 (SCA) para 39, Plasket JA said that 'very weak prospects of success may not offset a full, complete and satisfactory explanation for a delay; while strong merits of success may excuse an inadequate explanation for the delay (to a point).'

- 19 In Smith N.O. v Brummer N.O.¹³, it was stated that the court tends to grant a removal of bar where:

19.1 the applicant has given a reasonable explanation for the delay;

19.2 the application is bona fide and not made with the object of delaying the opposite party's claim;

19.3 there has not been a reckless or intentional disregard of the Rules;

19.4 the applicant's action is clearly not ill-founded; and

¹² [2021] ZAGPJHC 48 at para 7

¹³ 1954. (3) SA 352 (O)

19.5 any prejudice caused to the opposite party could be compensated by an appropriate order as to costs.

- 20 In *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA)¹⁴, the court stated:

‘One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with a preparation of appeals to this Court: condonation is not to be had merely for the asking; a full detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related, then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.’

What calls for some acceptable explanation is not only the delay in the filing of the heads argument, but also the delay in seeking condonation. An appellant should, whenever it realises that it has not complied with a rule of court, apply for condonation without delay¹⁵.

(my emphasis).

- 21 In the Constitutional Court decision of *Van Wyk V Unitas Hospital and Another* (Open Democratic Advice Centre as amicus curiae)¹⁶, it was reiterated that an applicant must give a full explanation for their delay. In addition, the explanation must cover the entire period of the delay.
- 22 There are two time periods alluded to above, relevant to considering the default of the Defendant, which was pertinently addressed in *Ingosstrakh v Global Aviation Investments (Pty) Ltd and others*¹⁷ where Makgoka JA stated as follows:-

¹⁴ 2004 (1) SA 292 (SCA at para 6

¹⁵ 2004 (2) SA 472 (CC)

¹⁶ 2008(2) SA 472 (CC)

¹⁷ *Supra* 9 at para 22

'With regard to the explanation for the default, there are two periods of default which Ingosstrakh must explain for its failure to deliver a plea. The first is before the notice of bar was served on it, and the second relates to the period after the bar was served. This is because the notice of bar was served as a consequence to Ingosstrakh's failure to plea. With regard to the former, Ingosstrakh served its notice of intention to defend the Action on 30 September 2015. It, therefore, had up to 28 October 2015. There is simply no explanation whatsoever why a plea was not filed during that period.'

The common cause facts

23 Before putting flesh on the bones, the skeleton timeline is the following:

23.1 a written and signed Settlement Agreement (the 'Settlement Agreement') was concluded on 22 September 2022.

23.2 on 13 January 2023, a divorce summons initiating the Action was served at the instance of the Plaintiff on the Defendant;

23.3 on 26 January 2023, the Defendant filed a notice to defend;

23.4 on 30 June 2023, the Plaintiff served a notice of bar;

23.5 on 20 October 2023, the Plaintiff enrolled the Action on the unopposed divorce roll for hearing;

23.6 on 8 November 2023, the Plaintiff filed a notice of set down for an unopposed divorce enrolled for hearing on 17 November 2023;

23.7 on 16 November 2023, the Defendant's new attorney of record delivered a notice of appointment as attorney of record;

23.8 on 17 November 2023:

23.8.1 this Rule 27 application was initiated by the Defendant; and

23.8.2 the unopposed divorce was removed from the roll by agreement between the parties

24 So much for the skeleton; now for the flesh. As is to be noted, the periods between:

24.1 the filing of a notice of intention to defend on 26 January 2023 and the filing of the notice of Bar on 30 June 2023 (ie, the first period); and

24.2 the filing of the notice of bar on 30 June 2023 and the filing of this application on 17 November 2023 (i.e., the second period),

comprised lengthy delays and it is the Defendant who, inter alia, has the onus to establish that there was good cause to uplift the bar (and by extension, an explanation as to why the plea was not filed), but also to set out a bona fide defence to the Action.

25

25.1

25.1.1 The Defendants' explanation for the delays can, I think, be fairly summarised as follows; she spent large swathes of time both in the United Kingdom and in the United States of America with the parties' daughters who required her presence and was therefore (by implication) unable to deal with the Action.

25.1.2 This explanation is as sparsely explained as it is unconvincing, rendered even more unconvincing by the defendant's failure to furnish dates as to her movements between continents, and her activities whilst with her daughters outside South Africa.

25.1.3 This hiatus in the Defendant's narrative is vast and leaves the court without any real understanding – indeed without any understand at all – as to what precluded the Defendant whilst outside South Africa and visiting her daughters, dealing with the Action and instructing her attorneys.

25.2

25.2.1 There was however a period when she failed to deal with the Action because she says she believed that the notice of bar had been suspended, but assuming in favour of the Defendant that this was a reason not to file her plea, it is common cause that on 9 August 2023, she, the Defendant, was notified that the period of suspension relating to the bar had terminated and that she should deliver her plea, and yet she failed to do so.

25.2.2 Save for a brief and passing reference to the parties' daughter in the United States of America being depressed, the Defendant makes no effort whatsoever to explain why her lengthy delays overseas (running into many months) had any form of priority over the litigation between her and her husband in South Africa.

25.2.3 To exacerbate the Defendant's sparse (at best) explanation for the delays, the Defendant made no effort to explain why (particularly with today's technology which enables parties to meet remotely at the proverbial drop of a hat), she was unable to engage with her attorneys whilst overseas.

25.3 The excuse proffered by the Defendant (such as it is) as to why she failed to attend to the matter is hard to justify in today's age of instant and easy communication. Save in the rarest of circumstances, people are able to manage their affairs effectively, properly and substantively from afar. The Defendant's explanation in this regard is, put at its highest and at best for the Defendant, completely unconvincing.

26 The Defendant also relies on the fact that she failed to deliver a plea because she was provided with assurances by the Plaintiff that the notice of bar had been withdrawn and that she did not need to consult with her attorney to prepare a plea – this at the time when the Plaintiff had performed all his financial obligations in terms of the Deed of Settlement – but such a position is not only untenable, but disingenuous, because:

26.1 on 28 June 2023, the Defendant's attorney received an email from the Plaintiff's attorney placing on record that the pleadings were no longer being held in obedience, that there was only one day left to plead and absent a plea, a notice of bar would be filed on 30 June 2023;

26.2 a notice of bar was in fact served on 30 June 2023, the dies of which lapsed on 7 July 2023 when the Defendant became ipso facto barred from pleading;

26.3 on 9 August 2023, the Defendant's attorney reminded the Plaintiff's attorney that she, the Plaintiff was ipso facto barred from pleading;

26.4 on 30 October 2023, the Defendant's attorney advised the Plaintiff's attorney that the Defendant would be enrolling the matter for an unopposed divorce order on 17 November 2023,

which 'warnings' were plentiful and should have alerted the Defendant – over and over again – to the consequences of her failure to initially plead and thereafter absent a plea, take whatever steps she considered appropriate to advance and protect her interests as she saw them.

27

27.1 Notwithstanding service of a notice of bar on 30 June 2023, the Defendant travelled to the United Kingdom some 11 days later – on 11 July 2023 – and only returned to South Africa in January 2024 during which time she made no effort whatsoever to address the notice of bar

in spite of the fact that the Plaintiff reminded the Defendant on 9 August 2023 that she was under a notice of bar.

27.2 As I state hereunder; the Defendant's attorney of record who received the email dated 28 June 2023 and the other warnings (see paragraph 26 above), has not deposed to an affidavit in support of the Defendant. That omission is glaring.

27.3 It is clear that the Defendant's plea was due prior to service of the notice of bar anyway.

28

28.1 The Defendant also contends that she was a financial hostage (my words, not the Defendant's words – although this forms part of the Defendant's explanation) with limited funds, but yet it is common cause that the Defendant had access to many millions of rands which she could have used to acquire appropriate legal advice at the appropriate time. She failed to do so.

28.2

28.2.1 The canvas of impecuniosity painted by the defendant in support of why she failed to deliver a plea timeously, is the equivalent of a hundred piece jigsaw puzzle with perhaps three or four pieces identified by the Plaintiff in her founding affidavit.

28.2.2 The defendant makes no attempt whatsoever to take the Court into her confidence and attach, for example, monthly accounts showing income and expenditure, nor does she attach any financial documents (for example, bank or credit card statements) that may have assisted her. The absence of this sort of detail is telling.

28.3

28.3.1 In fact, if I have regard to the common cause facts as to what monies were paid by the Plaintiff to the Defendant – not only as he was obliged to do so in terms of the Settlement Agreement, (viz R3 075 000.00) – but over and above his contractual obligations contained therein, in order to assist the Defendant financially in regard to her living expense,.

28.3.2 This however does not mean that the parties are not bound by the Settlement Agreement or for that matter, not obliged to attend to their obligations in respect of the Action; it simply demonstrates in my view a kindness by the Plaintiff in what where probably fairly difficult / trying – and very frustrating – circumstances for him. To hold this against the Plaintiff would be most unfair.

28.4 In addition to the aforesaid it seems to me that the Plaintiff's tolerance extended to a willingness – but clearly within certain parameters – to engage with the Defendant about what is called a 'new' Settlement Agreement proposed by the Defendant. That the Plaintiff was willing to engage in such discussions is indicative of a person who adopted a pragmatic approach, as opposed to a dogmatic approach and an approach that if used against him would be fundamentally unfair. A willingness to engage with a spouse of approximately 29 years and who is the mother of your children is to be viewed for what it is; an act of humaneness and perhaps even generosity of spirit.

29 As emerges from what is referred to above, I have found that the Defendant's explanation (such as it is) for her delay in pleading in the matter is completely unsatisfactory and does not reach the threshold of a reasonable explanation; indeed, it seems to me, in the words of *Smith N.O v Brummer N.O*¹⁸, that there has been a reckless or intentional disregard of the Rules.

Allegations / Defence of duress

¹⁸ Ibid 11 above

30

30.1 It may well be that having found that the Defendant's explanation (I repeat – such as it is) in relation to the delay is non-existent or completely unconvincing, there may be no need to consider whether the defence tendered by the Defendant is a bona fide defence which has a reasonable prospect of success, but nonetheless, I intend to do so.

30.2 In considering the question posed in paragraph 30.1 above, I have had regard to the Defendant's founding affidavit and her proposed plea that she would file in the event that the notice of bar is uplifted and she is given leave to file a defence. In considering this defence on paper, I have had regard to the legal principles referred to above.

30.3 This defence is as unconvincing as it is unlikely. I say that for the reasons referred to hereunder.

31 The Settlement Agreement was concluded on 22 September 2022. The high water mark of the Defendant's explanation in regard to the allegation that it was signed under duress is that – and what follows is the defendant's version – she was 'man-handled by the plaintiff outside the South African UK Embassy' (I deal therewith briefly hereunder) 'in the presence of his agents, being 2 (two) male policemen friends who are employed by SAPS and stationed at Mondeor SAPS'. This defence is supplemented by her proposed plea (to be clear; this is the plea that the Defendant would file assuming her application is successful) in which she stated (in pleading form obviously as opposed to in affidavit form) that:

'6.2 In amplification of the Defendant's denial the Defendant states the following:-

6.2.1 the Settlement Agreement was signed under duress with Police Officers present at the behest of the Plaintiff to ensure she signed it;

6.2.2 the parties did not agree to incorporate the Settlement Agreement.'

32

32.1 As opposed to the Defendant's cryptic explanation of the circumstances surrounding the signing of the Settlement Agreement in her founding affidavit, the Plaintiff sets out in detail what transpired, not only on the day the Settlement Agreement was signed, but also what led up to the signing of the Settlement Agreement, that he was acting cautiously and carefully and under the guidance of his attorney of record.

32.2 The so-called two 'friends' referred to by the Defendant were clearly not friends; they were strangers to the Plaintiff who were policemen at the Mondeor police station because the Plaintiff's clear intention (guided by his attorney) was to ensure that matters relative to the signing of the Settlement Agreement proceeded properly, prudently and in circumstances where there would, if needs be, be reliable witnesses.

32.3 There is a reference to the South African UK Embassy made by the Defendant being the venue outside of where she was allegedly manhandled, but it is clear that the Settlement Agreement was not signed in the United Kingdom, but in South Africa. This strange feature has never been explained, but nothing turns thereon other than a further layer of incredulity as to the veracity of the Defendant's version in regard to her having signed the Settlement Agreement under duress.

33 It seems inconceivable that the Defendant (who at all times material was represented by an attorney) would not appreciate (under the guidance of her attorney and perhaps even counsel) how crucial it would be in her founding papers to set out as much detail as possible about the circumstances surrounding the signing of the Settlement Agreement (the alleged duress) so

that a court could determine whether it is likely or possible that the Defendant would be able to establish (if she was given leave to file her plea and the matter proceeded to trial) that actionable duress had occurred which would suffice to set aside / rescind the Settlement Agreement.

34

34.1 What is noticeable however is that in spite of the fact that the Settlement Agreement was concluded on 22 September 2022, there is no allegation made by the Defendant until the delivery of her application in this matter (451 days after the conclusion of the Settlement Agreement) that she was placed under duress.

34.2 I do not think it would be unfair to the Defendant to opine that, had she been placed under duress, as alleged, she would have instructed her attorney to place same on record as soon as possible after the Settlement Agreement was signed (after all she had access to substantial monies in terms of the Settlement Agreement) and endeavour to then repudiate the Settlement Agreement, but she does nothing of the sort. She does not proffer any evidence by, for example, friends of hers who she may have spoken to about the (alleged) duress. The Defendant also makes no reference to any efforts she may have made to obtain the evidence of the police officer who witnessed her and the Plaintiff's signature to the Settlement Agreement. All this court is left with is one sentence in the founding affidavit which is quoted in paragraph 31 above.

34.3 In addition thereto, and very surprisingly, she has not procured affidavits from any legal representative she had instructed at any time prior to or even subsequent to the Settlement Agreement being concluded, and 16 November 2023 when her new attorney of record filed a notice of appointment as attorney of record. This hiatus is highly significant and exacerbates the Defendant's somewhat hopeless position (in general) as well as her inability to present a bona fide defence (grounded in alleged duress) as alleged by her.

34.4 The Defendant has accepted the financial benefits of the Settlement Agreement and in spite of her wanting to set aside the Settlement Agreement which provided for and generated those financial benefits, the Defendant makes no effort to tender the return of the money she received thereunder.

35

35.1 This is a case involving a marriage of many decades that had, for whatever reason, run its course and was to come to an end where the parties to that marriage (the Plaintiff and the Defendant) resolved (via the Settlement Agreement) the proprietary matters between them and one of those parties (the Defendant) has had second thoughts as to the wisdom of her decision to conclude the Settlement Agreement.

35.2 This dispute is not about a divorce per se; it is - at its core – a commercial dispute. The Defendant having concluded the Settlement Agreement – and it is important to note that the Plaintiff has performed all his financial obligations in terms of the Settlement Agreement – clearly has, what is known in the commercial world as ‘buyer’s remorse’ and now wishes to turn the clock back, set aside / rescind the Settlement Agreement and (at least from her perspective) endeavour to procure what she perceives to be a more attractive settlement in the (divorce) Action.

36 The allegations in regard to the alleged duress are so thin that there is simply no flesh to extract from the Defendant’s narrative. Compared to the Plaintiff’s narrative, which is at pains to point out in detail to the court what, on the Plaintiff’s version, actually occurred (not rebutted by the Defendant in reply), it seems to me that the Defendant’s version is so improbable that I can reject it entirely and conclude that, delays aside, the Defendant is not being *bona fide* in her conduct in seeking to set aside the notice of bar and assert her defence of duress. Her version (ie, her defence) is, in a word, unbelievable.

37 I am satisfied that the Defendant’s conduct in seeking to set aside the notice of bar based on her version that there had been duress (as set out in her

founding affidavit and proposed plea, which is all I have to rely on) is doomed to failure; there is, based on the papers, no prospect of the Defendant succeeding. It is not for me to speculate as to what evidence the Defendant might present to this court if she were to be granted the order she has prayed for and the matter proceeded on the issue as to whether there was or was not duress and whether the Settlement Agreement is to be set aside. I can only rely on the Defendant's own version in coming to the conclusion I have.

38

38.1 All in all, I would be remiss in my duty in seeking to do justice if I granted the order prayed for by the Plaintiff.

38.2 It is clear from the totality of the narrative (as contained in the affidavits) that the Defendant was very anxious to settle the anticipated (by the parties – husband and wife) divorce action on certain terms, did so after careful consideration, signed the settlement agreement purposely and purposefully, received payment pursuant to the Settlement Agreement, and then used the millions of rands made available to her pursuant to the Settlement Agreement (and additional monies from the Plaintiff – without any obligation- to assist the Defendant) as she chose ,and knew that she was bound thereby. I furthermore believe (as I have already found) that the Defendant's allegation of duress (her portal, as she sees it, to setting aside the Settlement Agreement) is simply untrue. At the risk of repeating myself; she has 'buyer's remorse', which cannot be visited upon the Plaintiff. To do so would in my view be not only grossly unfair, but would not be the proper application of the legal principles in this kind of matter.

38.3 The Defendant concluded the Settlement Agreement because that is what she wanted at the relevant time, that is what she bargained for at the relevant time, and she received the benefit of her bargain at the relevant time. It is clear that the Defendant, suffering from buyer's remorse wants a second bite at the cherry (to use a well-known phrase) and in reaching for that bowl of cherries, has conjured up a

way (at least as she sees it) to obtain a better financial outcome than that which is provided for in the Settlement Agreement that she and the Plaintiff deliberately signed – a way which is both fanciful and disingenuous.

Strike out application

39 The Respondent, in his answering affidavit, makes reference to the striking out of a number of paragraphs in the Applicant's founding affidavit, but at the hearing of the application, same was not pursued and consequently, I will not deal therewith, other than in the following limited respects; the paragraphs the Plaintiff identified as being subject to the strike out (whether irrelevant, vexatious, scandalous, without prejudice, hearsay or scurrilous), were not of such a nature that even though I had regard thereto, the content would have affected the outcome of this application.

Conclusion

40 In coming to my conclusion and exercising my discretion in all the circumstances of the matter I have taken into account all that is referred to above which includes:

- 40.1 the factual matrix as described by the Defendant (vague, superficial and unconvincing) compared to that described by the Plaintiff (precise, detailed and convincing);
- 40.2 the delays occasioned by the Defendant in the matter and the reasons tendered by her in regard thereto (also vague, incomplete, painted in broad brushstrokes and in my view contrived); and
- 40.3 the likelihood of the Defendant being able to set aside the Settlement Agreement based on duress – ie, a bona fide defence (no realistic prospect at all);

and the fact that at its heart this is not (at this juncture) a family law matter; it is simply a commercial matter and an attempt by one of the parties to set aside the settlement based on alleged duress. Based on what the Defendant has tendered to this court, I am not able to find in her favour.

- 41 The conduct of the Defendant in this matter is, in my view, an abuse of the process; she has not explained her multiple and ongoing delays and she has not presented a bona fide defence. On the contrary, she has, I regret to say, presented a dishonest defence – at least as emerges from the papers filed in this matter.
- 42 As a result thereof, the application is dismissed with costs.
- 43 In considering the level of costs, I am guided by the Defendant's conduct in this matter; she has by her conduct, wasted scarce judicial resources, delayed the Plaintiff getting on with his life (and also delayed her independent future and getting on with her own life) in circumstances where there was simply no prospect of success in her application. Consequently, I believe costs on the attorney / client scale are warranted and insofar as counsel's fees are concerned, on scale B.

B R KAHN AJ

Judge of the High Court

Johannesburg

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