

SOUTH AFRICA / JUDGMENT

B.J.M v M.A.M [2023] ZAGPPHC 147; 1423/2004 (1 March 2023)

[2023] ZAGPPHC 147**COURT**

North Gauteng High Court, Pretoria

BEFORE

M P N Mbongwe

CASE / FILE NUMBER

1423/2004

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NO: 1423 /2004****REPOERTABLE:**

OF
INTEREST TO OTHER JUDGES
REVISED
01/03/2023
In

the matter between:

B
[....] J [....] M [....]
Applicant
ID
NO: [....]
And
M
[....] 1 A [....] M [....]
Respondent

JUDGMENT

MBONGWE J

INTRODUCTION

- [1] The applicant has brought this application seeking the variation of a divorce order in terms of which the marriage between him and the first respondent was dissolved on 29 November 2006. The variation is sought 16 years after the divorce order was granted.

THE

FACTS

- [2] The applicant and the first respondent were married in community of property in Warmbad (now Bela-Bela) on 08 June 1995. The marriage was dissolved by an order of this court on 29 November 2006 subsequent to the parties, both legally represented, had entered into a written settlement agreement. The applicant had withdrawn its counterclaim consequent to the conclusion of the settlement agreement.

THE ORDER

- [3] The order of the court, per Shongwe J, reads as follows:

“IT IS ORDERED

1. That the bonds of marriage subsisting between the plaintiff and the defendant are hereby dissolved.
2. That the agreement between the parties filed of record be and is hereby made an order of this court.”
- [4] The settlement agreement between the parties addressed the disposition of the three immovable properties owned by them. In terms of the agreement each party was to retain exclusive ownership of one property. In respect of the third property, which was registered in the name of the applicant, the first respondent was to pay 50% of its value to the applicant (R21 000-00) within 24 months from the date of the granting of the divorce order, whereupon the applicant was to

effect transfer of that property into the first respondent’s name.

- [5] The applicant has not denied the first respondent’s assertion that she duly paid the aforesaid amount to him as per the agreement and that the terms of the agreement were duly honoured.
- [6] Clause 4.1 of the written settlement agreement reads thus;

“Each party will retain all other assets not specifically dealt with in this deed of settlement, as his or her sole respective property.”

APPLICANT’S CASE

- [7] The applicant alleges in the founding affidavit that although the court had ordered that the joint estate of the applicant and the first respondent be divided equally between them, the division never occurred. This allegation contradicts the applicant’s prayer 1.1 of the notice of motion in terms of which the applicant seeks that a division of the joint estate be ordered and that the varied order specifically states that he is entitled to 50% of the first respondent’s pension benefits.
- [8] The applicant further alleges that the court omitted to address and to grant his prayer (in the counterclaim) that the second and third respondents be ordered to implement payment to him of the 50% of the first respondent’s pension benefits as at the date of the divorce order.
- [9] It was further argued on behalf of the applicant that clause 4.1 of the settlement agreement did not affect the first respondent’s pension benefit nor the applicant’s entitlement to one half thereof. The applicant has not attached the settlement agreement to his founding affidavit.

THE LAW

- [10] It is trite that an order of the court stands until set aside by a competent court (see *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229 B – C). A court order can be varied or amended in terms of Rule 42 or rescinded in terms of Rule 31 (2) or set aside in an appeal. The remedy sought by the applicant can only be attained in terms of Rule 42 which requires that the variation be sought within a reasonable period of time. The applicant’s delay of sixteen years can by no stretch of imagination be construed as a reasonable period and requires a detailed explanation in an application for condonation of the late filing of the variation application. The applicant has not brought an application for condonation. In *M v M* 10751 – 2000 ZAGPPHC 155 (20 March 2020) an unreported judgment, the court in dismissing an application, stated that the applicant had failed to bring the application within a reasonable time and to explain the delay of 19 years fully.

CONDONATION

- [11] It is a principle of the law that non-compliance with the time frames for filing of a court process in terms of the rules, a court order or directive has to be explained in an application for condonation. An applicant seeking condonation must show good cause for the delay. The length of the period of delay has to be fully explained. In the case of an appeal the courts consider the prospects of the success of the appeal in addition.
- [12] An applicant for condonation must set out justifiable with regard to non-compliance with the time frames, the *Holmes JA in Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at C-F, stated thus:

“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 all the fact and, in essence, is a matter of fairness to both sides. Among the fact usually relevant are the degree of lateness, the explanation thereof, the prospect 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...”

- [13] In *Foster v Stewart Scott Inc.* (1997) n18 ILJ 367 (LAC) at para 369, Froneman J stated the principle in the following terms:

“It is well settled that in considering applications for condonation the court has a discretion, to be exercised judicially upon a consideration of all the fact. Relevant considerations may include the degree of non-compliance with rules, the explanation thereof, the prospect of success on appeal, the importance of the case, the respondent’s interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice, but the list is not exhaustive. These factors are not individually decisive but are interrelated and must be weighed one against the other. A slight delay and a good explanation for the delay may help to compensate for prospect of success which are not strong. Conversely, very good prospect of success on appeal may compensate for an otherwise perhaps inadequate explanation and long delay. See, in general, Erasmus Superior Court Practice at 360-399A.”

- [14] It follows from the above principles that while inter-related, a reasonable explanation for the delay coupled with a good prospect of success on appeal enhance the chances of the success of the application for condonation. A weak explanation, but good prospect of success and / or the importance of the case will allow for the granting of an application for condonation. The exercise of discretionary powers in favour of granting condonation is influenced by a positive finding on the reasonableness of explanation and good prospect of success of the matter. A good explanation without prospect of success on the merits warrants a refusal of condonation.

- [15] The absence of prejudice on the other party is also a consideration, particularly where the prejudice may not be cured by an order of costs. In *National Union of Mine Workers v Council for Mineral Technology* [1998] ZALAC at 211 D- 212 at para 10, the court stated the legal position thus:

“The approach is that the court has a discretion, to be exercised judicially upon a consideration of all the fact, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospect of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospect of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for delay, the prospects of success are immaterial, and without prospect of success, no matter how good the explanation for the delay, an application for condonation should be refused.”

MERITS OF APPLICANT'S APPLICATION

[16] I now turn to traverse the facts in the present matter.

ANALYSIS

OF APPLICANT'S CASE

- [17] There can be no doubt that the divorce order quoted in para [3] above incorporated a settlement agreement entered into by the parties. In para [4] the agreed manner of the disposition of the parties' immovable properties is set out. (own emphasis)
- [18] In contrast to the explicit disposition of the parties' immovable property clause 4.1 of the settlement agreement unambiguously sets out the parties' agreement with regard to "all other assets". Any assets other than the immovable properties are to be dealt with differently from the immovable properties of the parties in terms of clause 4.1 of the settlement agreement. Such assets were to be retained by the party who is in possession thereof or in whose name the asset is. The interpretation of order 2 of the divorce order or clause 4.1 of the agreement espoused by the applicant, is absurd and ought to be rejected.
- [19] It is my finding that it is opportunistic for the applicant to seek that clause 4.1 of the agreement be read to exclude the first respondent's pension benefits. The applicant received money from the first respondent in terms of the settlement agreement. Conveniently and opportunistically 16 years later the applicant seeks an equal distribution of "all other assets not dealt with in the settlement agreement".

(LACK OF) CONDONATION APPLICATION

- [20] The applicant seeks, purportedly in terms of Rule 42, the variation of a court order that was made over 16 years ago. Despite the obvious inordinate delay, the applicant has not brought an application for condonation of the delay. Furthermore, the applicant has not furnished any reason(s) for the delay. None of the principles laid down in the authorities referred to in paragraphs [11] to [15] supra, has been met by the applicant with in this matter. This is fatal to this application.
- [21] In light of the findings with regard to the different manners of the distribution of the parties' assets, I find that the appellant's application lacks merit and stands to be dismissed.

COSTS

- [22] The general principle that costs follow the results of the proceedings holds good in this matter.

ORDER

- [23] In light of the finding in this judgment, the following order if made:

1. The application for the variation of the divorce order dated 29 November 2006 is dismissed with costs.

M P N MBONGWE

JUDGE OF THE HIGH COURT

APPEARANCES:

FOR THE APPLICANT:

Mr V Mabe

victamabe@gmail.com/admin@victormadeinc.co.za

012 335 4455 / 072 745 7914

FOR THE RESPONDENT:

Adv P Springveldt

springveldta@mweb.co.za

082 333 8474

INSTRUCTED BY:

G W Mashele Attorneys

gwm607@gmail.com

JUDGMENT

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