

SOUTH AFRICA / JUDGMENT

T.M.R v M.R.R - Reasons (184/2004)

[2024] ZALMPTHC 2 (16 January 2024)

[2024] ZALMPTHC 2

COURT

Limpopo High Court, Thohoyandou

BEFORE

IM Khosa

CASE / FILE NUMBER

184/2004

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HIGH COURT OF SOUTH

AFRICA

LIMPOPO LOCAL

DIVISION, THOHOYANDOU

CASE

NO: 184/2004

REPORTABLE: NO/YES

OF INTEREST TO OTHER

JUDGES: NO/YES

REVISED.

16/01/2024

In

the matter between

T[...]

M[...] R[...]

APPLICANT

And

M[...]

R[...] R[...]

RESPONDENT

REASONS

FOR JUDGMENT

IM KHOSA AJ

Introduction

[1]

The Applicant approached this court for variation of a divorce order granted around August 2005.

The application is opposed and the Respondent raised two points in limine.

[2]

After hearing the parties' submissions on the point in limine of lack of condonation, I upheld that point in limine with costs. The Applicant filed a notice requesting reasons for judgment. These are the reasons.

Factual background

[3]

On the 26 August 2005, the parties signed a deed of settlement. The deed of settlement was made an order of court when the court granted an order dissolving their bonds of marriage.

[4]

The deed of settlement contain clauses recording the parties' agreement in relation to the dissolution of their marriage, the custody and maintenance of minor children, the division of their joint estate and payment of the parties' debts. In clause 5 of the deed of settlement, the parties specifically agreed that "the parties shall have no further claims against each other arising out of their marriage relationship".[1]

The Applicant's case

[5]

The Applicant essentially seeks an order for the inclusion of a clause in the deed of settlement to the effect that the Government Employees Pension Fund be ordered to pay her 50% of the pension fund interest of the Respondent held with that fund from date of marriage to date of divorce with interest. Further, in prayer 4 of the notice of motion, the Applicant prays for an order that "the late filing of this application to be condoned if found to be done late"[2].

[6]

In support of the relief she seeks, the Applicant avers that the deed of settlement does not address the division of pension because she was not advised that pension forms part of the joint estate and as a result, she lacked that knowledge when signing the deed of settlement[3]. The Applicant further contends that the exclusion of pension in the deed of settlement was a common mistake between the parties[4].

The Respondent's case

[7]

The Respondent's opposed the application and raised two points in limine of lack of merits based on the no further claims clause and a point in limine of lack of condonation application as the order sought to be varied was granted around August 2005.

[8]

On the merits, the Respondent's case is that the Applicant cannot seek an amendment of the deed of settlement by way of a variation application. Both parties were legally represented during the divorce proceedings and she is bound by the no further claim clause contained in the deed of settlement.

The issue

[9]

The issue for determination was whether the Applicant failed to apply for condonation for the delay in launching this application.

The law

[10] An

order of court can be varied in terms of Rule 42 or the common law. It is trite law that a variation application must be brought within a reasonable period of time. If not launched within a reasonable period of time, the Applicant must seek condonation for the delay by way of a substantive application.

[11]

Condonation applications are governed by Rule 27. Rule 27(1) provides as follows:-

“27

Extension of Time and Removal of Bar and Condonation

(1)

In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.”

[12]

In

the matter of Grootboom v National Prosecuting Authority and Another[5], the court held that “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”[6].

[13]

Our courts have held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends upon the facts and circumstances of each case.

[14]

Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and prospects of success[7]. All these factors are to be set out in the founding affidavit.

Evaluation

[15] I must mention at

the outset that the Respondent’s counsel did not pursue the

lack of merits point as it is not a point in limine by nature,
but a substantive defence to the merits of the application.

[16]

This variation application was launched during September 2022,
seventeen years after the order sought to
be varied was granted.

Without doubt, a period of seventeen years cannot be construed as a
reasonable period for filing of this
application. It is imperative
that the Applicant launches a substantive application for condonation
for the belated variation application.

[17] As

I indicated above, the Applicant prays for condonation if this
application is found to be filed late.

In the face of a flagrant
inordinate delay of seventeen years, it is astounding that the
applicant prayer for condonation is made
conditional upon a finding
that this application is filed late. It is uncertain what infused
doubt on the Applicant's mind
on the aspect of delay when the
facts of this matter presents an obvious inordinate delay in bringing
this application.

[18]

Our law requires the Applicant in motion proceedings to make out a
case for relief sought in the founding
affidavit. The affidavits in
motion proceedings serve a dual purpose. They stand as both pleadings
and evidence.

[19] I

have read the founding affidavit with scrutiny. A microscopic
examination of the Applicant's founding
affidavit reveals that
the Application does not make out a case for condonation. Throughout
the entire founding affidavit, the
Applicant fails to set out the
requirements for condonation as set out is authorities cited above.
In fact, the word "condonation"
does not feature in the
whole body of the Applicant's founding affidavit.

[20]

In reply to the point
in limine
of lack of condonation, the Applicant aver that she has fully

explained in the background in the founding affidavit and she never had knowledge of when to bring this application[8].

Further, the Applicant aver that she believes that this application will be deemed to have been filed within a reasonable time.

[21]

The Applicant's averment in reply to the point in limine that she lacked knowledge of when to bring this application is mutually destructive with her conditional prayer for condonation and her believe that this application will be deemed to have been filed within a reasonable time.

[22]

The inclusion of a conditional prayer for condonation in the notice of motion is not an equivalent of a condonation application. At best, it is indicative of the Applicant's awareness that this application is launched out of time. Absent averments on the requirements for condonation in the founding affidavit, a basis for the conditional condonation prayer has not been made out.

[23]

Condonation of the non-observance of the time frames is by no means a mere formality. Condonation is not to be had for a mere asking[9].

More is required of the Applicant for condonation for this extended period of delay. The delay in this matter is patent. A substantive application is imperative. The averments necessary to support the granting of condonation must be canvassed fully in the founding affidavit.

[24]

The applicant had failed to bring the variation application within a reasonable time and to explain the delay fully. The Applicant's glaring failure to canvass the requirements for an application for condonation application in the founding affidavit gives substance to the Respondent's point in limine for lack of condonation.

[25]

This court has discretion to grant condonation. The exercise of the said discretion is triggered, and, must

be preceded by an application for condonation. A party will rise or fall on his/her papers and this court is bound within the four corners of the pleadings. In this case, the Applicant did not make a case for condonation in his founding affidavit. The mere inclusion of a conditional prayer for condonation in the notice of motion is inadequate. The Respondent's point in limine of lack of condonation application must succeed.

Costs

[26] The general principle that costs follow the results of the proceedings holds well in this matter. The Respondent must be awarded costs for his success.

[27]

In the circumstances, the order I made still stand as follows:

[27.1] A point in limine of lack of condonation application is upheld with costs.

IM KHOSA
ACTING JUSTICE OF THE
HIGH
COURT OF SOUTH AFRICA
APPEARANCES

For
the Applicant

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by

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Instructed
by
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Anton Ramaano Attorneys

Date
of hearing
:
02 November 2023

Order
delivered on

:
02 November 2023

Written
judgment delivered on
:
16 January 2024.
Reasons
for Judgment furnished on
:
16 January 2024.

JUDGEMENT

DATE;: Judgment handed down in court and electronically by circulation to the parties' legal representatives by email and publication through SAFLII. The date and time for hand down is deemed to be 16 January 2024.

- [1] Deed of settlement annexure "RTM A"
- [2] Prayer 4 of the notice of motion
- [3] Para 6.3.- 6.4 Founding Affidavit
- [4] Para 8.4 Founding Affidavit
- [5] Grootboom v National Prosecuting Authority and Another 2014(2)SA 68 (CC)
- [6] Ibid at para 23
- [7] Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)
- [2007] ZACC 24; 2008
- (2) SA 472 (CC) at 477A-B
- [8] Replying affidavit para 3.2.1
- [9] Note 6 above at para 23

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Prepared on 9 October 2026 · Esheria