SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

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

CASE NO: 40000/2017
REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
REVISED:
DATE; 29/04/2022

In the matter between:

R[....]1	Applicant
And	
R....]2(born M[....])	Respondent

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgment and order are accordingly published and distributed electronically. The date and time of hand-down is *deemed to be 14:00 on 29 April 2022*

JUDGMENT

LENYAI AJ:

[1] This is an application for the variation of a settlement agreement entered into between the parties on the 16th February 2018.

[2] It is common cause between the parties in terms of the joint minutes, that

(a) the parties were divorced on the 16th March 2018;

(b) the primary residence of the parties' minor children presently vests with the respondent;

(c) the applicant is to have reasonable rights of contact with and access to the minor children as set out in the Deed of Settlement;

(d) the applicant is to pay the maintenance for the parties' minor children in terms of clause 5.3 of the Deed of Settlement and

(e) the respondent has obtained a garnishee order against the applicant.

[3] It is also common cause between the parties in terms of the joint minutes, that the issues to be determined by the court are the following:

(a) Whether the applicant's late filing of his replying affidavit should be condoned.

(b) Whether the respondent has shown sufficient reason as prescribed by section 8 (1) of the Divorce Act 70 of 1979, (the Divorce Act), to vary the Agreement of Settlement and

(c) Relief sought by the applicant to vary the settlement agreement as follows:

(1) Reducing the Applicant's maintenance obligations.

(2) Dividing the property listed in paragraph 6.1 of the settlement agreement in order to have the applicant have half share in the matrimonial property. Be it the matrimonial property is bought by the respondent or sold to somebody else, and the proceeds be shared equally.

(3) The implementation of the social worker's report that:

(i) both applicant and respondent need to attend mediation sessions;

(ii) the respondent be ordered to attend rehabilitation to assist with her substance abuse disorder;

(iii) the respondent be ordered to respect the divorce order and allow the applicant to have contact with the children and

(iv) the applicant and respondent be referred to parenting skills sessions.

[4] The applicant filed his replying affidavit late and in it incorporated his application for the condonation for the late filing. I will deal with the condonation application first and will attend to the main application afterwards.

[5] The applicant avers that he filed his replying affidavit rather belatedly and he is seeking the court to condone his late filing of same. The respondent's answering affidavit was served on his erstwhile correspondent attorneys on the 14th January 2020, however because of financial falling out, his attorneys withdrew from representing him on the 11th February 2020 and at that stage he was not notified of the answering affidavit. He further avers that he was only notified on the 21st February 2020 of the notice of withdrawal and the existence of the answering affidavit. Upon receipt of the notice of withdrawal he proceeded to obtain new legal representation as soon as reasonably possible and was only able to obtain such representation with his current attorney on the 1st July 2020. Due to work commitments and schedule, he was only able to meet up with his new attorney for a consultation on the 17th July 2020.

[6] The applicant contends that as the allegations that were made by the respondent were bald, he was advised that a replying affidavit would be required to be filed and the services of Counsel would be required. The applicant reiterates that because of his financial constraints he could not pay the deposit required to secure the services of Counsel and it was only around 27th August 2020 that he was able to devise some means to secure a deposit

to ensure that Counsel can be briefed on his matter. A consultation was then arranged on the 17th August 2020. Counsel had to peruse and consider the plethora of papers that had been filed before court as well as other messages and voice recordings he had made to draft the affidavit, and all this took longer than expected. The replying affidavit was only ready around October 2020 and thereafter he had to attend to have it deposed to and commissioned. The applicant contends that as the matter is important to him, he acted with as much speed as he could muster however there were factors outside his control which caused the delay, and he accordingly seeks the court's indulgence to condone the late filing of the replying affidavit.

[7] The respondent on the other hand avers that the answering affidavit was served on the applicant's attorneys on the 14th January 2020. The replying affidavit was served on her attorneys on the 11 December 2020 when it was due to be filed on the 28th January 2020, a delay of almost eleven months. The respondent further avers that her consent was not sought in respect of the late filing of the replying affidavit, and therefore the applicant needs to make out a case for the court to condone his noncompliance with the rules of court in accordance with Rule 27 of the Uniform Rules of Court.

[8] The respondent contends that the applicant has not put-up sufficient facts and has not shown good cause or reason as to why his replying affidavit should be allowed by the court. The applicant had knowledge of the answering affidavit as early as 11th February 2020 but did not take any timeous action to deal with the answering affidavit, he could have answered the averments made in the answering affidavit himself if he could not obtain legal representation. The respondent further contends that the applicant did not give a full and reasonable account for the entire period of the delay.

[9] It is a well-established principle in our law that it is in the interests of the administration of justice to require adherence to well established rules and that those rules should in the ordinary course be observed. **James Brown & Hamer (Pty) Ltd v Simmons 1963 (4) SA 656 (A) at 660 E-G**.

[10] Rule 27 of the Uniform Rules provides that:

"(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.

(2) Any such extension may be ordered although the application therefor is not made until after expiry of the time prescribed or fixed, and the court ordering any such extension may make such order as to it seems meet as to recalling, varying or cancelling of the results of the expiry of any time so prescribed or fixed, whether such results flow from the terms of any order or from these Rules.

(3) The court may, on good cause shown, condone any non-compliance with these Rules."

[11] In the matter of **Grootboom v National Prosecuting Authority and Another 2014 (2) SA 68 (CC), at para [20]**, the Constitutional Court stated that "*…It is axiomatic that condoning a party's non-compliance with the rules or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation."*

In the same matter the court **at para [23]** stated 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".*

And **at para [50],** the court further reiterated that "*In this court the test for determining whether condonation should be granted or refused is the interests*

of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that inquiry include:

(a) the length of the delay;
(b) the explanation for, or cause for, the delay;
(c) prospects of success for the party seeking condonation;
(d) the importance of the issue(s) that the matter raises;
(e) the prejudice to the other party or parties; and
(f) the effect of the delay on the administration of justice.

[12] Turning to the matter before me, the applicant served the replying affidavit incorporating the condonation application for late filing, almost 11 months out of time. The delay was excessive, and the applicant's explanation as stated above does not cover the period after the replying affidavit was ready and when it was eventually served on the respondent's attorneys. In terms of the applicants' own version the affidavit was ready in October 2020. There is a delay of two months before the respondents' attorneys were served on the 11th December 2020. The explanation given by the applicant in my view does not cover the entire period of the delay and the court in the absence of a reasonable explanation draws a negative inference that the applicant was in willful default or negligent.

[13] The applicant in his application for condonation has not put up a case for the prospects of success on the merits. The other issue that the applicant has not dealt with in his application is the issue of prejudice which ties into whether it is in the interests of justice to grant the condonation. The replying affidavit was severely late, and this defeats the point that there needs to be finality in litigation matters. This delay is prejudicial to the respondent and is not in the interests of effective administration of justice. The application for the condonation for the late filing of the replying affidavit is declined.

[14] The applicant contends that he is entitled to a variation of the settlement agreement in terms of section 8 of the Divorce Act 70 of 1979, as amended,

as it does not reflect his true sentiment and feeling. He submits that the settlement agreement was entered into under duress which was inflicted upon him by the respondent.

[15] Section 8 of the Divorce Act provides:

"A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by the court if the court finds that there is sufficient reason therefore:

Provided that if an enquiry is instituted by the Family Advocate in terms of section 4 (1) (b) or 2 (b) of the Mediation in Certain Divorce Matters Act,1987, such an order with regard to the custody or guardianship of, or access to, a child shall not be rescinded or varied or, in the case of an order with regard to access to a child, not to be rescinded before the report and recommendations referred to in the said section 4 (1) have been considered by the court".

[16] Turning to the matter before me, it becomes imperative to have a look at the specific clauses in the agreement that the applicant wishes to vary and determine whether the applicant has demonstrated sufficient reason as stipulated in section 8 of the Divorce Act.

[17] It is trite that when dealing with matters of custody and maintenance of minor children, what is most important to the court as upper guardian of all minor children, is what is in the best interests of the children.

[18] The applicant's sufficient reason in respect of seeking to vary the settlement agreement is that he signed the contract under duress. The applicant submits that the respondent has prohibited him access to the minor children from the period of 7 November 2018 to April 2019, her reason being based on the psychological report dated 29 June 2018 which classified his emotional well-being as being severely compromised. Applicant further submits that his

relationship with the respondent was so acrimonious during the divorce proceedings that his work level started to show a decline and his superior took note of that and referred him to a therapist from the wellness Centre of his employer. The report mentioned above was occasioned by the psychological services provided by the therapist.

[19] Applicant further submits in his founding affidavit that during the divorce proceedings "*I found myself haemorrhaging financially for the following reasons:*

20.1 exorbitant legal fees;

20.2 monthly maintenance demanded by the respondent;

20.3 my salary being garnished for arrear maintenance in excess of R5000.00 a month;

20.4 having to move to a new place that will accommodate both myself and the minor children where I was required to pay R19 000.00 for rental deposit and

20.5 having to acquire new furniture for the new abode to make it comfortable for both myself and the minor children."

[20] The applicant submits that the respondent brought an application in terms of Rule 43 wherein she sought maintenance *pendente lite* as well as contribution towards her legal fees which was another financial obligation he could not afford. The applicant further details the duress as follows in the founding affidavit:

(a) *"[27] Due to the above described physical and mental exhaustion that I was experiencing as well as the threats that I received from the respondent, at the time when the settlement agreement was received by me, as a means to end the protracted litigation, I signed the settlement agreement on 16 February 2018.*

(b) [*28] In order to avoid the imminent threat to having the Rule 43 application, which was set down for hearing for March 2018, heard and resulting in more financial hardship for me and with the thought that certainly regarding having access to the minor children on a more permanent and consistent basis, I signed the agreement.*

(c) [28] It was clear to me during the proceedings of the divorce that the respondent was more than capable of paralyzing me financially and ensuring that I do not access the minor children based on her discretion.

(d) [29] At the time I signed the agreement, I truly felt I had no other alternative than to proceed with signing such agreement in order to bring the turmoil that I was placed under to end. Again, the court is referred to the report of the therapist which confirms the above.

[21] It is trite that a contract concluded as a result of duress may be voided by the innocent party. In terms LTC Harms, Amler's Precedents of Pleadings, Eighth Edition, page 178, the party seeking to rely on duress must allege and prove the following:

(a) a threat of considerable evil to the person concerned or to her and his family;

(b) that the fear was reasonable;

(c) that the threat was of imminent or inevitable evil and induced fear;

(d) that the threat or intimidation was unlawful or *contra bonos mores; and*

(e) that the contract was concluded as a result of the duress. **BOE Bank Bpk v Van Zyl 2002 (5) SA 165 (C), Honne v Super Stone Mining (Pty) Ltd 2017 (3) SA 45 (SCA) .**

[22] Turning to the facts before me, the applicant in his founding affidavit does not show the considerable evil that is so unreasonable that a reasonable person in his position could not have resisted. The applicant has stated in his founding affidavit that the relations between him and the respondent was acrimonious at the time of the divorce, which was one of the reasons that they were divorcing. The respondent was entitled to make use of the Rule 43 application as it is but one of the options available to a party in divorce proceedings and there is nothing evil about that.

[23] The applicant has not demonstrated the existence of the threat of evil that he was fearing. On the same breath there could be no degree of measuring how serious the threat was or whether it was *contra bonos* mores, as the threat was not established by the applicant in the first place.

[24] The applicant by his own version was given the settlement agreement to consider before signing. He was given time on his own to go through the agreement and appreciate the legal implications of the terms of the agreement before attaching his signature. The respondent avers that the applicant was legally represented during the signing of the agreement, a point not disputed by the applicant and was fully aware of what was occurring, and made conscious decisions in that respect. The applicant avers that he was under the threat of the Rule 43 application when he signed. In the matters of **Sievers v Bonthuys 1911 EDL 525-532 and Salter v Haskins 1914 TPD** 264, the courts held that the threat to sue is not duress in the eyes of the law, since the courts are open to all and the only penalty for rash litigation is costs. It is my respectful view that the applicant has not fulfilled the requirements for duress.

[25] He has also failed to show sufficient reason required by section 8 (1) of the Divorce Act to vary the settlement agreement. The respondent in her answering affidavit raised a point *in limine* that the relief sought by the applicant in the notice of motion is contradictory and does not make sense. *"[6] At paragraph 1 of the notice of motion the applicant seeks to be granted primary residence of the parties' minor children (the minor children), [7] then*

in terms of paragraph 2, applicant intends to replace certain paragraphs of the settlement agreement. [8] The paragraphs that the applicant intends replacing the existing paragraphs with are contradictory to the relief sought in in paragraph 1 of the notice of motion as:

[8.1] Whilst paragraph 1 of the notice of motion seeks that the applicant be granted primary residence in respect of the minor children, the intended paragraph 5.1.2 states that the primary residence of the minor children shall be with the plaintiff in the divorce proceedings, being the respondent herein; and

[8.2] The intended paragraph 5.2 makes reference to the "Applicant". Whilst there is no applicant in the divorce proceedings and this cannot be, it appears that the reference should be "Defendant". This position does not cure the problem as it cannot be reconciled in terms of what is stated in paragraph 8.1 above.

[9] The applicant's Notice of motion which sets out the relief that the applicant seeks and provides the basis for does not make sense and is contradictory.

[10] Further, sense cannot be made of what the applicant intends, and what relief the applicant seeks

[26] The applicant's replying affidavit was disallowed because of non-compliance with the rules of court, therefore the point *in limine* stands uncontested and is accepted by the court.

[27] The respondent further contends that the applicant has not annexed his plea to the founding affidavit despite making reference to it to substantiate his allegations in his founding affidavit.

[28] A party is bound to set out clearly the relief that it seeks in order for the opposing party to know exactly what is being sought, to be able to answer to same thereto effectively. It is my view that the applicant has failed to clearly

state the relief sought in the notice of motion, and have not made out a sufficient case for the respondent to respond to.

[29] In the premises, the following order is made:

(a) The application is dismissed with costs.

M.M.D LENYAI
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the Applicant:	Adv M.R Mokwala
Instructed by:	Letlhage Attorneys
Counsel for the Respondents:	Adv B Bhabha
Instructed by:	Ningiza Horner Attorneys
Date of hearing:	01 February 2022
Date of judgment:	29 April 2022