

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION: DURBAN

CASE NO: 4657/2016

In the matter between:

H[....] A[....] K[....]

Applicant

And

F[....] K[....]

Respondent

Judgment

Lopes J

[1] Before me are two interlocutory applications in a divorce action. The parties agreed that the matter would be heard by me on the papers.

[2] In order to understand the dispute between parties, it is necessary to outline some of the history of the parties:

- (a) The applicant and the respondent were married to each other in community of property on the 23rd February 2005. That they lived together thereafter as husband and wife, is a matter of considerable dispute between the parties.
- (b) On the 30th October 2015 the applicant, H[....] A[....] K[....], issued an Islamic 'Talaq' to his wife, the respondent, F[....] K[....]. On the 17th May 2016, the applicant issued a divorce summons against the

respondent.

- (c) Initially the applicant sought only a decree of divorce and a division of the joint estate. He later, however, amended his particulars of claim, to include a claim that the respondent should forfeit the benefits of the marriage in community of property. This was on the basis that the parties had not resided together as partners in a matrimonial union would have done.
- (d) The action was defended and on the 22nd November 2016, the respondent caused the applicant to be served with a notice in terms of Rule 35 (1) of the Uniform rules, requiring that the applicant make discovery.
- (e) During February of 2017, the applicant appointed new attorneys of record, and the respondent's attorneys advised them of the applicant's need to comply with the discovery request.
- (f) An indulgence was then requested by the applicant's attorney to extend the date by which discovery was to be made to the 3rd March 2017. Despite that extension, the applicant failed to comply with the discovery order.
- (g) On the 30th May 2017, the respondent brought an application to compel the applicant to comply with the Rule 35 notice.
- (h) On the 8th May 2018 and by order of this court, the applicant was directed to comply with the respondent's notice in terms of Rule 35 within five days of service of the order upon him.
- (i) On the same day, the order was served on the applicant by affixing it to the outer gate of his residence.
- (j) An indulgence was then requested by the applicant's attorney to extend the date by which discovery was to be made to the 3rd March 2017. Despite that extension, the applicant failed to comply with the discovery order.
- (k) Pursuant to an application brought by the respondent, on the 17th January 2019 the matter came before this court and an order in the following terms was made:

- (i) A *rule nisi* (without any interim relief) was granted calling upon the applicant to show cause on or before the 20th February 2019 why an order should not be made that he was guilty of contempt of the order granted on the 8th May 2018 , and that he be sentenced to a period of imprisonment or fined. The rule also directed the applicant to show cause why he should not pay the costs of the application on an attorney and client scale. In addition to the paragraph dealing with the rule *nisi*, the applicant's claim, as set out in his amended particulars of claim which had been served on the defendant on the 17th October 2016, was dismissed with costs on an attorney and client scale. The plea which the applicant had delivered to the respondent's counter claim, which was also served on the 17th October 2016, was struck- out with costs being granted on an attorney and client scale. Further costs were granted against the applicant.
 - (ii) That order was served on the applicant on the 4th February 2019.
- (l) The matter then came before this court on the 20th February 2019, when an order was made:
- (i) Adjourning the contempt application *sine die*;
 - (ii) Directing the applicant to bring an application for rescission of the order dismissing his claim and striking-out his defence to the respondent' s counter-claim, before the 8th March 2019.
- (m) On the 15th March 2019, the applicant delivered an application for rescission. The order prayed in the notice of motion seeks condonation for the late filing of the rescission application, together with prayer 2, seeking the rescission and setting aside of the order of the 17th January 2019.
- (n) In addition to opposing the applicant' s rescission application, the respondent delivered her own application to strike-out the

rescission application, and sought an order the applicant pay the costs on an attorney and own client scale.

- (o) Answering and replying affidavits were delivered in both applications. An order of this court has directed that the two applications be heard together.

[3] Mr *Haasbroek*, who appeared for the applicant, submitted that the applicant has given a reasonable explanation in respect of his failure timeously to lodge the application for rescission. In terms of the order of the 20th February 2019, the applicant was directed to bring his application for rescission of the order dismissing his claim, and striking-out his defence to the applicant's counterclaim (the order of the 17th January 2019) on or before the 8th March 2019. The application was in fact issued four days' late on the 15th March, 2019. I have no doubt from the affidavits in the papers, that the applicant has shown good cause for his failure to lodge the application for rescission timeously. Given that it was four days' late there cannot be any prejudice to the respondent, especially in circumstances where neither the applicant, nor his attorney, was present in court on the 17th January 2019. The applicant was advised that the matter had been adjourned to the 20th February 2019, but thereafter found himself in a position where it was advisable to change his legal representation. After the 20th February 2019, the applicant and his new attorney proceeded to make enquiries of his erstwhile attorney, to ascertain what had happened with regard to the hearing on the 1st January 2019.

[4] Ms *Qono-Reddy*, who appears to for the respondent, records that the respondent abides my decision in respect of the application for condonation for the late delivery of the rescission application. I am of the view that, as no prejudice is occasioned to the respondent, and as good cause has been shown by the applicant for the grant of condonation for the late delivery of his rescission application, that application should be granted.

[5] I am also in receipt of an application for the condonation of the late filing of the applicant's heads of argument. This appears to have been occasioned by a miscalculation of the *dies* by his counsel and attorney. Once again, an

explanation has been given which I am inclined to accept and there has been no prejudice to the respondent. Condonation should be granted for the late filing of the applicant's heads of argument.

[6] In terms of the joint statement of issues submitted by the parties, it remains for me to decide whether:

- (a) The applicant has demonstrated sufficient cause for his default of appearance on the 17th January 2019. The respondent contends that the applicant has failed to demonstrate sufficient cause for his default.
- (b) The respondent contends that I am to determine whether the applicant was in contempt of the order dated the 8th May 2018; if he was, whether he is liable to pay the costs of the contempt application as a consequence of his delivery of the response to the Rule 35(3) notice on the 20th February 2019.
- (c) Whether the respondent has demonstrated the exceptional ground to invoke her application to strike-out the applicant's application for rescission.

[7] With regard to the three orders of this court, the correct position is:

- (a) On the 8th May 2018, the applicant was directed to comply with the respondent's Rule 35(3) notice, within five days of the service of the order upon him.
- (b) On the 17th January 2019, a rule *nisi* was issued calling on the applicant to show cause why he should not be held in contempt for not having delivered his reply to the Rule 35(3) notice. In addition, his claim in the action was dismissed with costs, as was his plea to the respondent's counterclaim in the action.
- (c) On the 20th February 2019, the contempt application was adjourned *sine die*, and in addition, the applicant was directed to bring his application for rescission by the 8th March 2019.
 - (i) With regard to the contempt of court, an order was made on

the 8th May 2018 directing the applicant to deliver his discovery affidavit, and that order was served by affixing a copy to the drive-way gate of the applicant's premises;

- (ii) The applicant denies having received a copy of that order. In matters of applications for contempt of court, it is the practice in this division that personal service is affected of the order in respect of which a person is allegedly in contempt. The applicant was not at court on the 17th January 2019 which is no doubt one of the reasons why the learned judge granted a rule *nisi* in respect of the contempt, which rule was extended to the 20th February 2019. On the 20th February 2019, the applicant was represented in court, delivered his reply to the respondent's Rule 35(3) notice, and an order was granted adjourning the contempt application *sine die*.

The adjournment of a contempt application without the extension of the rule normally has the consequence that the rule lapses. That does not mean, in my view, that the contempt application was necessarily terminated, but the rule was effectively discharged (an application could have been made to reinstate the rule). There was no obligation on the applicant to deal with the contempt application.

[8] Contempt of court orders in the realm of civil litigation have, unfortunately, become an easy and ready tool to be used as a weapon to pressure litigants, in particular, in matrimonial matters. It is often the case that, where a party is alleged to be in contempt because of a failure to deliver a notice, the delivery of the notice is broadly regarded as purging the contempt and, save for matters of costs, the rest of the action then proceeds.

[9] There is no doubt that the applicant was aware of his obligation to reply to the Rule 35(3) notice during 2018. It is also clear that the applicant was relying on legal advice, and the applicant maintains that, at a consultation with one of his erstwhile attorneys, he provided all the relevant documents in his possession. The applicant was of the understanding that his erstwhile attorney would respond to the Rule 35(3) notice, but she did not do so. It would appear from the papers

that the applicant only became aware of the order of the 8th May 2018 when the contempt application papers were served on him during October or November of 2018. The applicant then consulted with the second of his erstwhile attorneys, and was advised during January of 2019 by that attorney that the application had been adjourned to the 20th February 2019 and that the applicant should obtain local legal representation. The second of the applicant's erstwhile attorneys was from Gauteng.

[10] Thereafter, the applicant consulted with his counsel and current attorney, and on the 20th February 2019, the Rule 35(3) reply was delivered. It was, apparently, only on the 20th February 2019 and after delivering his answering affidavit in the contempt application that he realised that an order had also been granted dismissing his claim and plea to the respondent's counterclaim in the divorce action. That precipitated a course of enquiry which concluded, for the reasons stated in the applicant ' s founding affidavit, with his application for rescission being late .

[11] There is accordingly a lack of clarity about when exactly the applicant became aware of the order of the 8th May 2018. For the reasons that: there was a lack of personal service: the applicant's denial that he had been served with or had initially become aware of the order of the 8th May 2018: the succession of attorneys which assisted him: and the fact that on the 17th January 2019 the rule *nisi* lapsed when it was adjomned *sine die* without extending the rule on the 20th February 2019, I find that the applicant is not in contempt of the order of the 8th May 2018.

[12] For the same reasons, I am of the view that the applicant has shown good cause for the rescission of the order of 17th January 2019 setting aside his particulars of claim and plea to the counter-claim in the matrimonial action.

[13] A further consideration in dealing with the applicant's alleged contempt, . is the complete failure by the respondent to do anything between May of 2018 and the launch of the contempt application in October or November of 2018.

[14] With regard to the requirements for the rescission of a judgment,

See :Lodhi 2 Properties Investments CC & another v Bondev

Developments (Pty) Ltd 2007 (6) SA 87 (SCA) at 94 and;

Colyn v Tiger Food industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA).

[15] With regard to the requisites for contempt and the differences between civil and criminal contempt,

See *Matjhabeng Local Municipality v Eskom Holdings Ltd & others* 2018 (1) SA 1 (CC).

[16] With regard to the bringing of the application to strike-out the applicant's rescission application:

- (a) The applicant's application was issued on the 15th March 2019. Respondent's answering affidavit was delivered on the 23rd April 2019. That answering affidavit seeks an order that the application for rescission be dismissed with costs. The applicant's replying affidavits was delivered on the 15th May 2019.
- (b) For reasons which I am wholly unable to comprehend, on the 9th September 2019, the respondent brought an application seeking condonation of the late filing of her replying affidavit in the contempt of court application, holding the applicant in contempt of the order of the 8th May 2018 and seeking confirmation of the rule granted on the 17th January 2019 in the contempt application. Part B of that application seeks the striking-out of the applicant's rescission application together with costs on an attorney and own client scale. As all of this could have been dealt with in the main application, it is even more puzzling that the striking-out application is dealt with in affidavits deposed to by the respondent's attorney. The matter was set down for hearing on the 29th January 2020. In the founding affidavit, she sets out a history of the matter, all of which is ascertainable from the founding affidavit of the applicant in the rescission application read together with the respondent's answering

affidavit. That answering affidavit is in any event included in the application to strike-out.

[17] In my view, the application to strike-out is flawed because the *rule nisi* relating to the contempt application which was granted on the 17th January 2019 is incapable of being confirmed because it has not been set down again, having been adjourned *sine die* on the 8th February 2019. The contempt of court proceedings are not set down in the application presently before me. What remains to be considered is the striking-out of the rescission application. There was no need to bring a separate application for the striking-out of the rescission application when it was dealt with in the respondent's answering affidavit in the main application. The answering affidavit seeks no more than an order that the application for rescission be dismissed with costs.

[18] Accordingly, in my view, it was wholly unnecessary for a separate striking-out application to have been brought. The striking-out application is in any event irregularly sought because it is deposed to by the respondent's attorney in circumstances where the application should have been brought on the basis of an affidavit deposed to by the respondent herself, perhaps with a confirming affidavit from her attorney. For her attorney, in these circumstances, to bring the striking-out application by herself deposing to the affidavits is an irregular procedure.

[19] With regard to the question of costs, the parties, and to some extent their attorneys, have been lackadaisical in their conduct of the action. It would appear that the various applications have been used for the purpose of raising the temperature in the divorce action which appears to have only one issue - that being forfeiture. The applications appear to be an extension of the ongoing and bitter matrimonial dispute. With proper cooperation and management of the matrimonial action by the parties' legal representatives, it should never have been necessary for these matters to have come before me. In all the circumstances, it would not assist if I were to add to the temperature of the litigation by making orders of costs against either of the litigants. In all the circumstances, it would be just and equitable were they have each to bear their

own costs with regard to the applications before me. The parties' legal representatives really need to get on with the action and finalise it.

[19] In all the circumstances, I grant the following orders:

- (a) The applicant's application for condonation for the late filing of his heads of argument and practice note is granted.
- (b) The applicant's application for condonation for the late delivery of his application for rescission is granted.
- (c) The orders granted in this court in favour of the respondent on the 10th January 2019, which constitute paragraphs 2, 3 and 4 of the order of the 17th January 2019 are rescinded and set aside.
- (d) The application to strike-out the applicant's rescission application is dismissed.
- (e) Each party is to bear their own costs with regard to both of the applications before me, save that the respondent's attorney may not recover any of the costs of the counter-application from the respondent.

Lopes J

Date of hearing: 23rd June 2020 (Matter heard on the papers).

Date of Judgment: 27th July 2020 (judgment handed down electronically).

Counsel for the Applicant: P Haasbroek (instructed by Rajesh Hiralall Attorneys).

Counsel for the Respondent: Z Qono-Reddy (instructed by Aashia Salojee Inc).