IN THE HIGH COURT OF SOUTH AFRICA
TRANSVAAL PROVINCIAL DIVISION

2005-08-31

CASE NO:28997/04

In the matter between:

LEONETT BEZUIDENHOUT **APPLICANT**

and

SCHALK PIETER HENDRIK BEZUIDENHOUT **RESPONDENT**

JUDGMENT

MA VUNDLA. J

1. This is an application to rescind and set aside an Order granted by my learned brother *Mr Justice Patel* on the 28th May 2004 under Case No.1 0247/2002 and substituting same with an Order that each party pays its own costs.

2. This application was initiated by the Applicant on the 2nd November 2004 almost FIVE months and a week after the Order was granted.

3. The background as sketched by the Applicant is briefly that, she and the respondent were married to each other in community of property on the 10th April 1972, out of which marriage two children were born viz. L and L respectively born on the [.....] and [.....], the last mentioned child passed away on the 15th June 1993.

4. The Applicant received the Combined Summons on the 21st June 2002. On the 21st July 2002 the matter was set down for hearing but it was removed from the roll. Only on the 9th September 2002 does she go to instruct attorney Van Vuuren. She subsequently makes appointments for consultation and with her attorney and all these efforts came to naught until she stormed into her attorney's office all the 14th July 2003 to uplift her file. This effort did not yield results. She goes to other attorneys Messrs Mercades & Schoeman on the 15th July 2003 whereafter she begs for her file and takes it to her present attorneys of record. She had on the 29th October received what she refers to as Summons from the Respondent's new attorney of record. On the 28th May 2004 she awaits her attorney, Mr Van Vuuren at Court, who arrives only at 10HOO and at that time the matter had been finalized.

5. Annexure "A" which is supposed to be the copy of the Combined Summons and Annexure "B" which is the Court Order by my brother *Mr Justice Patel* under Case No. 10247/2002 are not attached on the papers. However, copies thereof have since been made available to me.

6. The reason for the order having been granted in her absence is that her attorney of record advised her to wait on the ground floor. Her attorney did not even come at 1 OHOO and by the time he came a final order had been granted.

7. She then sets out that she was in 1997 employed at Sanlam. In 1999 she resigned from her work and got a package of R65 000 and she used it to pay 20% deposit towards their house. She sets out how they respectively contributed towards the joint estate and that they both contributed until 1999 when the Respondent contributed less. She further says that Respondent had

asked her to obtain a loan so that he can take the money and use it. He sold his car to maintain himself.

8. Respondent is opposing the application on the following grounds:

8.1 There is no application for condonation as the Final Order of Divorce was granted on the 28th May 2004 and the application for rescission was brought on the 2nd November 2004 well beyond 20 days as required by Rule 31(2)(b). He applies for condonation of the late filing of his answering affidavit. The reason for the late filing of his answering affidavit is due to the fact that the parties had been engaged in settlement efforts which came to naught.

9. **Legal Principles**

The Applicant in her affidavit states that she is bringing the application under common law. It has been submitted on behalf of the Respondent that the application was not brought within 20 days after the Order was granted, as required by the rules. It has also been submitted on behalf of the respondent, quite correctly in my view, that this application does not reside within the ambit

of rule 32(1)(b) and Rule 42.

10. The requirements for brining an application for rescission under the common law are clearly set out in **Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others 1996(4) SA 411 at page 417** where Van Reenen J states:

"In terms of *common law,* a *court has discretion to grant rescission* of *judgment where sufficient or good cause has been shown. But it is clear that in principle and in the long-standing practice* of *our Courts, two*

essential elements of "sufficient cause" for rescission of a *judgment by default are:*

10. 1 *that the party seeking relief must present* a *reasonable and acceptable explanation for his/her default*

10.2 that on the merits such party has a **bona fide** *defence, which prima facie, carries some prospect of success* (See **Chetly v Law Society of Transvaal 1985(2) SA 756 A at 765 B - C, Athmaram v Singh 1989(3) SA 953(d) at 954 E-F)."**

It is not sufficient if only one of these elements is established.

The Applicant must establish that she has a **bona fide** defence to the claim which **prima facie** carries some prospect of success. See **De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 AD at 1042 H**

11. In the case of **Grant v Plumbers (Pty) Ltd 1949(2) SA 470(0)**

Brink J at 476 - 477 stated that:

"(a) *He must give* a *reasonable explanation of his default. It if appears that his default was wilful or that it was due to gross negligence, the Court should not come to his defence.*

(b) His application must be ***bona fide*** *and not made with the intention of merely delaying Plaintiff's claim.*

(c) He must show that he has a ***bona fide*** *defence to the Plaintiff's claim. It is sufficient if he makes out* a *prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour'.*

12. In the De *Wet and Others Western Bank Ltd supra Trengrove AJA* states that under common law the Courts discretion much extends beyond the grounds provided for in Rule 31 and 42 (1)

13. The starting point is to look at whether the application has been brought within a reasonable time. This is so in view of the fact that the Applicant has resorted to bring this application in terms of the common law. The **dies** prescribed in the rules for brining an application for rescission are therefore not applicable in **casu**.

14. The Applicant was aware that the matter was coming at Court on the 28th May 2003. On her version she proceeded to Court and on the advice of her attorney she waits at the ground floor. Her attorney arrives late after an Order had been granted. She does not explain why she did not immediately upon coming to know of the Order of the 28th May 2003 not take steps to bring application for rescission.

In Mkwanazi and Another v Manstha and Another 2003 (3) All SA 222(T) 230 at paragraph 26 *Van Rooyen AJ* says:

> *"Even if applicant had not terminated his attorney's mandate, it is unlikely that* a *reasonable explanation would have been established. In* **Colyn v Tiger Food Industries Ltd *tla* Meadow Feed Mills Cape** 2003 (2) All SA 113 (SCA) *Jones AJA* stated as follows:
>
> *"While the courts are slow to penalize* a *litigant for his attorney's inept conduct of litigation, there comes* a *point where there is no alternative but to make the client bear the consequences of negligence of his attorney.* .. "

I sanguine myself with this dicta.

From the Respondent's version it would seem that there were negotiations to try to settle the matter, which efforts of negotiation come to naught. Read put from page 230 2003/(3) All SA 222 at ....

15. On what is a reasonable time depends upon the circumstances of a case. Although in **Moeketsi v Attorney General, Bophuthatswana & Another 1996(3) ALL SA 184** the question of reasonable time arose in the context of the delay, in prosecuting an accused person in a criminal trial, it would seem however that the court must look at the length of the delay, the reasons for such delay (whether due to the State, circumstances, justice system or accused)) waiver by the accused, prejudice to the accused. These factors have to be weighed against each other. In my mind for purposes of a civil trial a reasonable time can be measured as follows, the length of delay, the reasons for such delay (whether due to Applicant or Respondent, waiver by the Applicant and prejudice to the Respondent and or the Applicant).

16. The Applicant had an attorney. If she was dissatisfied with the said attorney she should have taken immediate steps to give instructions to another attorney, who in turn would have secured for her the relevant file. On the contrary she stormed into the attorney's office on the 14th July 2003 and allowed herself to be calmed down. On the 15th July 2003 she approached other attorneys but decides to go back to this very attorney who made her "Moedeloos". Nowhere in her papers does she say she gave him immediate instructions to bring an application to rescind and vary the order that she was not happy with.

17. **Promedia Orukkers** & **Uitegewers (Edms) Bpk 1996(4) SA 411 at 420A** Van

Reenen J states that:

"Those decided cases which have held that there is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence were diced in the context of clients who, with knowledge that action had to be taken, sat by passively without so much as directing any reminder or inquiry to the attorney in whose hands such matter were left (**see for example Salojee and Another v Minister of Community Development 1965(2) SA 135 at 141 C - H, N N O viz Moraliswani v Mamili 1989(4) SA(1)Aat10B-D)**

18. The delay in casu was of about 5 months. During that period of five months the Respondent says there were negotiations. This is being confirmed by the Applicant in her replying affidavit. I would have expected the Applicant to raise this aspect in her founding affidavit and not react to what the Respondent says. It is for her to convince this court that the delay is not on her account.

19. I am therefore of the view that the Applicant has not brought this application within a reasonable time. The question of indulgence is a matter of the discretion of the court which will judicially exercise its discretion having taken all the circumstances into consideration.

20. The reason for the default is that the Applicant arrived at court and waited for her attorney on the ground floor. One would have expected her to inquire where in the building are divorce matters to be heard, especially when she realised that her attorney was running late. There is however, the version of the Respondent on this issue. Firstly he says he had filed a counterclaim and served a Notice of Bar upon the applicant personally on the 12th February 2004. Proof of service has been furnished by the Respondent per annexure PHB3.

Secondly, he says two days after the divorce she told him that she could not attend Court because she had a "black out".

21. The reason for her failure to attend Court must not be seen in isolation but in the background of her entire communication with her attorney, Mr Van Vuuren, whom she alleges to have been unable to consult with on various occasions, who would cancel appointments with her. I am not persuaded that the failure to attend Court on the 28th May 2003 was not as a result of her own doing. She was negligent in not ensuring that she was at Court in time. This must be seen in the context that in any event she had already been under bar and therefore even if she had attended Court she had this hurdle to go over. She could not have been heard without bringing an application for condonation. I am of the view that the Applicant has not sailed over the first requirement viz to show that she was not in wilful default or it was not due to her gross negligence on her part. Vide paragraph 14 supra.

22. Is the Applicant **bona fide** in bringing this application and what are the prospects of success? In my view, it is difficult in determining whether a person is **bona fide**. This requires to look at the subjective purpose of the Applicant, which can only be measured against the prevailing circumstances and weighed against the prospect of success. In other words, I must look at whether the applicant would be successful, if the Order were to be granted.

23. The Applicant seeks in essence to have the order altered. She has not attached a copy of the order that was granted. She has not attached the Particulars of claim and the pleadings before me. However, her counsel made available to me the particulars of claim as well as the Court order of the 28 May 2005. The particulars of claim are the general standard complain in such

matters. The reasons for the breakdown of the marriage are:

(i) there is no communication between the parties.

(ii) each party attends to his her own interests

(iii) there is no physical contact between the parties

(iv) there is no longer love relationship between the parties.

These are not persuasive reasons that will move the Court to order forfuture of the benefits arising from accrued joint estate.

24. Where the parties are married in community of property there is a joint estate. "Community of property is a universal economic partnership of spouses. All their assets and liabilities are merged in a joint estate in which both spouses, irrespective of the value of their financial contributions". **Vide The South African Law of Husband and Wife HR Hallo 5th Edition at Page 154**. I am of the view that same applies in an accrual system.

25. The Applicant should demonstrate to me that she would have succeeded in getting an Order in the main action in terms of which the Respondent is ordered to forfeit the benefits arising from the marriage. If such order is disguised as an order that each party retains their own property as their exclusive property, this must be seen in the context that in paragraph 6.14 of her founding affidavit, she says:

"Dit is my respekvolle submissie dat die Respondent onverdienstelik bevoordeel sou wees sou die Agbare Hof nie die aansoek toestaan nie". It can only mean therefore that she wants the Respondent to forfeit those benefits of the marriage. I have not been persuaded on the papers that she would succeed on this aspect in the main case. Neither has she demonstrated to me what prejudice will she suffer were the Order granted

by my brother *Patel J* to stand as it is. They have both been contributing to the growth of the joint estate.

26. For the above reasons I can therefore make induction that the Applicant does not have a **bona fide** cause in bringing this application. Neither has she demonstrated to me on a balance of probability that she has a good prospect of success in the main application.

27. Consequently, I am of the view that as the Applicant does not have a prospect of success in the main application, it will serve no purpose for me exercise my discretion in her favour, still I would dismiss her application on the basis that she has not acquitted herself on the onus of proving on a balance of probability that she has good cause in brining this application. I am also of the view that she did not bring the application within a reasonable time.

[28] Counsel for the applicant had submitted that this application is being brought in terms of Rule 31 (2)(b). This rule requires the Applicant to bring the application for rescission within 20 days after she became aware of the default judgment. She failed to do so within 20 days. I would still reach the same conclusion as I have done herein above that she failed to bring the application within 20 court days. Besides there is no application for condonation.

[29] Assuming that she wanted to straddle three horses and ride on the common law and or Rule 31 (2) (b) and or Rule 42 she still would not succeed on any of these horses. Rule 42 requires the application to be brought within 20 days. Besides the court under Rule 42 can rescind or vary the judgment:

(a) sought or obtained erroneously. There was no evidence adduced to substantiate this point. There was in fact no error in *casu*

(b) in which there is an ambiguity, or a patent error or omission .... There is no evidence to this effect either;

(c) as the result of mistake. Again there is no evidence of a mistake.

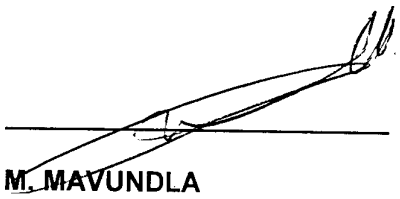
Therefore I am of the view that the applicant has not made a case either under common law, or under Rule 31 (2) (b) nor under Rule 42.

[30] In the premises the application must fail and the costs must follow the event.

ORDER

It is hereby ordered:

1. **That the application for rescission be and is dismissed.**
2. **That applicant pays the costs of this application.**



M. MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON:	19 AUGUST 2005
APPLICANT ADV.	Z SCHOEMAN
RESPONDENT ADV.	C.A KRIEL