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REPUBLIC OF SOUTH AFRICA



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

CASE NO: A3079/15

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:-

[D.....], [M.....] (born [B.....])

Appellant

And

[D.....], [A.....] [M.....]

Respondent

Appeal – Rescission of default judgment – Judgment divisible into distinct elements - Partial rescission of proprietary aspects of divorce judgment from divorce order - Court can rescind proprietary aspects of judgment without

unravelling divorce decree and costs order, if divisible and distinct from each other.

JUDGMENT

CORAM: WEPENER J AND CRUTCHFIELD AJ

[1] This appeal is against the whole of the judgment of the Regional court for the Regional Division of Gauteng, held at Randburg, ('the regional court'), in which that court dismissed the rescission application ('the rescission application'), with costs under case number GPRANRC 234/2012.

[2] The appellant in this court was the applicant in the rescission application and the defendant in the divorce proceedings issued in the regional court.

[3] The respondent appeared in person at the appeal hearing.

[4] The purpose of the rescission application was to set aside the regional court's order granted in the parties' divorce proceedings, in the absence of the appellant.

[5] The respondent, *qua* plaintiff, issued divorce proceedings on 15 March 2012 in the regional court. The appellant opposed the proceedings, and filed a plea and counterclaim ('the divorce proceedings').

[6] It was common cause in the divorce proceedings that the parties were married to each other on 14 December 1974 in community of property. There were no children relevant to the divorce proceedings. The parties had not lived

together as husband and wife since 14 December 2009, and both parties sought an order of divorce. This much was made clear by the respondent in person at the appeal hearing.

[7] The respondent claimed a decree of divorce, division of the joint estate, or, that each party retain the property already in their possession as their sole property respectively.

[8] The appellant filed a plea incorporating various special pleas, a plea to the merits and a counterclaim for a divorce, division of the joint estate, forfeiture by the respondent of the patrimonial benefits of the marriage in their entirety and costs.

[9] For reasons which will be canvassed more fully hereunder, the appellant was absent from court on the day of the divorce trial. The regional court, having heard the respondent's *viva voce* evidence, granted a decree of divorce, ('the divorce decree'), ordered an equal division of the joint estate, and made no order as to costs ('the divorce proceedings judgment').

[10] On 23 February 2014, the appellant issued the rescission application claiming rescission of the divorce proceedings judgment and costs only in the event of opposition.

[11] The respondent opposed the rescission application and a full set of affidavits was filed by the parties. It is unnecessary to refer to the technicalities which arose from the appellant's affidavits in the rescission application.

[12] On 2 June 2015, the regional court, having heard both parties' legal representatives, dismissed the rescission application with costs. ('the rescission judgment'). As stated afore, it is this rescission judgment that is the source of this appeal.

[13] Thereafter, the appellant served her notice of appeal.

[14] Section 36(a) of the Magistrates' Courts Act, 32 of 1944 ('the Act'), permits a magistrate's court to rescind a judgment granted in the absence of a litigant. The procedural requirements are governed by subrules 49(1) to (6) of the magistrates' courts rules.

[15] As referred to by the regional court:

"... Rule 49(1) provides that a court may rescind or vary a default judgment on such terms as it may deem fit upon good cause shown; or if it is satisfied that there is good reason to do so.

The term "good cause" in the context of the rescission of judgments is generally accepted to mean that the applicant must provide a reasonable explanation for his default; must show that he has a bona fide defence; and that the application is made bona fide.¹"

[16] A court has a wide discretion in evaluating 'good cause', the intention being to ensure that justice is done.²

¹ Eugene Phillips T/A Southern Cross Optical v SA Vision Care (Pty) Ltd 2000] 1 All SA 368 (C) at 368- 369

² Erasmus *Superior Court Practice*, Second Edition, Van Loggerenberg, Vol 2 at D1-365 – D1-366

[17] Hence, the appellant, in order to found success in the rescission application, was obliged to:

- 17.1 Explain fully and in a manner that allowed the court to truly understand the reasons for her non-appearance. The explanation should not appear wilful or due to gross negligence.
- 17.2 Be *bona fide* and not merely intent on delaying the respondent's claim; and
- 17.3 Demonstrate a *bona fide* defence to the respondent's claim. A *prima facie* defence, or a triable issue such that if the facts alleged were proven at trial the appellant would be entitled to the relief sought, will suffice.³ The court must look to the pleadings only and not to the evidence.

[18] The respondent did not furnish any evidence that served to contradict or undermine the facts alleged by the appellant, that:

- 18.1 She planned, booked and paid in respect of her travel arrangements, (which overlapped with the trial date), in advance of her attorney receiving notice of the trial date.
- 18.2 The travel costs were non-refundable.

³ Arend v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C) at 303 and 304

- 18.3 The appellant confirmed her travel plans on 9 March 2014. The date of her intended departure from Or Tambo International was 29 April 2014.
- 18.4 The appellant would be absent from the Republic on the allocated date of the trial, 13 June 2014.
- 18.5 The appellant instructed her attorney of record ('the attorney'), to take whatever steps were necessary pursuant to her envisaged absence on the trial date, which her attorney undertook to do, and did do, although an error occurred in the process thereof.
- 18.6 The correspondent attorney ('the correspondent'), who attended court on the trial date, although tasked to procure the necessary postponement, mistakenly appeared in the incorrect court.
- 18.7 Accordingly, the correspondent was not able to locate the trial on behalf of the appellant, and assumed, (incorrectly), that the trial had not been set down for that day.
- 18.8 Furthermore, the correspondent received confirmation from the clerk of the court (albeit the incorrect court), that a notice of set down had not been filed in the matter and it was not enrolled for that day.

18.9 It was only subsequently, on 23 June 2014, that the appellant became aware of the divorce proceedings judgment, when her rental agent communicated that the respondent sought access to an immovable property comprising part of the joint estate in order to sell it.

[19] In the final analysis, the reason why the divorce proceedings judgment was taken in the appellant's absence was because the appellant's attorney failed to advise the correspondent that the matter was set down in the regional court.

[20] It speaks for itself that a simple mistake occurred. This cannot found a reason to refuse the rescission of the divorce proceedings judgment.

[21] It is not for this court to speculate as to whether or not the postponement application by the correspondent would have succeeded. This court is tasked only with assessing whether or not a reasonable explanation of the appellant's default, (which does not appear to be wilful or due to gross negligence), is established by the appellant.

[22] Wilfulness or recklessness cannot be ascribed to the appellant, her attorney or the correspondent.

[23] Nor can the applicant be described as anything other than *bona fide*. No evidence was proffered as to any intent on the appellant's part to delay finalisation of the divorce proceedings.

[24] To the contrary, the evidence was to the effect that the appellant took the necessary steps to prosecute her defence and counterclaim in the divorce proceedings. Furthermore, the appellant attended upon and instructed her attorney to procure a postponement of the date of the divorce trial, due to her anticipated absence on the day. Hence, this court cannot find that the appellant was not *bona fide* in the sense envisaged by the Rule.

[25] As to the existence of a valid and bona fide defence to the respondent's claim in the divorce proceedings, the appellant's plea and counterclaim contain sufficient averments set out in an adequate manner. A valid and bona fide defence and a triable counterclaim, clearly exist.

[26] The necessary *facta probanda* of the appellant's counterclaim for a forfeiture by the respondent of the patrimonial benefits of the marriage in community of property, (in terms of section 9 of the Divorce Act no 70 of 1979), are adequately pleaded. The fact that the appellant may choose to bring certain amendments to the plea or counterclaim, does not serve to make the defence any less valid for the purposes hereof.

[27] Accordingly, it is appropriate for this court to set aside the rescission judgment, as we intend to do hereunder.

[28] As to the effect of setting aside the rescission judgment, it would automatically result in the rescission of the divorce proceedings judgment, and the parties returning to a state of matrimony, in the eyes of the law. Moreover,

the automatic consequences attendant upon a marriage in community of property would operate with immediate effect.

[29] This is in circumstances where the divorce proceedings judgment was granted on 13 June 2014, and, the parties have been divorced, at this stage, for approximately eighteen (18) months. It would be inappropriate and would serve to complicate the parties' lives unnecessarily and across multiple aspects thereof, were a court to countenance such circumstances.

[30] To set aside the divorce *per se* between the parties, and return them to a state of matrimony pursuant to an automatic consequence of the legal process, and, not as a result of a personal choice purposely made by each of them, would be to undermine, even deny, their respective rights of dignity, including their right to privacy.

[31] Given that both parties claim a decree of divorce in the divorce proceedings, that there are no minor children relevant to those proceedings, and no claim by the appellant for spousal maintenance, it would serve the interests of justice to craft an order that permits, in effect, the prevailing divorced status of the parties to continue, whilst simultaneously affording the appellant the opportunity to which she is entitled, to prosecute her claim aforementioned, and we intend to make such an order.⁴

[32] To grant an order to the contrary would result in the parties' patrimonial affairs being automatically subject to the legal consequences of a community of

⁴ MR v MM case no 52110/2007 dated 27 May 2011 NGHC

property marriage. This would be untenable given the parties existing divorced status.

[33] The question of whether a judgment can be rescinded in part was considered by Fischer AJ, in this court, in *Conekt Business Group (Pty) Ltd v Navigator Computer Consultants CC*.⁵

[34] In that matter, the court dealt with the wording of rule 31(2)(b) of the rules of the High Court, which provide in similar terms to rule 49(1) of the magistrates' court rules, that the High Court is empowered upon good cause being shown, to 'set aside the default judgment on such terms as to it seems meet.'⁶

[35] Fisher AJ considered the 'differing lines of cases on the question' 'as to whether (a) judgment can be rescinded in part.'⁷

[36] In so doing, Fischer AJ declined to follow the 'line of cases which holds that the rule does not, on a literal reading thereof, permit of a setting aside of part of the default judgment', and preferred instead to follow Flemming DJP, who, in dealing with the equivalent provision in the Magistrates' Court, 'declined to follow the line of cases which precluded a partial rescission.'

[37] Fischer AJ quoted Flemming DJP who stated in this regard:

⁵ *Conekt Business Group (Pty) Ltd v Navigator Computer Consultants CC* 2015 (4) SA 103 (GJ)

⁶ Rule 32(1)(b) Uniform rules of court

⁷ *Conekt Business Group (Pty) Ltd* supra [22] to [33]

'I find myself in disagreement with the reasoning in the Zealand case and subscribe to the opposite interpretation of the Supreme Court Rule. That also implies that although there is only one judgment even when plaintiff succeeded on five contracts, a defendant need not be given rescission on five causes of action if he has a defence only on one contract.' (In this case there are distinct causes of action for capital, for mora interest, and for agreed costs). As is by now predictable I conclude that similar wording in the Magistrates Court Act bears a similar meaning.

[26] *Flemming DJP* further entrenched this finding in *Revelas and Another v Tobias* in which he stated the following:

*"Insofar as the question arises whether the Court in deciding on rescission of orders is bound to an all or nothing approach, I mention two aspects. Firstly, Court Rule 31(2)(b), in authorising an order rescinding a default judgment 'on such terms as to it seems meet', to my mind authorises qualified or conditional orders. That sets the tone for rescinding the order striking out a defence, especially if one assesses the matter in the context of a Court's inherent jurisdiction to govern matters in the interests of effective administration of justice. (Both the striking out of the defence and the eventual judgment ordering defendants to pay an amount were default judgments.) Secondly, I have expressed views (which I still hold) in the matter of *Silky Touch International (Pty) Ltd and Another v Small Business Development Corporation Ltd* [1997] 3 B All SA 439 (W)."*

[27] In *Silky Touch* *Flemming DJP* cited with approval the approach taken in two Namibian cases: *Maia v Total Namibia (Pty) Ltd* and *SOS Kinderdorf International v Effie Lentin Architects*.

[28] The reasoning adopted in the *SOS Kinderdorf* case is indeed instructive in interpreting the rule. *Levy J* stated as follows in this regard:

"The Rules of Court constitute the procedural machinery of the Court and they are intended to expedite the business of the Courts. Consequently they will be interpreted and applied in a spirit which will facilitate the work of the Courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible..."

...

There is no reason why this pattern should be deviated from where a plaintiff has already obtained a default judgment in respect of more than one but separate claims, and the defendant shows a defence to some of plaintiff's claims, or to a part of the claim, which is divisible from the whole. For example, where a plaintiff is granted default judgment in respect of the payment of a sum of money as well as delivery of certain goods, and the defendant can show a bona fide defence to one or the other, there is no reason why the plaintiff should not be entitled to judgment in respect of the claim which defendant cannot defend. The

essential question is whether the claim or claims in respect whereof default judgment has been given is divisible.”

[29] In relation to an argument raised to the effect that the words ‘on such terms as to it seems meet’, refer only to matters ancillary to the default judgment, such as costs or periods of time within which to file subsequent pleadings, Levy J held as follows:

“I fail to see any reason for limiting the meaning of these words and the Judge’s discretion. In the interpretation of statutes words receive their ordinary grammatical meaning. Ebrahim v Minister of the Interior 1977 (1) SA 665 (A); Volschenk v Volschenk 1946 TPD 486 at 487. In Kavasis’ case the learned Judge failed to consider these words.

In De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A) the Court considered the common law in regard to the Court’s powers in the setting aside of default judgments generally, and the headnote of that case reads, inter alia:

‘Under the common law, the Courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient cause shown. This power was entrusted to the discretion of the Courts. This discretion extended beyond, and was not limited to, the grounds provided in Rules of Court 31 and 42(1) ...’

“In the absence of an express or clear statement to the contrary, a Court will not assume that its powers are curtailed. Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A) at 584A. Those words therefore must be interpreted to mean that a Court is not in any way limited in setting aside a part of a default judgment.”

[30] Levy J furthermore embarked on an examination of judgments of the Zimbabwean Appellate Division and an English decision where similar provisions to Rule 31(2)(b) were interpreted on the basis that a partial rescission was competent.

[31] He thus concluded as follows:

“Consequently, where a defendant has a defence of, say prescription, in respect of part of a claim for goods sold and delivered but not in respect of the balance, it is permissible to set aside the default judgment for that part which can be defended. The plaintiff, however, would be entitled to judgment in respect of that part of the claim for which there is no defence.”

[32] In all the circumstances I am in respectful agreement with Flemming DJP that a Court is empowered in terms of Rule 31(2)(b) to rescind part of a judgment.

[33] The aforementioned pronouncements of Flemming DJP and Levy J, notwithstanding their wide interpretation of the rule, appear to accept that,

for a partial rescission to occur, the judgment should be capable of being divided into discrete parts so that the part in respect of which there is a possible defence can be discerned. Thus, if a defence is made out which is not capable of quantification in this way or which cannot be dealt with on the basis that it can be related in some manner to a distinct part of the judgment, it would appear that a partial rescission would not be permissible. This would be the case even if it were apparent that there was no defence to the entire claim. The rationale behind this is probably the impracticability of such an approach in circumstances where there is no delineation in relation to how the partial defence would relate to the claim. What then of a situation where a defence of this nature is established to what appears to be a proportionately small part of the judgment? It is likely that, in such a case, a court would have resort to the relatively wide powers afforded by Rule 31(2)(b) to impose such “such terms as to it seem meet” so as to achieve a situation where the respective rights of the parties were, in some manner, accommodated.’

[38] In the present matter, this court is faced with three distinct components to the divorce proceedings judgment.

[39] It is not appropriate to rescind the decree of divorce, (a court cannot *unravel* the consequences of a divorce), whilst it is desirable and possible, given Fischer AJ’s findings afore, to set aside the regional court’s order for the division of the joint estate, apart from the remaining provisions of the divorce proceedings judgment.

[40] There is no reason to interfere with the regional court’s provision for no order in respect of the costs of the divorce proceedings.

[41] Thus, of the three components of the divorce proceedings judgment, only one, (that in respect of the division of the joint estate), stands to be rescinded. It is distinct and easily divisible from the remaining two and renders the divorce proceedings judgment suitable to an order of partial rescission.

[42] As regards the issue of the patrimonial consequences of the parties' divorce, this court cannot, and, should not deal with those issues, and hence they will be referred back to the regional court.

[43] It follows upon the fact that the divorce decree was granted on 13 June 2014, that the effective date in respect of which the patrimonial consequences of the parties' divorce are to be determined, is 13 June 2014.

[44] The following order is granted:

44.1 The appeal is upheld with costs;

44.2 The judgment and the order of the Regional Court for the Regional Division of Gauteng held at Randburg under case number GPRANRC 234/2012 dated 2 June 2015, is set aside and, replaced with an order in the following terms:

44.2.1 The rescission application succeeds in respect of the decree of divorce, (being paragraph 2 of the divorce proceedings judgment only), granted by the Regional Court for the Regional Division of Gauteng held at Randburg under case number GPRANRC 234/2012;

44.2.2 The costs of the rescission application in the regional court under case number GPRANRC 234/2012 are for the account of the respondent.

W L WEPENER

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

A A CRUTCHFIELD

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**