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REPUBLIC OF SOUTH AFRICA



THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
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CASE NO: 2016/ 06073

17/1/2019

In the matter between:

N K (BORN R)

APPLICANT

and

D K

RESPONDENT

JUDGMENT

NKOSI - THOMAS AJ

- [1] This is an application for the rescission of a judgment dated 20 July 2017 granting a decree of divorce (“the Court Order”).
- [2] The parties herein were married to each other, out of community of property, in terms of an ante-nuptial contract excluding community of property, profit and loss, on 22 June 1957.
- [3] The applicant alleges, at paragraph 3.5 of her founding affidavit, that she instituted divorce proceedings on 4 March 2016 under case number 43223/2015. Whilst settlement negotiations were still ongoing, the applicant, who is a seventy-seven years old housewife, was shocked to receive the divorce order forming the subject of this application.
- [4] The respondent (currently 82 years of age), on the other hand, alleges that he instituted a divorce action prior thereto and on 22 February 2016. After the Sheriff of this Court ‘s numerous failed attempts at effecting personal service on the applicant, he was advised to enlist the services of Wits Law Clinic on how to proceed in the face of the applicant’s obstructive conduct on receiving personal service of the combined summons.
- [5] The above culminated in an application for substituted service being launched and, ultimately, granted by this Court.
- [6] The impugned divorce order was subsequently granted.
- [7] Simultaneously with the rescission of the Court Order, the applicant seeks condonation for the late filing of the rescission application. She contends, in that regard, that she became aware of the Court Order for the first time towards the end of September 2017. The respondent denies this. He contends that he

personally informed the applicant of the Court Order on 17 August 2017 during a formal court appearance in the Roodepoort Magistrate Court.

[8] In order to succeed, the applicant must show good/sufficient cause. This generally entails that the applicant must:

[8.1] give a reasonable (and obviously acceptable) explanation for the default;

[8.2] show that his application is made bona fide; and

[8.3] show that on the merits she has a *bona fide* defence which *prima facie* carries some prospect of success.¹

[9] In regard to the reasonable explanation for the default, I have already stated above the circumstances under which leave to serve the divorce summons by way of substituted service was sought and had. The applicant makes imputations of fraud on the part of the respondent which resulted therein. I am enjoined to resolve this dispute on respondent's version. I, accordingly, find that the applicant has failed to put up a reasonable and acceptable explanation for her default.

[10] In regard to the existence or otherwise of a *bona fide* defence, the following are the material common cause facts:

[10.1] The parties were married out of community of property without accrual system during May 1957;

[10.2] The parties have not been living as husband and wife since 1970 inasmuch as the respondent moved out of the matrimonial bedroom then; and

¹ *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042F–1043A; *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764J–765D; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9D–F; *Naidoo v Matlala NO* 2012 (1) SA 143 (GNP) at 152H–153A; *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at 350D; *Scholtz v Merryweather* 2014 (6) SA 90 (WCC) at 93D–96C.

- [10.3] The respondent formally moved out of the common home in 1996 when the parties' youngest son completed his academic career.
- [11] The applicant does not dispute that the marriage relationship between herself and the respondent has broken down irretrievably. Accordingly, the divorce order *simpliciter* is not challenged on ground that it has been erroneously granted in her absence.
- [12] What is being challenged are the patrimonial consequences of the marriage. By granting the decree of divorce in her absence, so goes the argument, the Court deprived the applicant of the opportunity to seek a redistribution order in terms of section 7(3) of the Divorce Act in respect of which she carries a reasonable prospect of success.
- [13] It is plain that the applicant's prospects of success in respect of the divorce order are non-existent for the reason stated above.
- [14] In so far as the redistribution order sought, the applicant has not shown, on these papers, that her prospects of success in that regard are reasonable. Firstly, the applicant merely makes the bald allegation that she is entitled to such a redistribution inasmuch as she "*indirectly contributed to the growth and increase of the Respondent's estate*" without setting out the primary facts from which this conclusion has been drawn. Secondly, the applicant does not say what the extent is of respondent's estate in respect of which a redistribution is claimed.
- [15] It has to be borne in mind that although the decree of divorce was granted as recently as 20 June 2017, the parties ceased living together as husband and wife since 1970, forty-seven years ago, and the respondent left the common home twenty-six years ago, in 1996. This is, thus, not a typical case of parties

living together as husband and wife and, in the course thereof, accumulating assets or making a contribution in that regard.²

- [16] The Appellate Division, as it then was, had the following to say as regards characterisation of facts³:

“Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be called, in relation to primary facts, inferred or secondary facts ...”

- [17] In *Radebe v Eastern Transvaal Development Board*⁴ the Court had the following to say in this regard:

“If I am incorrect, or inaccurate, in regarding the crucial allegation in the answering affidavit as a conclusion of law, it is at best for appellant an inference, a ‘secondary fact’, with the primary facts on which it depends omitted...”

In the instant case it is a legal result only that has been ‘pleaded’. Respondent failed to deny these allegations in a replying affidavit. This is of no legal consequence since they do not amount to statements of fact disclosing a defence to respondent’s claim...”

- [18] It follows, from the above, that secondary facts do not constitute evidentiary material capable of disclosing either a cause of action or a defence.

² *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA); *Bezuidenhoudt v Bezuidenhoudt* 2006 (2) SA 187 (SCA) at [19], [23] and [23].

³ *Willcox and others v Commissioner of Inland Revenue* 1960 (4) SA 599 (A) at 602A.

⁴ *Radebe v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793C–E.

[19] In the result, it ineluctably follows that the applicant failed to show a bona fide defence as regards the redistribution relief, and as such, the application for rescission falls properly to be dismissed. I make no order as to costs.

**L.G NKOSI-THOMAS AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Heard: 1 August 2018

Judgment: 17 January 2019

For the applicant: Advocate Billings.

Instructed by: Cass Pieterse Attorneys

For the Respondent: In Person.