

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

CASE NO: 41019/2020

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
DATE: 13 MARCH 2023

In the matter between:

K[....] D[....] N[....]1

Plaintiff/Respondent

And

G[....] M[....] N[....]2

Defendant/Applicant

JUDGMENT

MAKUME, J:

[1] On the 4th June 2021 a decree of divorce was granted dissolving the marriage between the parties.

[2] The order of divorce further provides for the primary care of the minor children as well as their maintenance and spousal maintenance.

[3] Summons was issued on the 30th November 2020 and served personally on the Defendant on the 14th December 2020. On the 4th January 2021 the Defendant entered appearance to defend represented by Menzi Vilakazi attorneys.

[4] On the 1st March 2021 a Notice of Bar in terms of Rule 26 was served on the Defendants attorneys calling upon them to file a plea within 5 days.

[5] On the 2nd March 2021 Menzi Vilakazi attorneys withdrew as attorneys of record for the Defendant

[6] On the 10th May 2021 the Defendant was notified of the Notice of the Set down per email for the 4th June 2021.

[7] On the 31st August 2021 the Defendant filed an application seeking to rescind the Default Judgement granted in his absence on the 4th June 2021.

[8] The basis of that application was that according to the Applicant he and his wife were reconciling hence he instructed his attorneys not to file a plea and do nothing further.

[9] The Respondent/Plaintiff filed a lengthy Opposing Affidavit denying reconciliation. In the Application for Rescission the Applicant was now represented by Messrs Du Preez and Associates.

[10] On the 15th November 2021, the Applicant approached a third set of attorneys being Messrs DS Attorneys of Johannesburg. The Respondent/Plaintiff filed heads of argument during February 2022. On the 24th May 2022 the Applicant (Defendant) withdrew the Application for Rescission of Judgement and tendered wasted costs on a party and party scale. A bill of costs for taxation was prepared and is being opposed.

[11] On the 19th August 2022 a fresh Application for Rescission of Judgment was filed by the Applicant's third set of attorneys. In this second application the Applicant prays for the following relief:

11.1 That the order granted on 4th June 2021 by her Ladyship Madam Maier-Frawley under case number 41019/2020 be rescinded and set aside.

11.2 That the bar against the Defendant/Applicant be uplifted.

11.3 That the Defendant/Applicant be ordered to file his plea within 15 days of the date of the order.

11.4 That the Plaintiff/Respondent be ordered to pay the costs of the application only in the event of opposition.

[12] The basis of the rescission as set out in the Founding Affidavit is that:

12.1 The order was erroneously sought and granted in the absence of the Applicant.

12.2 The Notice of Set down was never served on him in terms of the Rules after he has been placed under bar.

12.3 The Court erred by granting a decree of divorce without having considered the whole law of "*lex causae* of the marriage being the law of the Democratic Republic of Congo."

12.4 He was under the impression that he and his wife were reconciling hence he did not file his plea despite him having received a Notice of Bar.

[13] This application is based on the provisions of Rule 42 (1) (a) of the Uniform Rules of Court which reads as follows:

“The Court may in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescinded or vary:

(a)An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.”

[14] The Applicant contends that the erroneous granting of the Default Judgment is because he firstly did not receive the notice of set down for the 4th June 2021. Secondly that because he and this wife had become reconciled he instructed his attorneys to withdraw and not file a plea and or counterclaim despite the fact that he had been placed under bar in terms of Rule 26 of the Rules of Court.

[15] This Court accepts that when he instructed his attorneys to withdraw despite the Notice of Bar he must have told them of the reason why he no longer wished to be involved in the litigation. It is common practice amongst legal practitioners that when such an instruction is given especially where rights such as those arising out of marriage are involved then the attorneys will place it on record that “according to my client the parties have become reconciled and I have been instructed to withdraw as attorneys of record.”

[16] This did not happen. There is also no Affidavit from Menzi Vilakazi attorneys to confirm the Applicant’s reasons for having instructed them to withdraw.

[17] The second issue is that the Applicant says that he never received the Notice of Set down for the 4th June 2021 despite the fact that same was emailed to him on the email address provided by his previous attorneys Attorney Menzi Vilakazi.

[18] In paragraph 20 of his affidavit in the first rescission application he says the following:

“I am often very busy with work and on call and I did not receive the email and read it regarding the Notice of Set-down.”

[19] This statement is belied by what appears in an email dated the 26th August 2021 written by the Applicant and or his partner Denise P Steele in which email says the following: "I received the email for the notice of set down."

[20] This statement clearly means by the 14th May 2021 which is the date on which it was emailed to him he was aware that the Respondent will be proceeding to Court on the 4th June 2021 to seek relief as prayed for in the summons which he has received and was aware of.

[21] In his Replying Affidavit in the first rescission he now changes and say he never received the email confirming the notice of set-down. In the Founding Affidavit in the new application he now says that Ms Steele email dated 26th August 2021 is incorrect.

[22] He now says that he never told Ms Steele that he had received a Notice of Set-down on the 14th May 2021 he says Ms Steele assumed he did because the attorneys referred to the Notice of Set-down. The strange thing is that Ms Steele has not filed a supporting or confirmation affidavit as a result the Applicant is in my view speculating. Why is there no affidavit by Steele.

[23] The applicant alleges further without elaborating that the Notice of Set-down was not served on him in terms of the Rules and practice of this honourable court.

[24] The Notice of Set-down was correctly served on the Applicant in accordance with the provisions of Rule 4a (1) (C) which reads as follows:

"Service of all subsequent documents and notices not falling under Rule 4(1)(a) in any proceedings on any other party to the litigation may be effected by one or more of the following manners to the address provided by that party under Rules 6(5) (b); 6(5) (d)(i) 17(3) 19(3) or 34(8) by (c) facsimile or electronic mail c) facsimile or electronic mail to the respective address provided."

[25] The Applicant in his heads of argument at paragraph 24 thereof makes a glaring misstatement of the legal position by saying that Rule 4 of the Uniform Rules

does not make provisions for service by way of fax or any other electronic media. He chooses not to refer to Rule 4A (1)(i) which clearly allows for such services. The Applicant is not being truthful and is bent on misleading the Court.

[26] The email address at which service was effected is an address provided by his own legal representative when they withdrew. The Applicant has not denied that it is his email address. The Applicant is a learned person and should not be treated like a person foreign to legal process. He is a busy medical practitioner who has lived in this Country for many years. His claim for fraudulent misrepresentation by the Respondent is but one of his efforts to hood wink and mislead this Court.

HAS THE APPLICANT SATISFIED THE REQUIREMENTS OF RULE 42 (1) (a)?

[27] In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware which would have precluded the granting of the judgment and which would have induced the court if aware of it not to grant judgment.

[28] The Applicant knew about the date of the hearing of the divorce matter and chose not to be present at Court to inform the Court at the least that he and the Respondent were “reconciling.”

[29] The Applicant despite having been told on the 7th June 2021 that the divorce has been finalised only launched his first application for rescission of judgment on the 31st August 2021 a period of more than two (2) months. He thereafter dragged the matter on until heads of argument were filed then decided to withdraw that application and started a new application when he could have simple moved for an amendment. All this in my view were delaying tactics tying the Respondent hands from executing on the judgment granted in her favour.

[30] The Applicants application for rescission of judgment does not meet the legal requirements for rescission in terms of Rule 42 (1) (a) nor the Common Law and falls to be dismissed. Service was proper of all notices in fact as far back as the 4th January 2021 the parties agreed to service of further processes by way of email.

[31] The Applicant does not say what his defence is or will be once the judgment is rescinded. He has failed to file his pro-forma plea when in fact prior to the judgment during the year 2020 and 2021 he had made a settlement proposal to be made an order of court on divorce. His settlement proposal was rejected by the Respondent as the Applicant refused to disclose documentation in respect of the assets of the joint estate. There has never been an allegation by the Applicant that the marriage has not broken down.

[32] Madam Justice Khampepe in the recent Constitutional matter of Zuma vs The Secretary of the Judicial Commission of Inquiry [2021] ZACC 28 at paragraph 58 of that judgment said the following:

“The words granted in the absence of any party affected thereby as they exist in Rule 42 (1) (a) exists to protect litigants whose presence was precluded not those whose absence was elected. Those words do not create a ground of rescission for litigants who afforded procedurally regular judicial process opt to be absent.”

[33] There is no evidence of any procedural irregularities committed by the Respondent. The Applicant made his own choice to be absent from Court and cannot approach this Court and claim that the judgement was erroneously granted against him.

[34] The Applicant was afforded an opportunity to serve and file his plea after the expiry of the regulated days this was done by serving on his attorneys and him a Rule 26 noticed of Bar warning him that if he does not file his plea within a certain number of days then Respondent will proceed to Court unopposed. He did not take heed of that. He opted not to take advantage of the extended period. The effect of this is that the judgement granted in his absence does not mean that the Court committed in error.

[35] The last basis for seeking rescission by the Applicant is that the Court erred by granting a decree of divorce without considering the whole “*lex causae* of the marriage being the laws of the Democratic Republic of Congo.” There is no merit in

this argument. The parties live and are employed in South Africa and have property. It is known rule of common international law that the law of the Country in which the parties are domiciled at the time of the divorce is the law to be applied.

[36] In this matter the Court postponed consequences of the divorce which aspect is the only one remaining to be dealt with without having to reverse what has long been granted legally.

[37] In the result I have come to the conclusion that this application should not be granted.

ORDER

1. The Application for Rescission of the judgement dated 4th January 2021 by Maier-Frawley J is dismissed.
2. The Applicant is ordered to pay the Respondent's taxed party and party costs.

Dated at Johannesburg on this day of March 2023

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING	:	26 th JANUARY 2023
DATE OF JUDGMENT	:	MARCH 2023
FOR APPLICANT	:	ADV RAMBA-NAIDOO

FOR RESPONDENT : ADV M FEINSTEIN