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

CASE NUMBER: 2022-015956

REPORTABLE

OF INTEREST TO OTHER JUDES

REVISED

15/09/23

In the matter between: -

L, W (formerly C)
(IDENTITY NUMBER:[...])

Applicant

and

L, W B

Respondent

(IDENTITY NUMBER:[...])

J U D G M E N T

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 15 September 2023.

SUMMARY: Rescission of judgment – divorce – Court not empowered to set aside a decree of divorce. Claim for spousal maintenance in terms of section 7(2) and redistribution in terms of section 7(3) of the Divorce Act, 70 of 1979 not divisible from decree of divorce.

F. BEZUIDENHOUT AJ:

INTRODUCTION

- [1] There can be no debate that the rescission of a decree of divorce has far reaching consequences. This is what the applicant in this application, who was the defendant in the divorce action, asks this Court to do.
- [2] On the 14th of October 2022, the respondent (the plaintiff in the divorce action) procured a decree of divorce together with an order for the appointment of a receiver and liquidator by default in this Court. The application for rescission was instituted on the 31st of October 2022 in terms of the common law, alternatively Uniform Rule 31(2)(b), further alternatively rule 42. It is opposed.

ISSUES FOR DETERMINATION

[3] This Court is thus called upon to determine whether the applicant has shown good cause – whether the applicant provided a reasonable and acceptable explanation for her default, and whether on the merits, the applicant has a *bona fide* defence which *prima facie* carries some prospect of success.¹ This is not the end of the enquiry, however.

[4] During argument, the Court engaged with Mr Boden for the applicant, and Ms Eichner-Visser for the respondent, on the competency of granting a part-rescission and the setting aside of the divorce order itself, let alone the ancillary relief. As a result, I intend to also address these vexing issues in this judgment.

SALIENT BACKGROUND FACTS

[5] The parties were married on 20 August 2014 out of community of property excluding the accrual. No minor children were born of the marriage. The divorce action was instituted on the 31st of August 2022. By that time the parties had been separated since February 2022. In the divorce action, the respondent sought the following relief: -

[5.1] A decree of divorce;

[5.2] That a receiver be appointed to dispose of the immovable property situated at 35 [...] , Kempton Park held under Title Deed

¹ *Chetty v Law Society Transvaal* 1985 (2) SA 756 (A) at 764; see also *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042.

No T3283/2010 with the power to pay all debts in respect of the property and to distribute the net proceeds equally between the parties;

[5.3] Costs of suit in the event of opposition.

- [6] Prior to the institution of the divorce action, the parties attempted mediation but without success. On the 5th of April 2022, the applicant instructed Mr Carl Boden ("**Boden**") from JJS Manton Attorneys, who forwarded a settlement proposal to the respondent. Initially a meeting was scheduled between Boden and the respondent personally, but on the 12th of May 2022 Boden received an email from Mr Trevor Keyes ("**Keyes**") who had been instructed by the respondent to represent him. The parties engaged in further settlement negotiations with the assistance of their legal representatives but to no avail. On the 31st of August 2022 it was apparent that no common ground could be found and the respondent's attorneys served the summons on the applicant.
- [7] The applicant forwarded a copy of the summons to Boden who informed her, via WhatsApp communication, that they were required to enter an appearance to defend and had 20 court days within which to file a plea and counterclaim. Boden requested documentation from the applicant relating to the disputed issues in the divorce action and on the 27th of September 2022, the applicant received further WhatsApp communication from Boden informing her that he was working on her plea and counterclaim.

- [8] On the 28th of October 2022 at approximately midday, Boden received a letter from Keyes, together with a copy of the final decree of divorce. It was then that Boden became aware of the default order granted by this Court on the 14th of October 2022.
- [9] It is pertinent that Boden served the applicant's plea and counterclaim on the 26th of October 2022. At this juncture it is important to mention that the parties were married to each other out of community of property with the exclusion of the accrual system on the 30th of August 2014. The applicant instituted a claim for spousal maintenance and a claim for a redistribution of assets in terms of section 7(3) of the Divorce Act, 70 of 1979.
- [10] The plea and counterclaim was not preceded by a notice of intention to defend as is required in terms of the Uniform Rules of Court. Boden deposed to an affidavit annexed to the applicant's founding papers where he explains that he was under the mistaken belief that he had caused an appearance to defend to have been entered as he had done "*many hundreds of times in similar matters in [his] career spanning nearly four decades*". He concludes that his failure not to formally enter an appearance to defend was a *bona fide* oversight and in no way malicious or wilful or designed to frustrate the process. Boden takes full responsibility for the "*slip up*" as he calls it. Boden states that the applicant is blameless and that his *bona fide* omissions should not be visited upon her.
- [11] Prior to furnishing a copy of the decree of divorce to Boden, Keyes

addressed an email to Boden on the 25th of October 2022 requesting Boden to confirm whether he was still acting on behalf of the applicant since Keyes has not heard from Boden for quite some time. This email was addressed a day before Boden served the plea and counterclaim.

GROUND OF OPPOSITION

[12] The respondent regards the rescission application as an attempt to delay the finalisation of the divorce proceedings until such time as the Constitutional Court has found that section 7(3) is applicable to marriages out of community of property with the accrual and the amendment is written into law. The respondent believes that this could take years and is to his prejudice, more particularly in circumstances where the only joint asset is the former matrimonial home. The respondent in the same breath however alleges that the applicant has amassed a significant pension which he estimates to be in the region of R3 million.

[13] Regarding the applicant's claim for spousal maintenance, the respondent avers that Boden on the 5th of April 2022 specifically stated that no spousal maintenance would be claimed. The respondent further states that the applicant is gainfully employed and has been so employed throughout the marriage. The respondent accordingly avers that the applicant would be unable to discharge the onus in respect of her right to claim spousal maintenance.

[14] The applicant refutes these allegations by stating that her State pension fund amounts to R1.8 million after 32 years of service before tax, which

would be insufficient to cover any bond instalments of a modest abode. The applicant explains that she was prepared to forego on her claim for spousal maintenance, provided that the respondent paid the bond and retained her on his medical aid scheme.

THE LAW AND ITS APPLICATION TO THE FACTS

Rescission and wilful default

[15] It is trite that a Court has a wide discretion in evaluating whether good cause exists to set aside an order.²

[16] In *Silber*³ the Supreme Court of Appeal held that good cause includes but is not limited to, the existence of a substantial defence.

[17] The requirements for an application for rescission under subrule 31(2)(b) have been stated repeatedly by our courts.⁴

[18] The first is that the applicant must give a reasonable explanation of her default. If it appears that her default was wilful or that it was due to gross negligence the Court should not come to her assistance. Coupled with this requirement, the application must be *bona fide* and not made with the intention of merely delaying plaintiff's claim.

[19] In *Harris*⁵ it was found that the true test is whether the default is a

² *Wahl v Prinswil Beleggings (Edms) Bpk* 1984 (1) SA 457 (T).

³ *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A).

⁴ *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476-7; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9F.

⁵ *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at 529 E-F.

deliberate one.

- [20] Having applied the legal principles to the facts of the matter I am satisfied that the applicant has given a reasonable explanation for her default. She took all reasonable steps to instruct an attorney (Boden) to represent her and was guided by Boden about the process forward. Unfortunately an omission to file an appearance to defend occurred within the offices of Boden but the fact that a plea and counterclaim was being prepared demonstrates to important things: Boden had acted under the *bona fide* but mistaken belief that the intention to defend had been filed as he proceeded to prepare the plea and counterclaim and it was in fact filed before Boden or the applicant was alerted to the default order.

Bona fide defence

- [21] Next the applicant is required to show that she has a *bona fide* defence to the respondent's claim. It is sufficient if the applicant makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle her to the relief asked for.
- [22] The applicant seeks the setting aside of the order in its entirety. This includes the decree of divorce. At first it may seem peculiar as it is common cause that the marriage relationship has broken down irretrievably. This is clear from her intended counterclaim. The reason for a rescission in its entirety becomes clear if one considers the balance of the applicant's intended claims, namely the payment of spousal maintenance and an order for a redistribution of assets in terms of section

7(3) of the Divorce Act, 70 of 1979 (**"the Act"**), as foreshadowed in *GKR v Minister of Home Affairs and Others*.⁶

Spousal maintenance

[23] It is a general principal of our law that neither spouse has a right to spousal maintenance after divorce. The common law reciprocal duty of support between spouses comes to an end on the termination of the marriage, either by death or by divorce.⁷ It follows that unless the decree of divorce is rescinded, any spousal maintenance that the applicant may have, would be expunged as it is trite that section 7 of the Act provides that a claim for spousal maintenance can only be granted on divorce.

[24] In *MT v PM* ⁸ the court grappled with the same dilemma but with a marriage in community of property and where one of the parties had already concluded another marriage. In considering the application, the court was alive to the fact that the rescission of the divorce order would have far reaching consequences in that it would affect the status of the parties, which was not desirable. The court quoted with approval the decision in *M v M*⁹ in which the court left the status of the parties unchanged and only rescinded the proprietary consequences of the decree of divorce, accepting that the marriage between the parties had irretrievably broken down and that both parties wished to remain

⁶ 2022 (5) SA 478 (GP) (11 May 2022).

⁷ *Schutte v Schutte* 1986 (1) SA 872 (A).

⁸ 2016 JDR 1477 (GP).

⁹ (GP) (unreported case no 52110/2007, 27-5-2011) (Mngqibisa-Thusi J).

divorced.

[25] More importantly, the court in *MT* recognised that the impugned divorce order granted had severely curtailed the applicant's rights to spousal maintenance and division of the joint estate to which she was entitled by virtue of their marriage in community of property. The court stressed the fact that if spousal maintenance is not claimed at the time of the divorce, it is forever forfeited. To this end, the court warned the applicant that should the court adopt the approach, which was applied in *M v M*, this may have the result that she would continue to forfeit her entitlement to spousal maintenance as this must be claimed at the time of the divorce.

[26] What simplified matters considerably for the Court is that the applicant consented to waive her claim for spousal maintenance resulting in the Court rescinding the ancillary orders and leaving the decree of divorce intact.

[27] In this matter, the applicant has not consented to waive her claim for spousal maintenance.

[28] In *D v D*,¹⁰ where the parties were formally married in community of property, this court, sitting as a court of appeal, identified the peculiar consequence of setting aside a divorce order – a remarrying of the parties. In this regard, the appeal court aptly described the situation as

¹⁰ *D v D* (A3079/15) [2016] ZAGPJHC 31 (12 February 2016); see also *Conekt Business Group (Pty) Ltd v Navigator Computer Consultants CC* 2015 (4) SA 103 (GJ).

follows:-

"[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."

[29] It also found that the proprietary claims may be divisible from a divorce order in certain instances, but nevertheless cautioned that:-

"[28] ...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...

....

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

[30] Consequently, the appeal court left the divorce order unaffected by the onslaught of the rescission application, but set aside the proprietary portion. The court's motivation granting a divisible order rescission is instructive:-

*"[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.” (emphasis added)

- [31] Again, the appeal court recognised the fact that an undetermined claim for spousal maintenance cannot survive a divorce order. Given the fact that spousal maintenance was not claimed, it was unnecessary for the appeal court to determine whether a court can in fact set aside a decree of divorce. In the present matter this vexing question becomes particularly relevant by virtue of the fact that the applicant wishes to pursue a claim for spousal maintenance and an order for the redistribution of assets.

A redistribution claim

[32] The Constitutional Court is yet to pronounce on the matter of *GKR* and whether it is constitutional for spouses married out of community of property with the exclusion of the accrual system after 1 November 1984 to be deprived of the relief provided for in s 7(3) of the Act. What the applicant intends to claim is therefore contingent upon the Constitutional Court finding that the relevant section is unconstitutional and directing the legislature to table statutory amendments.

[33] When applying the legal principles to the factual allegations pleaded by the applicant in support of her claim for spousal maintenance¹¹ and a redistribution order¹², the facts pleaded in support of a claim for redistribution speak against the granting of such an order. In fact, the facts do not support a claim for spousal maintenance either. According to the applicant she:-

33.1 supported the respondent and purchased *inter alia* groceries for him during the period 2014 to mid-2015 after he was retrenched.

33.2 paid the majority of the household expenses when the respondent found full-time employment from 2015 to 2017.

33.3 absorbed the majority of the household expenses when the respondent went under debt review.

¹¹ Section 7(2) of the Divorce Act, 70 of 1979.

¹² *Bezuidenhout v Bezuidenhout* 2005 (2) SA 187 (SCA); see also *Beaumont v Beaumont* 1987 (1) SA 967 (A).

33.4 paid the respondent's medical aid premiums.

33.5 replaced the respondent's laptop when it was stolen.

33.6 volunteered for extra administrative duties in order to supplement her basic salary.

[34] In *Beaumont*¹³ the Court found that in the making of a redistribution order, the nature, extent and manner of transfer to be ordered and the apparent relationship between a transfer order and the question of maintenance must be considered.

[35] Section 7(2) provides that:

*"...the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, **an order in terms of subsection (3)** and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur."*(emphasis added)

[36] A claim for redistribution must therefore be assessed together with

¹³ 1987 (1) SA 967 (A).

any maintenance order the Court intends to make. Hence a symbiotic relationship exists between a claim for spousal maintenance and a claim for redistribution, the consequence of which is that a redistribution claim, like a spousal maintenance claim, can only be considered before a decree of divorce has been granted.

[37] On both parties' version on the papers before me the applicant has the greater estate. This is where any potential claim for distribution must fail.

[38] In the premises, I am not persuaded that the applicant has on the facts or in law, made out a *bona fide* and triable case for spousal maintenance and a redistribution of assets, and therefore on these grounds, the application for rescission must fail.

The rescission of a decree of divorce

[39] Even if the applicant did make out a *bona fide* case it would not have been the end of the applicant's woes. It would have given rise to the next question of whether it is competent for a Court to set aside a decree of divorce. In my view it is not, however iniquitous as it may seem.

[40] Section 8(1) of the Act prescribes what portions of the order of a divorce court may be set aside:-

"8(1) A ***maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor..***" (emphasis

added)

[41] Section 8(2) provides further that: "*[A] court other than the court which made an order referred to in subsection (1) may rescind, vary or suspend such order if the parties are domiciled in the area of jurisdiction of such first-mentioned court or the applicant is domiciled in the area of jurisdiction of such first-mentioned court and the respondent consents to the jurisdiction of that court.*"

[42] On a plain reading of these provisions, the Act does not allow for the setting aside of a decree of divorce. The reason for this is quite clear. The consequence of a rescission is a remarrying of the parties. Firstly, a Court is not authorised to solemnize marriages. Section 11(1) of the Marriages Act¹⁴ provides that only a marriage officer may solemnize a marriage. Secondly, a Court would remarry parties who do not intend to be married to each other. A lack of consensus, which is an essential requirement for any valid marriage, immediately becomes absent. Turning to the facts of this matter, neither party desires nor intend to be married to one another. Accordingly, an order setting aside the decree of divorce would not only be *ultra vires* but would constitute a nullity.

CONCLUSION AND COSTS

[43] In the premises, the failure of this application is inevitable.

[44] Lastly, I find no special circumstances urging me to deviate from the normal principle that costs should follow the result.

¹⁴ 25 of 1961.

ORDER

[45] I therefore make the following order: -

"The application is dismissed with costs."

F BEZUIDENHOUT

**ACTING JUDGE OF
THE HIGH COURT**

DATE OF HEARING: 2 May 2023

DATE OF JUDGMENT: 15 September 2023

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