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

CASE NO: 10393/2017
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED. YES
21 June 2021

In the matter between:

N M[...]

Applicant

and

T M[...]

(Born S[...])

Respondent

JUDGMENT - LEAVE TO APPEAL

CONRADIE AJ

Heard on: 17 MAY 2021

INTRODUCTION

[1]. On 14 February 2020, this Court handed down judgment, dismissing with costs the Applicant's application for a partial rescission of a judgment granted by default on 20 November 2018 by Molefe J. The Applicant applied in terms of Rule 42, alternatively the common law, basing his application thereon that the judgment was erroneously granted in his absence.

[2]. While the Applicant required that the decree of divorce remain an order of court, he applied to have certain clauses of the settlement agreement (which

agreement was incorporated as an order of court) rescinded and set aside.

- [3]. The Applicant brought an application for leave to appeal the said decision. Messrs SE Kanyoka Attorneys, on behalf of the Applicant, filed and uploaded electronically Heads of Argument drafted by Adv I Mureriwa. On 18 May 2021, at the hearing of the application, Court was informed that the legal team for the Applicant had withdrawn.
- [4]. The Applicant was “represented” at the hearing by a Mr Toto, who by his own admission is not an admitted legal practitioner in South Africa. Mr Toto relied on a Special Power of Attorney which was granted to him by the Applicant on 17 May 2021 at Harare, Zimbabwe. It would seem from the Power of Attorney that it does not comply with Rule 63 of the Supreme Court Rules.
- [5]. Mr. Toto was clearly not properly prepared for the hearing – he admitted to not having read the Heads of Argument of the Applicant referred to above and did not even read the judgment of this court.
- [6]. For all intent and purposes, I have thus disregarded the submissions made by Mr. Toto at the hearing. Nevertheless, in the interest of justice and of the minor children, I considered the submissions made in the heads drafted by Adv Mureriwa.

THE BACKGROUND

- [7]. The parties were married to each other on 4 November 2000 in Harare, Zimbabwe. Two minor children (N[...] and L[...]) were born from the marriage. N[...] attained majority on 7 August 2019. In anticipation of their intended divorce, the parties entered into a settlement agreement on 30 January 2017.
- [8]. A summons was issued by the Respondent on 14 February 2017 and served on the Applicant on 17 March 2017.
- [9]. From an endorsement, dated 3 May 2017, on the first page of the settlement agreement, it appears that the Office of the Family Advocate did not initially approve the settlement agreement.
- [10]. A family counsellor from the Office of the Family Advocate subsequently conducted interviews with the parties and the minor children on 7 February 2018 and in her report and recommendations of 18 October 2018, approved and endorsed the terms of the settlement agreement as far as it relates to the minor children.

[11]. The Applicant alleges that the said settlement agreement was, shortly after the interviews with the Family Advocate, revoked / cancelled by him unilaterally on 26 February 2018 through a letter of his erstwhile attorneys to the Respondent's erstwhile attorneys.

[12]. The Applicant further alleges that, while he served a notice of intention to defend on the Respondent's erstwhile attorneys on 19 July 2018, he was not aware that the matter was on the unopposed court roll of 26 November 2018.

[13]. The decree of divorce, incorporating the settlement agreement, was granted by default on 26 November 2018.

[14]. In his rescission application, the Applicant did not seek to set aside the decree of divorce, nor did he ask for the settlement agreement to be set aside in its entirety. The only clauses of the settlement agreement which the Applicant sought to set aside were, in summary:

- relating to the maintenance of the minor children
- relating to contributions to household expenses while the children are not yet self-supportive.

THE APPLICATION FOR LEAVE TO APPEAL

[15]. The grounds upon which the Applicant relies in his application for leave to appeal can be summarised as follows:

- The endorsement by the Family Advocate had no bearing on the rescission application.
- The unilateral cancellation of a bilateral agreement brought the agreement to an end and left the aggrieved party with other remedies.
- A notice of intention to defend was filed before the divorce action was enrolled for hearing on an unopposed basis. The Applicant further alleges that the court order was obtained fraudulently in his absence by the Respondent and her erstwhile counsel. He denies that a copy of the settlement agreement was sent to his attorneys with the notice of set down.
- The court order can and should be partially rescinded and the Court ought to have removed/rescinded the contested clauses.
- The Court abdicated its order by finding that the Applicant ought to have approached the maintenance court if he believed that there was a change in circumstances.

THE PURPORTED CANCELLATION OF THE SETTLEMENT AGREEMENT

[16] It is significant to note that the Applicant attended and participated in an interview with the Family Advocate on 7 February 2018 but did not mention the so-called “changed circumstances” or indicate his intention to cancel the settlement agreement, which would have been the subject of the interview, a couple of weeks later. If he had done so, it would have been recorded in the report of the Family Advocate.

[17] There is further no indication that the Applicant did not abide and comply with the balance of terms of the settlement agreement – this demonstrates that the Applicant recognised the existence of the agreement. The only aspects of the settlement agreement which the Applicant seeks to rescind are of a financial nature.

[18]. The court thus confirms its finding that the bilateral settlement agreement has remained enforceable and of effect.

THE NOTICE OF INTENTION TO DEFEND AND THE NOTICE OF SET DOWN

[19] The Applicant did not manage to discharge his onus to prove that the notice of intention to defend was filed and even if so, could not disprove that he had knowledge of the hearing.

[20] The mere fact that he continued to comply with the balance of the terms of the settlement agreement, is an indication that he must have anticipated that the matter would be decided on an unopposed basis at some stage.

[21] The Applicant has also not been able to show that he was prejudiced by the fact that the order was given in his absence, nor has he demonstrated a bona fide defence.

THE APPLICATION FOR PARTIAL RESCINDING OF THE COURT ORDER

[22] The Applicant did not give any good reasons why he did not apply to court to have the settlement agreement set aside in its entirety. He simply argues that “*there is a need for the court to explore the changes in the circumstances which are pivotal to the issues of custody and maintenance...*” Amongst the so-called “changed circumstances” which the Applicant contends should be reason to partially rescind the order is that an amount of money which the Applicant was obliged to pay to the Respondent, had already been paid.

[23] Such payment is more proof of the Applicant regarded himself bound to the remaining terms of the settlement agreement and the payment of the amount

certainly does not nullify the agreement.

[24] The other “changed circumstances” which the Applicant refers to in his founding affidavit, occurred after the granting of the order which the Applicant sought to rescind, and would therefore not have any bearing on his application.

[25] In finding that the Applicant ought to have approached the maintenance court if he believed that there was a change in circumstances, this court certainly did not abdicate its order but instead indicated the remedy which the Applicant should have pursued in the event of changed circumstances.

[26] The Court remains of the view and finds that the Applicant’s application for the partial rescission was simply aimed at unburdening him of his financial responsibilities towards the minor children while leaving the rest of the settlement agreement which, on the face of it suits him, unchanged.

[27] The Court can find no compelling reasons or any grounds on which another court will come to a different conclusion than this court.

ORDER

Having read the papers and heard argument, the following order is made:

1. The application is dismissed with costs.

T
CONRADIE ACTING JUDGE OF
THE HIGH COURT

FOR THE APPLICANT:	Unrepresented
FOR THE FIRST RESPONDENT:	ADV F BEZUIDENHOUT
INSTRUCTED BY:	MARSTON & TALJAARD
ATTORNEYS	