

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

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

CASE NO: 10393/2017

14/2/2020

In the matter between:

N[....] M[....]

Applicant

and

T[....] M[....] (Born S[....])

Respondent

JUDGMENT

CONRADIE AJ

Heard on: 13 November 2019

INTRODUCTION

[1]. The Applicant seeks a partial rescission of a judgment granted by default on 20 November 2018 by Molefe J. The Applicant applies 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 requires that the decree of divorce remains an order of

court, he applies to have certain clauses of the settlement agreement (which agreement was incorporated as an order of court) rescinded and set aside.

THE FACTS

[3]. 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.

[4]. In anticipation of their intended divorce, the parties entered into a settlement agreement on 30 January 2017.

[5]. A summons was issued by the Respondent on 14 February 2017 and served on the Applicant on 17 March 2017.

[6]. 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.

[7]. 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.

[8]. 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.

[9]. 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.

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

[11]. The Applicant does not seek to set aside the decree of divorce nor does he ask for the settlement agreement to be set aside in its entirety. The only clauses of the settlement agreement which the Applicant seeks to set aside are, in summary, the following:

- Clauses 7.1 and 7.2: - relating to the maintenance of the minor children;
- Clauses 8.3.1, 8.3.2 and 8.3.3: - relating to contributions to household expenses while the children are not yet self-supportive;
- Clause 11.1: - relating to a loan owing by the Applicant to the Respondent.

THE SUBMISSIONS OF THE PARTIES

[12] The Applicant 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.

[13] According to the Applicant his "personal legal advisor" Adv T Toto, corresponded with Messrs N S Nkala (the attorneys of the Respondent at the time) regarding the set down of the matter on the unopposed motion roll. Adv Toto is not an admitted legal practitioner in South Africa and could therefore not be regarded as the Applicant's attorney of record.

[14] The Applicant further relies on his unilateral cancellation of the settlement agreement. The Respondent in turn argues that clause 15 of the settlement agreement renders the agreement incapable of being cancelled unless the cancellation is reduced to writing and signed by both the parties. She therefore denies that the settlement agreement was lawfully cancelled by the Applicant.

[15] The Respondent denies that the Applicant was unaware of the hearing of the matter on the unopposed role of 20 November 2018. She relies on communication between her attorneys, Messrs N S Nkala, directly with the Applicant and alleges that the notice of set down was indeed sent to the Applicant.

FINDINGS

[16] The Applicant makes much of the initial non-endorsement of the settlement agreement by the Office of the Family Advocate (the Family

Advocate). The well- established mandate of the Family Advocate is to deal with disputes between parents or family members over parental responsibilities and the rights of the minor children. When considering a settlement agreement in divorce proceedings, the role of the Family Advocate is primarily to consider and make recommendations regarding minor children which relate to custody, primary residence and contact. When approving a settlement agreement, the Family Advocate is not required to consider the financial arrangements between parties.

[17] The aspects of the settlement agreement which the Applicant seeks to rescind are exclusively of a financial nature. Whether the Family Advocate had approved the settlement agreement or not, such approval has no bearing on these financial aspects.

[18] It is clear from clause 15 of the settlement agreement that it cannot be cancelled unilaterally. The court thus finds that the settlement agreement has remained enforceable and of effect.

[19] The Applicant does not give any reasons why he does 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 .. ."* The Applicant essentially requires of the court to, without any evidence relating to the interests of the minor children, unburden him of financial responsibilities towards the minor children while leaving the rest of the settlement agreement which, on the face of it suits him, unchanged.

[20] While it is in dispute whether the Applicant had knowledge of the hearing of the matter on 20 November 2018, it is important to adjudicate whether the Applicant was indeed prejudiced by the order of the court given in his absence and whether he does not have other recourse. The fact that the Applicant does not apply for the court order to be set aside in its entirety, is of significance. While the Applicant alleges that he revoked / cancelled the settlement agreement, the question then arises why he did not then apply to have the settlement agreement set aside in its entirety.

[21] The court accordingly finds that, while the Applicant's knowledge of the

hearing of the divorce is in dispute, the Applicant has not shown that he has a bona fide defence in respect of those clauses of the settlement agreement which he seeks to set aside. In the opinion of the court the Applicant has thus failed to show sufficient cause for the court to partially rescind the order of the court.

[22] The Applicant has inappropriately used this application in terms of Rule 42 alternatively the common law, to selectively challenge some of those clauses of the settlement agreement which place a financial responsibility on him. These matters should be addressed in a maintenance court where both parties will be able to bring evidence of "changed circumstances" since entering into the settlement agreement.

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:

ADV I MURERIWA

INSTRUCTED BY:

S E KANYOKA ATTORNEYS

FOR THE FIRST RESPONDENT:

ADV F BEZUIDENHOUT

INSTRUCTED BY:

MARSTON & TALJAARD ATTORNEYS