

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 73754/14

DATE: 3 February 2017

Reportable: No

Of interest to other judges No

Revised.

A O

Applicant

v

M O

Respondent

JUDGMENT

MABUSE J:

[1] This is an application for a rescission of an order of divorce that was granted by default against the applicant on 8 December 2014. In addition, the applicant seeks an order that he be authorised to serve his plea in the same matter which resulted in the order he seeks to rescind on the respondent or still to file a counterclaim against the respondent.

[2] The applicant describes himself as an adult male with permanent residential address at [...] Windmill, Intala Street, Mooikloof Ridge, Pretoria. He is a volunteer in the United Nations as a COE Inspector and based in the Democratic Republic of Congo ("DRC"). He describes the respondent as his spouse and also as the plaintiff in the main action,

of the same residential address as his.

[3] The applicant seeks a rescission of the divorce order that was granted by Makhubela AJ on 8 December 2014 on the following grounds that:

- 3.1 the respondent undertook to withdraw the divorce action after she had agreed to a reconciliation but failed to do so;
- 3.2 the two firms of attorneys he had engaged to handle the divorce action against him while he was in the Democratic Republic of the Congo failed to carry out his mandate;
- 3.3 at the time he contracted his marriage to the respondent he was still married to another woman in Algeria. He contends on this basis that the marriage with the respondent could be declared *void ab initio* and that he would have raised this factor as a defence.

[4] The applicant and the respondent were married to each other in community of property on 11 July 2011. The said marriage ceremony took place through the offices of the Department of Home Affairs in Pretoria. Proof of this marriage by way of a marriage certificate was submitted to Court on 8 December 2014. There is therefore no dispute about this marriage. Three minor children were born of the said marriage.

[5] On 8 October 2014 the applicant was discharged from a local hospital. On his discharge the respondent went to fetch him. The respondent took him home whereupon his arrival he was served by the sheriff with a copy of the divorce summons. He testified that after a copy of the summons was served upon him he and the respondent discussed the effects of the divorce and agreed to become reconciled. According to him, the respondent undertook that she would not proceed with the divorce action but would instead proceed to her attorneys in order to instruct them to withdraw the divorce action. Subsequent thereto, he returned to the DRC and awaited documentation from the respondent to the effect that the divorce action had been withdrawn. When he realised that no such documents were forthcoming he contacted his attorneys of record whilst he was still in the DRC and notified them of the pending divorce action and requested them to assist. By reason of the fact that it was during December 2014 he heard nothing from the attorneys but then had to approach another set of attorneys Hack Stupel & Ross, for assistance. The initial attorneys that he had instructed and who

seemingly delayed in reporting to him what they had done had entered appearance. When he realised that he got no response from them he continued to instruct Shapiro & Ledwaba Inc. to attend to the matter. Later he received feedback from both attorneys who informed him what they had done. He then instructed Shapiro & Ledwaba to withdraw from the matter as he had already instructed Hack Stupel & Ross to represent him. During January 2015 he received emails from Messrs Shapiro and Ledwaba in which he was informed that the respondents had proceeded to obtain an order of divorce against him on 8 December 2014. He gave those emails and a copy of the order of divorce to the attorneys whom he instructed to proceed to have the order set aside. He waited to hear from such attorneys. He did not hear anything from them.

[6] The respondent does not dispute the fact that the applicant left the Republic of South Africa to return to the DRC on or about 31 October 2014. She claims, however, that after she had been granted the decree of divorce she sent the applicant a text message informing him that the divorce action was finalised. On that basis the respondent claims that the applicant was well aware and was duly informed that the divorce action was finalised when he arrived back in South Africa on 23 December 2014.

[7] The respondent denied vehemently that she ever undertook to instruct her attorneys to withdraw the divorce action. She claimed that there would have been no basis for her whatsoever to do so. She denied vehemently that she and the applicant discussed the effects of a divorce. Pertinently she denied that she and the applicant became reconciled and furthermore that she ever promised the applicant that she would provide him with any documentation as proof that she had withdrawn her action.

[8] With regards to the merits the applicant slated that he would have raised the following points as a defence to the divorce action against him. Firstly, that the respondent formed an adulterous affair whilst he was based in the DRC and as a consequence of which she sought to obtain the divorce. The respondent did not deny that she did form a relationship with someone else but contended that any relationship that she would have formed with another person was not the immediate cause of the deterioration of the marriage relationship between her and the applicant. Secondly, that although the parties contracted a marriage in community of property as indicated above the applicant states that he was also married in his country of origin in

Algeria and he was not divorced in Algeria prior to his marriage with the respondent. The marriage to the respondent could on that basis alone be declared *void abinitio*, so he contended further. The respondent, however, does not deny that the applicant was previously married. She claims that she did not know that he was married but the applicant avers that he had fully disclosed his status prior to the marriage to her. The purpose of rescission of the order of 8 December 2014 would, according to him, to enable him to challenge the orders of forfeiture and maintenance issued against him. On the basis of the afore going the applicant stated that he has a *bona fide* defence against the claims of the respondent in the divorce action and that the order of divorce be set aside so that these disputes may be ventilated properly.

[9] On the other hand the respondent opposed the relief sought and claimed that there was absolutely no basis for the order to be set aside and that the matter should be regarded as finalised. She claimed that if the applicant was married when he married her, that due to her not having known the true status, the Court would in any event decree that the combined property should be shared equally between them and that the Court would order forfeiture if this was to the advantage of the innocent party. She stated furthermore that the position between the parties may conceivably constitute a putative marriage.

[10] The bedrock of the applicant's case was simply that at the time he and the respondent got married to each other on 11 July 2011 he was still married to another woman in Algeria and that the said marriage was still in subsistence. He claimed that on that basis that his marriage to the respondent was null and *void abinitio*. In addition he claimed that he had discussed that issue of the marriage with another woman in Algeria with her and that she knew about it and that she got into their marriage with the full knowledge that he was married to another woman.

[11] The *onus* to satisfy the Court that he was married to another woman in Algeria is on the applicant. No duty lies on the respondent to prove the negative. The applicant can discharge the *onus* that lies on him by producing to the Court a copy of the marriage certificate. The existence of any valid marriage must, in terms of the law, be proved to the satisfaction of the Court. This proof must be by way of the best evidence available. This means that an authenticated copy of the marriage certificate must be produced.

See Wittekind v Wittekind 1948(1} SA 826 where the Court stated that:

"In an action for divorce on the ground of adultery the plaintiff stated that he had been married to the defendant in Germany, that he did not have the marriage certificate, that he had been married by a magistrate and in a Synagogue and that his brother had been present at the ceremony. His brother gave evidence of having been present at the marriage. Held, postponing the action sine die, that plaintiff should produce either a marriage certificate or proof that one was not obtainable. "

In Wittekind v Wittekind the Court quoted with approval the following passage for Anderson v. Anderson (1942, W.L.D. 86):

"It is a well-established practice in our Courts to require documentary evidence of the marriage where this is possible. In the case of Davidson v. Davidson (1902, T.H. 105), Mr Justice Wessels said at page 106: 'The best evidence must always be given to prove a marriage in these cases. A copy of the marriage certificate had been handed in here, and I do not know who the person is who certified it Certified copies like these should be properly legalised. I do not suppose that a person who has not been married would apply for divorce; but it has been laid down long before I was born that in all divorce proceedings, the marriages must be properly proved, and that rule must be followed.' In the case of Warren v. Warren (1909, T.H. 304), Mr. Justice Mason said the Court required all marriages to be proved by documentary evidence, where such evidence could be produced."

In Warren v Warren the Court had stated as follows:

"The Court requires all marriages to be proved by documentary evidence where such evidence can be produced. I do not propose to relax this rule."

Furthermore there must be proof *aliunde* that the parties mentioned in the certificate and the parties before the Court are the same parties.

[12] A foreign marriage certificate must be authenticated in terms of Rule 63 of the Uniform Rules of Court. A certificate produced in Algeria would qualify as a foreign marriage certificate. Where a party is unable to produce such a marriage certificate or where it is not practical for such a party to obtain a copy of the marriage certificate, such a marriage may be proved in other ways, for instance by evidence of witnesses who attended the marriage ceremony or by evidence of cohabitation and repute which creates a rebuttable presumption that there was a valid marriage. The applicant does not rely on any of the grounds set out above.

[13] Other than making an allegation that he was married to another woman in Algeria, the applicant does not produce any proof of such marriage. There is a paucity of essential details in his evidence. He has not disclosed the date of such marriage nor the full details of the woman in Algeria he claims he was married to. He has not explained why he married the respondent when he knew that he was already married to another woman, nor did he explain why he lied to the officials of the Department of Home Affairs. He has admitted that he committed fraud. In the circumstances he has failed to discharge the onus that lies on him that he was married.

[14] The respondent has raised a point *in limine* in terms of which she claims that the applicant's application constitutes a gross abuse of the processes of the Court and that it be dismissed with a punitive costs order. The respondent claimed that the applicant has failed to set out any grounds in support of his claim that the final order obtained on 8 December 2014 should be set aside. A judgment could only be set aside if the applicant shows good or sufficient cause for such rescission. In this regard see *Grant v Plumbers (Pty) Ltd* 1949(2) SA 470 at 476 to 477 and *Silber v Ozen Wholesalers (Pty) Ltd* SA 349 A at 352H-353A. The requirements for an application for rescission in terms of the Uniform Rules of Court are stated as follows:

- "1. The applicant must give a reasonable explanation for his default, ·
2. His application must be *bona fide* and not made with the intention of merely delaying the plaintiff's claim;
3. He must show that he has a *bona fide* defence to the plaintiff's claim. It is sufficient if he makes an outright *prima facie* defence in the sense of setting out averments which, if established at a trial court, would entitle him to the relief asked for. He needs to deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour."

[15] The applicant has failed to comply with the basic requirements to show a *bona fide* defence. See *Standard Bank of South Africa Ltd v EL Naddaf and Another* 1999(4) SA 779 W at 784. On his own version he could not have entered into a marriage with the respondent well knowing that he was not lawfully entitled to do so and then later claim that this offence that he has committed should serve as an excuse and as a defence to

nullify his second marriage. He was therefore not *bona fide* in his actions and therefore has no *bona fide* defence.

[16] It is clear that the applicant brought his application for rescission of the order of 8 December 2014 under common law. In terms of common law, an application for rescission of a default judgment is limited to circumstances which are not covered by the provisions of Rule 31(2)(B) or Rule 42 of the Uniform Rules of Court. An application for rescission of the default judgment under common law may only be granted where an applicant has satisfied the court that sufficient cause exists. This means that in order to succeed with the application, on the grounds of common law, the applicant must:

- (i) have reasonable explanation for a failure to defend the respondent's divorce action, in other words, for his default;
- (ii) secondly, he must show that the application for rescission is made *bona fide*; and
- (iii) he must show that he has a *bona fide* defence, which *prima facie* has some prospects of success.

[17] The applicant admits that he committed fraud inasmuch as he was married at the time of his marriage to the respondent and that he was not divorced from his first wife. Accordingly, the order of 14 December 2014 may be set aside on the grounds of fraud.

[18] A REASONABLE EXPLANATION FOR THE DEFAULT

The applicant contends that he was not in default because after he had been served with a copy of the divorce action he had an intense discussion with the respondent about the effects of a divorce after which they became reconciled. He contended furthermore that following such reconciliation she undertook that she would approach her attorneys, inform them that she and him had become reconciled and accordingly instruct them to withdraw the divorce action. Over and above she had promised that as proof of the withdrawal of the action she would send him some documents. He waited for such documents. When nothing was forthcoming he became suspicious and sought legal assistance, first with Shapiro and Ledwaba Inc and when he got no joy in dealing with them, from Hack Stupel and Ross. The Respondent disputed the rest of the applicant's evidence as set out above. The applicant did not dispute the following averments made by her; that while he was still in the country they spoke only when it

was necessary. It is highly unlikely that people who had become reconciled would speak very little to each other. The second averment that he failed to comment on and which must be accepted as admitted is the allegation by her that she reminded him literally on a daily basis of the number of days left for him to indicate whether or not he would defend the divorce action. Again left unchallenged, this averment is totally inconsistent with the circumstances in which parties have become reconciled. It would be unusual that after the parties had reconciled, as claimed by him, she would persist with the divorce action even to the extent of advising him, like she did on 20 October 2014, of the days within which to defend the divorce action. The inference is inevitable that there could not have been any reconciliation if there was at the same time a persistence to proceed with the divorce action. This is a clear case of actions speaking louder than words.

[19] The applicant failed, whilst he was still in the country, to take the respondent to the attorneys where she would have instructed them to withdraw the divorce action, if they had reconciled. He proffers no explanation while he did not follow this important step. It is therefore clear that the applicant left for the Democratic Republic of Congo with the full knowledge that the respondent was proceeding with the divorce action. He deliberately failed to take the necessary steps to defend the respondent's divorce action. In the circumstances this Court finds that he has failed to furnish a reasonable explanation for his default. The applicant has therefore failed to satisfy the requirements set out in *Grant v Plumber supra* of giving a reasonable explanation for his default.

[20] The applicant must show that the application was made *bona fide*. It should not be made with the intention to delay the plaintiffs action. The appellant states that:

"The respondent formed an adulterous affair while I have been based in the DRC and as a consequence of that adulterous affair she has sought to obtain a divorce. I accordingly wish to file documents to the divorce. We are married in community of property and I am also married in my country of origin being Algeria."

The following are the problems with this evidence. No further details of such an adulterous relationship have been furnished. In his replying affidavit the applicant testified that:

"It was during the same period around December 2014 that I realised that the respondent was involved with an Algerian man in an affair and this was amongst things

that made me engage attorneys to seek some assistance. "

It was not his evidence in his founding affidavit that he intended using such a relationship as a ground for the divorce. It only emerged in the replying affidavit.

[21] If rescission of this order is granted, the applicant would seek a divorce still. Why then seek a divorce order when he already has one? For this reason, the application for rescission is not made *bona fide*.

[22] The applicant must show that he has a *bona fide* defence which *prima facie* had some prospects of success. The applicant failed to meet this requirement. He has not disclosed any defence against the respondent's claim for divorce. The so-called intimate relationship between the respondent and another man was only discovered after the divorce. He would not have raised it as a defence. It would also not have served the purpose. The applicant has not proven the existence of any valid marriage between him and another woman in Algeria. Accordingly there is no merit in the argument that his marriage to the respondent could be declared *void ab initio*. On the facts before me the application cannot succeed.

[23] In an effort to sort out other aspects of the divorce, the parties handed the Court a consent paper and applied that It be made an order of the Court alongside an order this Court may make with regard to the application.

In the result I make the following order:

1. The application for rescission of the order of Court granted on 8 December 2014 is hereby dismissed.
2. By consent between the parties the terms of the amended draft order marked "XPS" and attached hereto are hereby made an order of Court.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant:

Adv. Ml Haskins (SC)

Instructed by:

Shapiro & Ledwaba Inc.

Counsel for the first respondent:

Adv. R Ferreira

Instructed by:

Bronwyn May Inc.

Date Heard:

7 June 2016

Date of Judgment:

3 February 2017

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

CASE NUMBER: 73751/2014

In the matter between:

ABDERRAHMANE OUANECHÉ

Applicant

and

MONIQUE OUANECHÉ

Respondent

DRAFT ORDER

An order is made as follows:

1. The Applicant's application for rescission is dismissed.
2. It is declared that the order of the Honourable Madam Justice Makhubele AJ under the above case number is amended and varied only in the following respects:
 - 2.1. Ad paragraph 4 of the order:
 - 2.1.1. The Applicant shall be responsible to pay the maintenance in this

paragraph, in respect of the minor children, to the Respondent, until the amount as set out in this paragraph of the order is amended by a competent forum, also in respect of retrospective effect.

- 2.1.2. The Applicant shall have the right to immediately approach the Maintenance Court and apply for a variation of the maintenance order in terms of the Maintenance Act, without having to prove a change in circumstances.

- 2.2. Ad paragraph 5 of the order:

- 2.2.1. The paragraph 5 of the order is set aside.

- 2.3. Ad paragraph 6 of the order:

- 2.3.1. The immovable property known as Stand [...] Mooikloof Ridge, Extension 12, situated at nr. [...] Windmill Intala Street, Mooikloof Ridge, Pretoria ("the immovable property"), is to be sold to the highest offer with a reserve price of R900 000.00 within six months from date hereof.
 - 2.3.2. The nett proceeds from the sale of the immovable property shall be divided equally between the parties subject to the following:
 - 2.3.2.1. The Applicant's share of the following expenses from 8 December 2014 to date of transfer is to be deducted from his half share of the nett proceeds of the sale of the immovable property and paid to the Respondent if and in the event of the Respondent having paid same on his behalf:
 - (a) Rates and taxes;
 - (b) Levies; and
 - (c) Electricity.
 - 2.3.3. In the event of the any of the parties failing to sign the deed of sale or transfer documents within 48 hours after being requested so by the transferring attorney or the other party, the Sheriff of the district where the property is situated is hereby authorised to sign in such party's place and stead.

- 3. Each party is to pay its own costs

BY ORDER

THE REGISTRAR