

FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

CASE NO: 5035/2012

In the matter between:

J J

Applicant

and

K J

1st Respondent

SUID-AFRIKAANSE POLISIE PENSIOENFONDS

2nd Respondent

HEARD ON:

25 APRIL 2013

JUDGMENT BY:

MHLAMBI, AJ

DELIVERED ON:

11 JULY 2013

INTRODUCTION

- [1] This is an application for the rescission of the divorce order granted by this Court in the absence of the Applicant on 14 February 2013 under case number 5035/2012.
- [2] The Applicant seeks leave to be granted to defend the divorce action, specifically the rights to primary care and residence which were permanently awarded to the First Respondent.
- [3] The Application is opposed by First Respondent.

[4] **THE VERSIONS OF THE PARTIES**
THE APPLICANT

- 4.1 Service of the summons initiating the divorce proceedings was effected upon the Applicant by the Sheriff at Ladybrand on 19 December 2012 whereafter he handed it to Ms Madel van Rensburg, an attorney at Ladybrand expressing his dissatisfaction with the relief sought and instructed her to defend the action. She informed him that the Court was in recess and that the appearance to defend the action would be proceeded with during January 2013. He left her a copy of the summons and another he handed over to his brother, an advocate, whom the attorney indicated would assist her with the preparation of the papers for filing in the High Court.
- 4.2 On 18 February 2013, he was informed by a friend that the divorce was finalised. He immediately communicated with Ms vanRensburg who advised him that she would communicate with Mr Leon Marè, First Respondent's Ladybrand attorney, to ascertain what the true position was as she did not know what the developments were.

- 4.3 Having received no feedback from her on 19 February 2013, he directly approached the said Mr Mar who was known to him, and discovered that no Notice of Intention to Defend was filed. He received a copy of the divorce order the following day from the said Mr Marè. He consulted and was advised by his present attorney of record on 22 February 2013 to apply for the rescission of the order and the application was drafted on the same day.
- 4.4 He admits that the marriage between the parties has irretrievably broken down but denies the grounds upon which the First Respondent relies.
- 4.5 He was at the outset dissatisfied with the relief sought in the summons and it was his desire to defend the action. He would in due course instruct his attorneys to file a Plea and Counterclaim setting out the grounds for the irretrievable breakdown of the marriage.
- 4.6 He was disgruntled that the rights and responsibilities relating to the primary care of the two minor children were awarded to the First Respondent. He was satisfied that both children were in his care and that it was in the interest of both children that their primary care be awarded to him.
- 4.7 The minor child, R C, lived with the Applicant's mother at Bloemfontein since March 2012 as per arrangement. He took care of his needs.
- 4.8 In July 2012, the First Respondent left the common home and since October 2012, she stayed permanently with one Attie Venter who has two protection orders against him for family violence. Since July 2012 the minor child, A, was in his care until the decree of divorce was granted. Both children prefer to stay with him.

- 5.1 Save for argumentative material in her opposing affidavit, First Respondent denies that the Applicant has a *bona fide* defence as both parties admit that the marriage has irretrievably broken down.
- 5.2 The applicant was suspended for two years during which period she took care of the household. She frequently sought financial assistance from her parents to take care of household needs as the applicant was unable to.
- 5.3 There was no communication between the parties, the Applicant showing no concern for the family and withholding information about what went on in his life. There was a criminal charge against the Applicant for which he was suspended for two years from the South African Police Service. Currently there is a pending criminal charge against him according to the information at her disposal.
- 5.4 She admitted that she left the common home but that it was at the request of the Applicant who informed her that for the past fourteen years, he had a love affair with another woman. He had rejected all requests to find help to save the marriage.
- 5.5 She admitted that R C, the minor child, stayed with her in-laws and attended school at Fichardt Park, Bloemfontein, but denied that the Applicant took care of his needs. Her in-laws are elderly people and cannot take care of C's daily needs. It would be better if he were to stay in a school boarding house.
- 5.6 She contributed financially to C's needs even though she has, to date, never received any maintenance from the Applicant despite the Court Order.
- 5.7 Applicant refused to allow her to take A along when he told her to leave the common home. Since the date of her leaving the

common home, A would be left in the afternoons with the housekeeper, a situation which was unsafe and unsuitable for a daughter of her age. The Applicant could not be home in the afternoons by virtue of the nature of his work.

5.8 The relationship with her children is good and A is happy to be with her. C prefers to be with her but is influenced by the Applicant.

5.9 The Applicant sought neither the assistance of the Family Advocate nor a social worker to investigate and obtain a report in regard to the welfare of the minor children.

5.10 She denied that she lived in unsatisfactory circumstances. She moved in with Mr Venter during February 2013. He raises a nine year old boy and possesses his own house and motor vehicle and also helps with the minor children whenever he can.

5.11 There were judgments against the Applicant for the Ladybrand High School, Ladybrand Primary School and the Ladybrand Animal Clinic. The Sheriff used to serve Court processes on a number of occasions at their house.

[6] **THE ISSUES**

6.1 Whether a reasonable explanation for the default was given.

6.2 Whether the explanation is *bona fide*.

6.3 Whether the applicant has a *bona fide* defence to Plaintiff's claim.

[7] **CONTENTIONS BY THE PARTIES** **APPLICANT**

Mrs Murray contended as follows:

- 7.1 The Applicant was not in wilful default. Even though the Ladybrand attorney denies having been instructed to defend the matter she admits having told him of the *dies non* period and that it was not necessary to react immediately to the summons. The *dies non* period is only applicable to exchange of pleadings other than appearances to defend.
- 7.2 The said attorney did not inform him when the *dies non* period would expire and when the follow-up consultation would take place.
- 7.3 The applicant, not being legally trained, would not have known the periods within which he should enter Appearance to defend if someone did not enlighten him.
- 7.4 There are no allegations that the Applicant received a Notice of Set Down nor that he had knowledge of the date when the divorce would be heard.
- 7.5 Even though the Applicant admits on his own version that he knew of the case against him, there is no evidence that he deliberately failed to do anything about the matter and it is clear that the finalisation of the divorce proceeded without his knowledge and in his absence on 14 February 2013.
- 7.6 Applicant was and still is of the intention to defend the action, file a Plea and Counterclaim with a view to, inter alia, opposing the award of primary residence of the two minor children to the First Respondent in Court.
- 7.7 His seriousness in this regard is supported by his application to the

Family Advocate on 8 April 2013 as well as the first application for the rescission of the divorce order filed on 22 February 2013, two days after 20 February 2013 when he first laid his eyes on the divorce order.

- 7.8 The Applicant solicited the services of another attorney immediately for applying for the rescission of the order. The application was therefore launched within the first twenty court days after knowledge of the order.
- 7.9 The Applicant has a prima facie defence: There is a clear dispute between the parties over the custody of the minor children. The children are teenagers and have reached such an age that the Court can take into account their preferences as to custody. It is also essential that the Family Advocate should investigate the circumstances and assist the Court with a recommendation.
- 7.10 The Court, having a wide direction, should subject the true dispute between the parties to a thorough investigation and all relevant facts be placed before the Court as the primary concern is the rights of the minor children, before a final decision is made.
- 7.11 If the allegations concerning the children are investigated by both the Family Advocate and the Court, and are found to be true, this would constitute a good defence which would radically alter the stipulations of the divorce order.

[8] **THE FIRST RESPONDENT**

- 8.1 The Applicant never gave instructions to Ms Van Rensburg to defend the action.
- 8.2 The allegations in the Applicant's replying affidavit that he informed Ms Van Rensburg of his dissatisfaction with the care and

custody of the minor children and the claim against his pension fund are unfounded.

- 8.3 The duty to make an appointment with the attorney was on the Applicant, and the failure to do so was a deliberate decision on his part, alternatively the result of gross negligence.
- 8.4 The Applicant's explanation for his default is insufficient.
- 8.5 Even though the Applicant was not legally trained, he should have appreciated the relief sought by the First Respondent. Logically he should have given clear and unambiguous instructions to Ms Van Rensburg to defend the action and his failure to do so can be viewed as "wilfull default".
- 8.6 Service of the summons implies that the Sheriff made it clear to him what the date of the hearing of the action would be in the event of failure on his part to enter appearance to defend and what the contents of the summons were.
- 8.7 Furthermore, Ms Van Rensburg advised him to consult with her should he wish to take the matter further.
- 8.8 The failure by applicant to take such steps indicates that he failed to give a reasonable explanation for his default.
- 8.9 The Applicant failed to take the Court into his confidence that he had earlier made a similar application for the rescission of the order.
- 8.10 The present application dated 18 March 2013 is outside the 20 day period as prescribed by the Uniform Rules of Court.
- 8.11 The previous application which was filed within the twenty day period, was irrelevant as the Court Rules stipulate that the

application must be before the Court within twenty days for the Court to decide whether the order should be set aside. Failure to furnish reasons for the late filing of the application and the withdrawal of the previous application is fatal and the application should fail on this ground. No application for condonation was filed.

8.12 No supporting affidavits were filed to confirm Applicant's unsubstantiated allegations that the minor children did not want to live with the First Respondent and that she lived under unsatisfactory conditions.

8.13 As at the time of the filing of the Notice of Motion, the Applicant had not enlisted the services of either the Family Advocate or a social worker but only did so on 8 April 2013 as stated in his replying affidavit. These steps should have been taken as early as 22 February 2013.

8.14 Applicant did not make out a *bona fide* defence in his affidavit in relation to the specific relief sought by the First Respondent. The only relief he is not satisfied with, is the custody and other rights relating to the minor children. The allegations he made in this regard were mere information regarding their accommodation in the past.

8.15 Consequently the Applicant has not made out a bona fide defence.

[9] **EVALUATION**

9.1 The application was never heard on the date of hearing but postponed by agreement to 28 March 2013. However, it was withdrawn on 19 March 2013. The present application, bearing the court date stamp of 19 March 2013, was served on First Respondent on 18 March 2013 to be heard on 11 April 2013.

- 9.2 Mr Olivier, on behalf of the FirstRespondent submits that the present applicationdated 18 March 2013, isclearly outside the twenty day period as provided for in Rule 31 (5) (d) of theUniform Rules of Court. The timeous filing of the earlier application which was withdrawn does not assist the applicant. The intention of the Rules must bethat the application must be filed within twenty days. Besides, no explanationwas given for both the withdrawal of the application and the late filing of thepresent application. For these reasons, the application must be dismissed withcosts. In this regard he relied on**Government of the Islamic Republic ofIran v Berends**1998 (4) SA 107 (NMH).
- 9.3 In counter-argument, Mrs Murray, on behalf of the Applicant, stated that thegrounds in both applications were the same; that the present application wasserved on 18 March 2013 and there was no need for an application forcondonation. Moreover, the First Respondent was not prejudiced. Thewithdrawal of the first application is irrelevant for purposes of this application.
- 9.4 In government of the **Islamic Republic of Iran**,*supra* C-F, it was held that theunderlying purpose of Rule 31 (2) (b) of the High Court Rules was to ensurethat an application made thereunder wasbrought to Court without delay.Obedience to the subrule was achieved when a defendant launched hisapplication by means of having it filed with the Registrar and served on theplaintiff within the period of twenty days of his becoming aware of the defaultjudgment. To construe the expression ‘apply to Court’ as meaning that anapplicant had to ensure that the application was set down on the Court roll forhearing and/or was actually brought before the Court within the twenty day periodwould be decidedly harsh, unjust, unreasonable, and glaringly absurd, as theapplicant clearly had no power over a ‘set down’ and/or hearing before theCourt. In any event, the phrase ‘apply to Court’ was ambiguous. I subscribe tothis view and find that an application for condonation in this matter isunwarranted.

9.5 **Rule 31 (2) (b) reads as follows:**

“A defendant may within twenty days after he or she has knowledge of such judgment, apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet”.

9.6 In **Grant v Plumbers (Pty) Ltd** 1949 (2) SA 470 (o) at 476-7, the requirements for a application for rescission under this subrule were stated as follows:

“(a) He (i.e. the applicant) must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.

(b) His application must be *bona fide* and not made with the intention of merely delaying plaintiff’s claim.

(c) He must show that he has a *bona fide* defence to plaintiff’s claim. It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.”

9.7 “While wilful default may not be an absolute or independent ground for refusal of a rescission application, a display or deliberate default in preventing judgment being entered would sorely co-exist with sufficient cause.”

Harris v Absa Bank Ltd t/a Volkskas 2006 (4) SA 527 (T) at 529 E-F. The true test is whether the default is a deliberate one: **Neumann (PVT) LTD v Marks** 1960 (Z) SA 170 (SR). **Maujean t/a Sudio Video Agencies v Standard Bank of SA Ltd** 1994 (3) SA 801 (C).

9.8 The onus is therefore on the Respondent to prove that the Applicant knew of the action, deliberately defaulted and displayed a certain mental attitude towards the consequences of the default:

Mahomed Abdulla v Chochan 1933NPD 334. An analysis of attorney Madel Janse van Rensburg's affidavit, an annexure to the opposing affidavit marked "A" on page 22, indicates more than a cursory conversation of the circumstances surrounding the divorce summons. This is demonstrated by the fact that she communicated with attorney Maré to obtain the divorce order. In an e-mail to the Applicant's brother dated 21 February 2013, marked annexure MJVRI, She states in paragraph 4

"As Johan onder die indruk was dat ek wel verdediging aangeteken het, het ek en hy mekaar duidelik verkeerd verstaan en ek bied my verskoning aan vir die mate waarin die misverstand voor my deur geëkan word. Ek was egter baie verontwaardig toe ek vanoggend julle sms kommunikasie sien en lees dat hy beweer dat die hele storie my skuld was en dat ek hom "gedrop" het,

Ek is enige tyd beskikbaar om 'n verklaring tot dien effekte af te lê indien u dit benodig vir u voorgenome tersydestelling".

9.9 It is therefore clear to me that the applicant never sat on his laurels on receiving the divorce summons and that throughout his intention and desire was that this matter should proceed on a defended basis.

9.10 Mr Olivier submits further that according to Ms Van Rensburg's affidavit, the Applicant never clearly showed his dissatisfaction with the relief sought in the summons, save for a few mistakes therein and that he never instructed her to defend the action. This statement does not seem correct.

9.11 In paragraph 2 of "MJVRI", attached to the opposing affidavit on page 27, she says

"Soos ek dan ook op daardie dag van hom verstaan het was sy groot probleem die onderhoud wat geëis word, en ek het hom meegedeel dat hy na afloop van die egskeiding enige tyd die plaaslike hof kan nader om die onderhoudsaangeleentheid te herondersoek, en dat hy dit in persoon kan doen of iemand plaaslik kan gebruik wat dan baie goedkoper sal wees."

9.12 In terms of paragraphs 3 and 4 of the Order the monthly payment to the First Respondent and the two minor children is R2000.00 (two thousand rands) each. Mrs Murray, in oral argument, submitted that paragraph 4 of the order regarding the maintenance payable to the First Respondent, did not indicate a date when such payment would terminate. This on its own is a justiciable point in issue. I agree with this view.

9.13 “It has always been the hallmark of what lawyers call a *bona fide* defence (which has to be established before rescission is granted), that defendant honestly intends to pursue before a Court a set of facts which if true, will constitute a defence”:

Saphula v Nedcor Bank Ltd 1999 (2) SA 76 (W). The object of rescinding a judgment is “to restore a chance to air a real dispute”: **Lazarus v Nedcor Bank Ltd; Lazarus v ABSA Bank** 1999 (2) SA 782 (W).

9.14 Mrs Murray argues strongly that the order be rescinded *in toto* so that the matter can be fully ventilated in open Court for the benefit of the minor children. To counter this argument Mr Olivier raised the point that to do so would be tantamount to remarrying the parties as both parties agree that the marriage has irretrievably broken down.

9.15 Once the irretrievable breakdown of the marriage has been established, the Court has no discretion to withhold the decree of divorce. **Schwartz v Schwartz** 1984 (4) 467 (A), **Levy v Levy** 1991 (3) SA 614.

9.16 However, the circumstances in this case are, in my view, of such a nature that a full ventilation of the issues is warranted and that an order to that effect should be made. The two minor children are 15 and half and 13 and half years old. Mrs Murray brought the Court’s attention to the fact that the daughter was born on 16 November 1999. No objection was raised by Mr Olivier. One of the

disputes between the parties is the choice the children may have taken as to the preferred parent. The Court must be satisfied that this expression of preference is a genuine and accurate reflection of their feelings towards the relationship of their parents: **Meyer v Gerber** 1999 (3) SA 650 (OPA) at 655 A-J.

[10] **FINDINGS AND CONCLUSION**

10.1 I am satisfied that the Applicant has:

- (a) Given a reasonable explanation of his default.
- (b) His application is *bona fide* and not made with the intention to delay First Respondent's claim.
- (c) He has a *bona fide* defence to First Respondent's claim.

10.2 The relief sought by the applicant satisfies the legal requirements for an application for rescission and justify such an order.

[11] **COSTS**

Even though in applications of this nature the Applicant should bear the costs, I am of the view that costs should be costs in the cause.

[12] **ORDER**

The application succeeds. Costs shall be costs in the cause.

J.J. MHLAMBI, AJ

On behalf of applicant:

Adv H. Murray
Instructed by:
Symington & De Kok
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On behalf of first respondent: Adv J.L. Olivier
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