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

Case Number: 56859/2021

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

DATE: **02 August 2024**

SIGNATURE

In the matter between:

S[...] P[...] M[...]

Applicant

and

L[...] M[...] (BORN M[...])

Respondent

JUDGMENT

GWALA AJ

[1] This is an application in terms whereof the applicant seeks to rescind an order granted in this Court on 16 November 2022, and a judgment and order granted on 21 February 2023. The respondent opposes the relief sought.

[2] The applicant and the respondent were married to each other out of community of property, subject to accrual system. During November 2021, the respondent instituted divorce proceedings. For reasons not pertinent to this judgment, the applicant failed to deliver his plea within 5 days of service of the notice of bar upon him. Consequently, he was *ipso facto* barred from filing his plea.

[3] The applicant instituted an application in terms of Rule 27 of the Uniform Rules of Court in which he sought to implore the Court to uplift the bar and grant him leave to file a plea. That application was opposed by the respondent. It was enrolled for hearing on the opposed motion roll at 10H00 on 16 November 2022. The applicant's counsel was not in court at 10H00 when the matter was called for hearing. The circumstances of his non-appearance will be dealt with later. The matter was stood down to allow counsel time to arrive.

[4] The matter was recalled at about 10H30. Still, there was no appearance on behalf of the applicant. The registrar called out the applicant's name in the lobby area of the court to no avail. There being no appearance on behalf of the applicant, the matter proceeded in their absence. The respondent asked for an order dismissing the applicant's application. The court granted the order dismissing the Rule 27 application. The transcript of the day shows that the application was dismissed purely due to the non-appearance by the applicant without entertaining the merits thereof.

[5] Subsequent to the dismissal of the Rule 27 application, the respondent proceeded to enrol the divorce action for hearing on an unopposed basis. It was set down for 25 January 2023. The notice of set down was duly served on the applicant for this purpose on 9 December 2022.

[6] On 13 December 2022, the applicant instituted the present application seeking an order to rescind the order granted on 16 November 2022, in terms of which his application in terms of Rule 27 was dismissed. He did not apply for the postponement of the hearing of the divorce action.

[7] On 25 January 2023, the divorce action was heard before Justice Swanepoel. The applicant attended Court duly represented by counsel. Counsel requested an application for the postponement of the matter from the bar and without submitting a formal application. The application for postponement was refused. The matter proceeded. After hearing the evidence of the respondent herein, the Court called upon the applicant's counsel to make submissions on behalf of the applicant on the issue pertaining to the forfeiture of the matrimonial benefit. Counsel for the applicant asked for leave to lead evidence through the applicant. This request was refused. He asked for an adjournment so that he could take instruction from the applicant. The request was granted and the matter was adjourned. When the proceedings resumed, neither the applicant nor his counsel returned to Court. The Court postponed the matter and directed that the applicant should file written submissions to address the issue pertaining to the forfeiture of the matrimonial benefits.

[8] On 27 January 2023, the applicant delivered his written submissions as directed by the Court. On 21 February 2023, the Court delivered its judgement in the divorce action. It granted the decree of divorce and directed that the applicant forfeits the matrimonial benefits.

[9] On 24 February 2023, the applicant filed an application for leave to appeal against the forfeiture order. On 12 June 2023, the application for leave to appeal was dismissed.

[10] On 18 July 2023, the applicant submitted a notice of his intention to amend the original notice of motion in the rescission application with a view to include a prayer for the rescission of the judgment and order granted on 21 February 2023. Together with the notice of intention to amend, the applicant filed a further founding affidavit in support of his application for the rescission of both the 16 November 2022 and 21 February 2023 orders. I need to say something about the submission of the further affidavit at this stage. I have decided to accept this affidavit even though it was filed out of sequence to the extent that it dealt with the order of 16 November 2022. The respondent did not oppose its

acceptance. I am of the view that the respondent will not be prejudice if this affidavit is accepted. In any event it deals with some events that occurred after the application for rescission of the order of 21 February 2023 was instituted. It also provided a clear picture of the events that transpired leading to the non-appearance of the applicant and his counsel in court on 16 November 2022. It is thus in the interest of justice that the affidavit be accepted.

[11] I understand that the rescission of the 21 February 2023 order is sought conditionally upon the success of the rescission application in respect of the Rule 27 application. I understand it that way more so because unless the 16 November 2022 order is rescinded, the Rule 27 application will see a light of the day, subject of cause to any appeal. That being so, the applicant will remain *ipso facto* barred from filing a plea. If there shall be no Rule 27 application then rescinding the 21 February 2023 order would not have any practical effect.

[12] The applicant has founded his application for rescission on the provisions of Rule 31(2), alternatively Rule 42(1)(a), further alternatively, common law.

[13] It is trite that in terms of Rule 31(2) the Court may, on application and upon good cause shown, set aside the default judgment on such terms as it may deem fit. *In Coetzee and Another vs Nedbank Ltd*¹ the court restated the position as follows:

“... An applicant for rescission must show good cause why the application should be granted. The accepted formulation as to what this entails was set out in *Grant v Plumbers (Pty) Ltd*, to the following effect:

- (a) He 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.

¹ 2011 (2) SA 372 (KZD) at para 1.

- (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.”² [footnotes omitted]

[14] The applicant has given contradicting versions in his attempt to explain the non-appearance in Court on 16 November 2022. In the founding affidavit that accompanied the original notice of motion the explanation provided for the default is that the applicant was in court together with a candidate attorney from the office of his attorneys of record when the matter was called at 10H00. The counsel who was briefed on his behalf to argue the matter was running late as he had to rush home to attend to an emergency situation. This was communicated to the Court and it is on this basis that the matter was stood down to allow counsel some time to arrive in Court. He explains further that the candidate attorney and himself temporarily left the Court room to ascertain the whereabouts of the counsel. When they returned the application had been dismissed.

[15] In the further founding affidavit filed together with the notice of intention to amend the notice of motion the applicant attached an affidavit, in support of his application, which was deposed to by counsel who was purportedly briefed to argue the Rule 27 application. This affidavit gives counsel's honest account of what took place in so far as it pertains to him. This affidavit reveals that the applicant's version, as presented in the founding affidavit, was untrue in several respects. It is best that I quote *verbatim* from the supporting affidavit deposed to by counsel. In paragraphs 3 to 7 he states the following:

² See Also Colyn vs Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA 9E-F.

“[o]n or about 15th November 2022 I was provisionally instructed, to attend to an application for upliftment of the bar in terms of the Rule 27 of the Uniform Court Rules, by Mngqingo Attorneys Inc at Pretoria [Pretoria] High Court. The matter was for hearing for the 16th November 2022.

I advised Mr Mngqingo that since I have been appearing on the matters of their firm and I have not received payment in most of the matters without probable explanation, I will prefer that they pay me something before I can commit since I was out of cash. Mr Mngqingo said to me he would pay me R3000 before the end of the day thus 15th of November 2022.

Unfortunately, that did not happen and I was caused to believe that they have opted for another counsel since I did not have the file or got any invitation to caselines, thus, I did not have access or received invitation until 10:15 am after I got a call from Mr Phalama an office Assistant then at the said attorneys at around 09:45am on the day of the court thus 16th November 2022. There I explained to the said Mr Phalama that I have not received any invitation to caselines, as such, I thought they opted for another counsel, judging on their failure to advance payment I spoke of above. (see hereto to attached as annexure “CL” is proof and audit from case lines showing the time of the invitation).

Thus upon learning that they have not secured anyone I decided to put aside out difference and I said is fine I will avail myself to assist regardless of the compromised position I find myself in since I was only having R200 in my pocket which I used to avail myself for the said despite last minute confirmation of brief. I arrived at my Chambers at around 11:00am I sought to get my robes and also to print the caselines bundle. I also ask that I get cash to pay for the print out which was pending, pending the availability of cash which was estimated at R500, which I did not have. I thought Mr Mngqingo would come to my aid in that respect, this is because I use printed caselines bundle to avoid difficulties which

result from poor network signal I the court room that has always been my approach...

In short, my failure to appear in court to attend to the matter in question is due to the said circumstances canvassed above ...”

[16] The applicant averred that, first, when the matter was called in Court on 16 November 2022, the Court was informed that counsel was running late after having gone home to sort out what was said to be an emergency situation. The applicant had requested for 15 minutes to allow counsel time to arrive. It appears from the affidavit deposed to by counsel that there was no such. According to counsel, when he was contacted at about 09H45 in the morning on 16 November 2022, it was not to ascertain his whereabouts, rather it was to brief him to appear in court to argue the matter.

[17] Second, the applicant averred that counsel was briefed on 10 November 2022 to appear in Court on 16 November 2022. The applicant’s attorney confirms this by way of a confirmatory affidavit. A brief cover is attached to the founding affidavit, though it is not dated, as evidence that counsel was briefed accordingly. It appears from the affidavit deposed to by the counsel that, in actual fact, he was contacted only on 15 November 2022, merely a day before the hearing of the matter. Even then, the brief was not confirmed because counsel had set certain conditions before he could accept the brief, and the conditions were not complied with.

[18] Third, counsel was not furnished with the contents of the brief. He was not given access to CaseLines and thus had no access to the papers until, according to him, about 10h15 on 16 November 2022, when the matter would have been heard at 10H00.

[19] Fourth, the applicant’s account is also implausible in another respect. In his further affidavit the applicant says that he was not in Court when the matter was called at about 10H30 because he had gone to look for parking for his vehicle which he had previously left in an undesignated parking area. This is not consistent with his version

that he arrived in Pretoria that morning from Durban, travelling on a bus. He was not driving his vehicle. It eludes me as to which vehicle he had to find parking for.

[20] The applicant and his attorneys, in an attempt to explain the non-appearance in Court, have sought to put blame on counsel when in fact the blame was solely on his attorney. It eludes me how it could be expected that counsel would appear in Court when he was not placed in possession of the necessary documents to proceed with the matter. In fact, the brief was not confirmed since his conditions for acceptance of the brief were met. Clearly, counsel was not briefed. The non-appearance was due to this fact. The attorney was aware of this fact. In all circumstances, the explanation for the non-appearance is not reasonable nor is it *bona fide*.

[21] Whilst it may be so that the applicant was not to blame for the non-appearance by the counsel, he may not escape the conduct of his chosen legal representative. The conduct of his attorneys of choice must be attributed to him. In *Saloojee and Another NNO vs Minister of Community Development* ³ the Appellate Division, as it then was, held that:

“There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are”.⁴

[22] I have sympathy for the applicant, but he is not without remedy. He has a recourse or remedy against his attorneys.

³ 1965 (2) SA 135 (A) 141 C-E.

⁴ See Also *Darries vs Sheriff, Magistrate's Court, Wynberg, and Another* 1998 (3) SA 34 (SCA).

[23] The other requirement that the applicant must satisfy in an application for rescission under Rule 31(2) is that the applicant has a *bona fide* defence. He is required to set it out *prima facie*. In the founding affidavit, the applicant was content to merely state that he has a *bona fide* defence which he will raise without stating what it is. In the further founding affidavit, he did not set out the *bona fide* defence. He merely refers to an annexure which, according to him, sets his *bona fide* but that annexure does not deal with the defence at all.

[24] In *Vosal Investments (Pty) Ltd V City of Johannesburg and Others*⁵, the Full Bench observed that:

“In order to succeed in its application for rescission the appellant had to establish that it had a bona fide defence to the council's claim. Failure to cross this hurdle would be fatal, irrespective of however reasonable or otherwise the explanation for the default might be (see *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765A - D).”

[25] The applicant has not established that he has a *bona fide* defence. This is fatal to the application for rescission.

[26] The applicant also relies on the provisions of Rule 42(1)(a). He contends that the judgment was sought and granted in error, because the Court dismissed his application in his absence only on the basis that there was no appearance and without hearing the merits thereof when everything necessary to enable a hearing was before the Court including the heads of argument.

[27] There is merit in this contention. The application was not considered on its merits. At least the transcript does not show the Court considered the application on its merits. The transcript shows that it was dismissed on an account of non-appearance by

⁵ 2010 (1) SA 595 (GSJ) at para 7.

the applicant. In my view, the Court could only make such an order to dismiss the matter after it had considered it on its merits because a dismissal brings an end to a matter and determines the rights at issue or at least the dispute between the parties. In circumstances where there was no appearance by a party, in particular the party who initiated the proceedings, the appropriate order would be to strike the matter from the roll unless the Court deals with the merits thereof. There is a stark difference between dismissal and striking off and their subsequent consequences.

[28] However, this does not take the matter any further and does not assist the applicant. An order may not be rescinded under Rule 42(1)(a) merely on the basis that it was sought and or granted in error. More is required. One of the requirement is that the order must have been granted in the absence of the affected party. The Constitutional Court in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*⁶, has made it clear that the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present. The Constitutional Court stated as follows:

“Accordingly, this Court found that the irregularity committed by the High Court, insofar as it prevented the parties’ participation in the proceedings, satisfied the requirement of an error in rule 42(1)(a), rendering the order rescindable. Whilst that matter correctly emphasises the importance of a party’s presence, the extent to which it emphasises actual presence must not be mischaracterised. As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed. I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of

⁶ (CCT 52/21) [2021] ZACC 28 at para 60-61.

regularity, only to then, ipso facto (by that same act), plead the “absent victim”. If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing *absentia* (absence).

The cases I have detailed above are markedly distinct from that which is before us. We are not dealing with a litigant who was excluded from proceedings, or one who was not afforded a genuine opportunity to participate on account of the proceedings being marred by procedural irregularities...”

[29] The applicant was not precluded from attending the proceedings due to any form of procedural irregularity. As far as the Court was concerned, the Rules of Court had been fully complied with. The applicant was aware of the date the matter was set down for. In fact, he is the party who set the matter down. The fact that counsel did not appear is the fault of his attorney which, as I said, he cannot avoid having it attributed to him. Accordingly, the applicant does not meet the requirement of absence as provided for in Rule 42(1)(a).

[30] For all these reasons, I am not satisfied that there is no good cause established for rescission. The applicant has failed to make out a case for the rescission of the order of 16 November 2022. Accordingly, the application falls to be dismissed. I have already mentioned that rescinding the judgment and order of 21 February 2013 would not have practical effect if the 16 November 2022 order is not rescinded. Accordingly, in view of the conclusion I have reached with regard to the application for the rescission of the 16 November 2022 order, that application too must be dismissed. There is no reason to depart from the usual rule that costs follow the event. It was not argued otherwise. I am of the view that such costs be set at scale A.

[31] In the result, I make an order in the following terms:

1. The application for rescission of the order of 16 November 2022 is dismissed.
2. The application for rescission of the judgment and order of 21 February 2023 is dismissed.
3. The applicant is ordered to pay costs including costs of counsel on scale A.

M GWALA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Counsel for the applicant: HJ Fisher (Adv)

Attorneys for the applicant: DMS Attorneys

Counsel for the respondent: S Liebenberg (Adv)

Attorneys for the respondent: Kgokong Nameng Tumagole Inc

Date of hearing: 09 May 2024

Date of delivery: 02 August 2024