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REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: B1349/2023

1. REPORTABLE: NO

2. OF INTEREST TO OTHER JUDGES: YES

3. REVISED: YES

DATE: 17 February 2025

SIGNATURE OF JUDGE:

In the matter between:

I[...], V[...]

APPLICANT

and

I[...], G[...] I[...]

RESPONDENT

JUDGMENT

HAUPT AJ

- [1] The Constitutional Court (CC) in ***Dawood, Shalabi and Thomas v Minister of Home Affairs*** remarked that entering into a marriage is to enter a relationship of public significance that serves an important social function as a marriage gives rise to legal and moral obligations, including the parties' reciprocal duty to support one another.¹ Consequently, the very nature of divorce proceedings are personal irrespective of whether it is considered from a legal, moral or emotional perspective.
- [2] A decree of divorce has a direct impact on the status of a person. A divorced spouse or partner in a civil union is free to marry again, may retain his/her married name or resume using a maiden surname or any other surname. A divorce order also regulates the matrimonial and patrimonial consequences of a divorce in terms of Section 7 of the **Divorce Act** including the extension of the reciprocal duty of support post- divorce.²
- [3] The opposed application for rescission of a divorce order that came before me serves as a reminder of the duty of legal practitioners towards the court to immediately inform the presiding judge when the opposing party wishes to be heard during the proceedings even if the matter is unopposed. Judges depend on ethical conduct by legal practitioners which includes the duty to make proper disclosure of relevant information. Legal practitioners must not merely pay lip service to section 34 of the Constitution and underplay the importance of protecting the right of access to justice, especially in unopposed divorces.³
- [4] The applicant applies for the rescission of the divorce order granted by me in the Family Court on 9 September 2024 (*September divorce order*). The applicant is the defendant in the divorce action instituted by the respondent, her husband during March 2023. The applicant did not file a notice to oppose and/or a plea and counterclaim in the divorce action.

¹ 2000 (3) SA 936 (CC) at paras 30 – 31 and 33

² Act 70 of 1979

³ **Constitution of the Republic of South Africa**, Act 108 of 1996

- [5] The applicant applies for rescission in terms of Rule 31(2)(b), alternatively, the common law, and in the further alternative in terms of Rule 42(1)(a) in that the judgment was erroneously granted.
- [6] The respondent obtained a decree of divorce and division of the accrual on an unopposed basis and in the absence of the applicant. The September divorce order was granted without hearing oral evidence as the matter did not involve minor children. In accordance with the *Consolidated Practice Directive 1/2024 for Court Operations in the Gauteng Division*, the hearing of unopposed divorces which do not involve the interests of minor children are dealt with in paragraph 30.5 of the Practice Directive as Category A Divorces. The Practice Directive provides that all matters that do not involve minor children must be dealt with by adducing evidence on affidavit and that no party shall testify in person, save where the Judge orders otherwise.⁴
- [7] Consequently, no oral evidence from the respondent was heard when the matter came before me on 9 September 2024. In the respondent's evidence affidavit deposed to on 2 September 2024 he confirmed that the applicant did not defend the divorce action and that the summons was personally served on her as well as the notice of set down. However, the affidavit makes no mention of the fact that the applicant had torn up both documents in front of the respondent. This was also not conveyed to the court when the respondent's counsel, called the matter and moved for an order.⁵
- [8] After hearing submissions from counsel, a decree of divorce was granted including the following order:

“2. *Pending the calculation of the accrual, the following issues are to be separated and postponed to be heard on 4 November 2024, before Madam Justice Haupt, AJ in the Family Court.*

⁴ Para 30.5.1 of the Consolidated Practice Directive

⁵ The respondent was represented by Mr Braga on 9 September 2024

2.1 *Defendant be ordered to pay to the Plaintiff an amount equal to 50% of the difference between the accruals of the respective estates of the parties within 21 days from date of this order; and*

2.2 *In the event of any payment not being made timeously or in full, the Defendant shall pay interest at more rate of interest on the arrears, compounded monthly on all areas, until the amount is paid full.*

3. *A copy of this order is to be served on the Defendant within seven days from date of this order.”*

[9] A copy of the September 2024 divorce order was served on the applicant on 17 September 2024. On 24 October 2024 the applicant issued an application for the rescission of the September divorce order, that she be ordered to file her plea and counterclaim within 15 days from date of granting of the order and that the respondent be ordered to pay the costs of the rescission application only in the event of opposition.

[10] When the matter came before me on 4 November 2024, I was informed of the rescission application. Ms Stroebe appeared on behalf of the applicant, and Mr Braga on behalf of the respondent.

[11] As the September divorce order was granted by me and serious allegations were made against the respondent's legal representatives I expedited the hearing of the matter before me. The applicant alleged that the respondent's legal representative failed to inform the court that the applicant had informed her husband prior to and on the morning of the court appearance that she wants to obtain her own legal representative. It is further alleged that she requested the respondent personally and via WhatsApp messages on numerous occasions on 9 September in which court the matter was being heard as she wanted to defend the action and he ignored her requests and

did not provide her with the relevant information.

FACTUAL MATRIX:

- [12] The merits of the application and the relief sought including the punitive costs order sought by the respondent, must be considered within the chronology of the events leading up to the September divorce order being granted and what happened thereafter.

- [13] On the papers filed the following is common cause, or not seriously disputed by the respondent.

- [14] The parties were married on 14 March 2001 out of community of property subject to the accrual system. It was the second marriage for both parties. No children were born from the marriage. Both parties have major children from their previous marriages who were part of their family unit during the marriage.

- [15] The parties are co-owners of an immovable property that has been their matrimonial home for the past 15 years. The applicant, who is 57 years old, has been unemployed for the past 16 years. The respondent is a 67-year-old businessman. The respondent financially supported the applicant for most part of the marriage. According to the respondent the applicant refused to obtain employment and contribute towards joint expenses. The applicant denies this.

- [16] The parties have been living in separate bedrooms for the past two years. According to the respondent, he was exiled to another bedroom in the matrimonial home after an argument.

- [17] Although the couple had their ups and downs, they continued with the marriage relationship even though they slept in different bedrooms. On the respondent's version, the parties did things together like "roommates" and

not like a loving couple and they were only living together because they are co-owners of the matrimonial home.

- [18] The applicant denies this. Despite not sharing a bed, the parties continued living in the same house, going out for dinner and the respondent also planned holidays and entertainment which they enjoyed as a couple. Both parties continued to do things for the other as a spouse would do. For example, the applicant would from time to time take the respondent to, alternatively collect him after his golf games and the respondent continued to financially support her and the family home. The respondent would also often buy gifts for the applicant.
- [19] The respondent informed the applicant in 2018 and 2019 that he consulted with attorneys regarding a divorce, but nothing further transpired from these meetings and the parties continued with their lives as usual.
- [20] According to the respondent, the applicant admitted during August/September 2022, that she had an extramarital affair for the past seven years with their elderly neighbour. The applicant denies this. According to the respondent it was always his intention to separate from the applicant and that he would inform her of the court date. The applicant denies this.
- [21] On 20 November 2022 the respondent's attorney⁶ addressed a letter to the applicant indicating that the respondent seeks a divorce and inviting her to a roundtable discussion. Nothing further came of this letter. During November 2022 the applicant's brother was also charged with a serious offence, leading to an extensive trial during which the applicant supported her brother by attending the Regional Court hearing.
- [22] The return of service confirms that when the divorce summons was served on the applicant on 23 March 2023, she refused to sign for the document

⁶ Manley Incorporated

and merely confirmed her identity. It is common cause that the applicant tore up the summons in front of the respondent and threw it in the dustbin. She did not read the document and could not believe that the respondent wanted to leave her after all that they have been through. Thereafter the parties again continued with their lives as usual.

- [23] On 11 June 2023 the parties had an open conversation regarding their marriage. It is common cause that the applicant requested that they work on themselves and their 22-year marriage and that they reassess the situation at the end of 2024. In addition, the applicant also informed the respondent that should they not be able to successfully reconcile, she wanted the opportunity to seek her own legal advice as she wanted to oppose the divorce action.
- [24] On 16 June 2023, the applicant found an email dated 12 June 2023 in her spam folder. The email was an email that the respondent received from his attorneys on the morning of 12 June 2023, which he had forwarded to the applicant. The email merely confirmed that the respondent's attorney was removing the matter from the unopposed roll and that they would be applying for a new date. The unopposed divorce was enrolled for 13 June 2023 and the applicant was not informed of the date. The matter was removed on 13 June 2023 due to non-appearance.
- [25] On 21 June 2023 the applicant forwarded the 12 June email to the respondent's attorney.⁷ The email confirms the 11 June discussion between the parties. In addition, the applicant made it clear that if the parties are not successful to restore their relationship, she wants the opportunity to seek legal counsel. She also indicated that she had not seen any settlement proposal let alone sign any agreement. The email is concluded with her hope that their relationship will be repaired as *"... 22 years, 5 children and 6 grandchildren later, we owe it to ourselves."* The respondent's attorney did not respond to the applicant's email.

⁷ Mr Andre Crauwkamp from Manley Incorporated

- [26] The matter was again enrolled on the Family Court roll of 31 July 2023. The matter was again struck due to non-appearance. The applicant was not notified of the court date. According to the respondent he instructed his attorneys not to appear at court on the allocated dates in June and July 2023.
- [27] According to the respondent he and the applicant had a discussion around the end of October 2023 as they were attempting to work things out in respect of their relationship. However, this was short lived. According to the respondent he informed the applicant that he was continuing with the divorce process. The applicant denies this.
- [28] The parties continued with their lives as usual and during April 2024, the parties enjoyed a holiday in Thailand. The respondent arranged and financed the holiday. During their vacation they enjoyed various activities including dining out and couples' massages. According to the respondent, the holiday was part of a business trip.
- [29] Approximately two months later, the divorce was again enrolled on the Family Court roll for the week of 9 July 2024. The matter came before me. I removed the matter as no evidence affidavit in terms of the Practice Directive or proof of service of the notice of set down was filed. Again, the applicant did not receive notice of the 9 July court date. According to the respondent the matter was set down unbeknownst to his attorney and was removed from the roll.
- [30] On 19 August 2024 the sheriff served the notice of set down for the hearing on 9 September 2024. It is common cause that the applicant again tore the document up in front of the respondent and threw it in the dustbin without familiarising her with the content thereof. According to the applicant she thought it was a new summons. She made it clear to the respondent that if he intends to proceed with a divorce, she should be afforded the opportunity to obtain legal representation and to defend the matter despite according to

her, her emotional and mental state. She also demanded that they work on their marriage.

- [31] The respondent does not deny this, but states that he informed the applicant on various occasions to obtain legal representation which she refused to do. After this spat, life again returned to normal, and the applicant dropped the respondent off at a golf day on 5 September 2024 and fetched him thereafter.
- [32] On 2 September 2024 the respondent deposed to a 3-page evidence affidavit to comply with the *Consolidated Practice Directive*. The respondent, in his capacity as the plaintiff, sought relief with reference to the summons. Reference is further made to the summons and notice of set down being served personally on the defendant. No mention is made that the defendant tore up these documents in the presence of the plaintiff or that the parties were continuously engaged in discussions relating to the restoration of the marriage relationship.
- [33] According to the applicant after the notice of set down was served they didn't speak about the document that was served until the morning of 9 September 2024. According to the respondent the applicant was aware of his intentions to proceed with the divorce, yet she sat back and did nothing. The applicant denies this. The respondent also referred to numerous WhatsApp's exchanged between the parties, but none of the WhatsApp's confirm that he ever informed the applicant of the court date, or in which court the matter would proceed even though, according to the respondent, his wife initially believed that the matter was in court on 6 September 2024.
- [34] The parties had heated arguments commencing the evening of Sunday, 8 September continuing to approximately 03:00 on the Monday morning. At around 08:00 on 9 September, the respondent informed the applicant that he is going to court to appear in the divorce proceedings. She reacted by grabbing the keys of his motor vehicle to stop him. She also requested to travel with him to court.

- [35] At some stage the respondent stepped away to call his attorney, Mr Crauwkamp. He informed the applicant that she could not travel with him as he is collecting his attorney and they are travelling together to court. The applicant wanted to know in which court and at what time the matter was going to be heard. She told the respondent that she wanted to be heard - in other words that she wanted to have her say in court. The respondent refused to inform her of the court's location and stated words to the effect that *"They don't want to hear your story. This is not Judge Judy, they will throw you out."*
- [36] According to the respondent he did not refuse to inform the applicant of the court's location. According to him, he was not aware of the exact details of where the hearing was to take place as he was travelling with his attorney. He explained his reference to *"Judge Judy"* as that the applicant's behaviour and threats to inform the court of his alleged infidelities during their marriage must be seen within the context of the applicant's often erratic and emotive behaviour. The respondent does not dispute that he informed the applicant that she must make her own way to court. However, he did not inform her of the time, nor which court (i.e. High or Regional Court) she had to appear in.
- [37] From approximately 8:19 to 13:25 on 9 September 2024 no less than 16 voice calls/ notes and more than 40 WhatsApp messages were exchanged between the parties. The trail of WhatsApp's and voice notes sent by the applicant, is attached to the founding affidavit and is not disputed by the respondent. In the multiple WhatsApp messages the applicant *inter alia* informed the respondent that what he was doing is wrong, she begged him to phone her, she informed him that he is denying her the opportunity to legal representation, and again enquired which court she must be at and reiterated that she has the right to be heard. Her WhatsApp at 09:11 read: *"I am waiting for you to let me know where I must go ... which court, I have the right to be heard..."*
- [38] The respondent contacted her at 09:13. They spoke for 4 minutes.

Thereafter the applicant attempted to telephonically contact the respondent on 5 occasions from 09:17 to 09:21 including a WhatsApp requesting him to call her at 09:20. The respondent did not take her calls.

[39] In response to her WhatsApp at 09:20 wherein she requested that he calls her, the respondent merely responded at 09:21: *"I have to do this for my self-preservation."* From the trail of WhatsApp's and voice notes, it is evident that the respondent replied to his wife's WhatsApp messages at 09:02, 09:08 and that at 09:13 the applicant again asked where she must go. He also sent further WhatsApp's at 09:24, six minutes before the court proceedings were to commence at 9:30.

[40] At some stage a further WhatsApp was sent by the applicant which read: *"The least you can do is to be honest with the Magistrate and tell that have been in total denial ... I have seen absolutely no settlement agreement and need this matter postponed Now it has become obvious you think DIVORCE will give you freedom."*

[41] Despite the applicant's numerous requests, messages and calls the respondent did not provide her with the details as to where and at what time the matter would be heard even though by that time he knew in which court the matter will be proceeding. Not only did the applicant clearly communicate her intention to oppose the divorce and her desire to be present at court on the morning of 9 September 2024 before the respondent left to collect his attorneys, she also conveyed this intention in a WhatsApp on 5 September 2024:

"You start this process, there is now going back EVER. I will NOT cohabitate with you nor will I emotionally/psychologically cope with staying in ANY form of contact with you. So please have the decency to let me know if I should have some emergency legal representation. Alternatively, I will appear in court without, and I will be heard."

- [42] The court proceedings commenced at 9:30. According to the respondent he informed his legal representatives,⁸ prior to the commencement of the court proceedings that his wife threatened that she would come to court and tell the court how he had cheated on her. He was apparently advised that she is entitled to come to court, but that the court is not interested in parties airing their dirty laundry. The respondent's attorneys filed short confirmatory affidavits simply confirming the content of the answering affidavit in so far as it relates to them and no further detail or context is provided.
- [43] At 11:59 the respondent sent the applicant a voice note: *"And yes I have disclosed to the advocate, not in detail obviously, they don't want to hear that, the court doesn't want to hear that. What you are doing is trying to seek an opportunity to voice, or to be heard, they don't work like that, its very clinical."*
- [44] According to the respondent he could never conceive that the applicant wanted to institute a counterclaim for spousal maintenance, even though the applicant has not been gainfully employed for the past 16 years and the respondent paid the family's expenses. I find the respondent's version unconvincing given the factual position.
- [45] The matter was called at 11:05 and again at 12:02. The transcript of the proceedings is attached to the answering affidavit. The transcript reflects the court's difficulty with the relief sought for payment of the accrual without sufficient evidence regarding whose estate has shown the larger accrual.
- [46] After the proceedings the respondent went out for celebratory drinks and returned to the matrimonial home much later that day in a "jolly" mood. He informed the applicant that the divorce order was granted but that they must still come to a settlement. According to the respondent he informed the applicant that she will receive a copy of the order once it was available. The order was subsequently served on the applicant on 17 September 2024.

⁸ Attorneys Mr David Manley and Andre Crauwkamp and counsel, Mr Braga

- [47] A few days after the granting of the divorce order the parties attended a music show together with the applicant's daughter. On Thursday, 12 September 2024, four days after the granting of the divorce, the applicant received a WhatsApp from the respondent with photograph of a luxury red sports car, and a further message stating *"looking forward to our first date tomorrow"* followed by a kissing emoji.
- [48] According to the respondent he informed the applicant on 9 and 10 September 2024 that they should come to a settlement on the patrimonial aspects of their marriage. On Tuesday, 10 September the applicant messaged the respondent at 14:10: *" I will not sign any settlement agreement We have 12 months to settle that. And only on that basis will I cohabitate."* The respondent responded: *"I think the settlement needs to be sorted ASAP as then there is no accusation of manipulation."*
- [49] The applicant then contacted the counsel who assisted with her brother's criminal matter and he advised her to approach an attorney. After contacting her present attorney of record, they consulted on 30 September 2024. The applicant was not able to provide her attorney with copies of documents relating to the divorce as she had torn them up.
- [50] Prior to the applicant consulting with her attorney, the respondent provided her with a document titled "Cohabitation Agreement". The agreement provides that as the parties still wish to continue living together for an indefinite period, the respondent agrees to pay the direct monthly running costs of the *"common household"*, medical aid, the applicant's vehicle insurance,⁹ and her cell phone contract.
- [51] The agreement further provides that the parties will contribute to the general monthly overheads until any separation occurs. If the parties decide to relocate together to another location the same conditions will apply. In

⁹ A Land Rover Evoque that he gifted to the applicant during 2017

addition if the parties are unable to stay in the same household and wish to live separately, the respondent is to pay rehabilitative maintenance to the applicant which includes accommodation at a property either owned by the respondent, alternatively rental to the maximum of R10,000.00 a month, a contribution towards living costs of R2,500.00 per month and comprehensive motor vehicle insurance for a period of 6 months from date of the separation.

- [52] Clause 3 of the agreement stipulates as follows: “*Should the separation be due to the influence of any third party, no rehabilitation will be paid.*” The agreement makes no reference to the September divorce order or to the calculation or a division in accordance with the accrual system. It merely provides in clause 5 for the division of the existing household contents to be agreed upon by both parties one month after the separation.
- [53] According to the respondent the cohabitation agreement merely establishes some ground rules in the hope that they have a less acrimonious “roommate” situation. His proposal to contribute to certain expenses was according to him done on a *bona fide* basis and to reach finality in the matter. It was not an admission of any liability to pay maintenance to the applicant and makes logical financial sense based upon his disposable income available and in circumstances where the applicant refuses to seek employment to assist financially.
- [54] When the applicant enquired from the respondent how the cohabitation will work in a WhatsApp, he merely responded that everything would be the same as before. The respondent then provided an estimate of the value of their respective estates. He recorded his net value assets as R12,749 000.00 and hers as R6,750,000.00. The estimate refers to assets as at September 2022, and provides full particulars of the applicant’s assets, including her vehicle, her undivided half share in the matrimonial home, the value of an immovable property the applicant owns in Moreleta Park which she received as part of a settlement in her divorce from her previous husband, investments and cash. The respondent later informed the applicant that she can add a further R1 million to his net asset value.

[55] The respondent does not dispute that he provided the asset value estimation. His version in his answering affidavit is however not supported by the particulars of claim and the evidence affidavit filed in support of the relief he sought on 9 September 2024. He failed to explain in the answering affidavit how he was able to provide an estimation of the value of the applicant's estate shortly after the divorce was granted when he pleaded in paragraph 7.11 of his particulars of claim that he does not have full particulars of the value of the applicant's estate. The relevant paragraphs in the particulars of claim dated 7 March 2023 are as follows:

“7.8 The Plaintiff pleads that, for purposes of determining the difference between the respective accruals of the parties estates, the value of the Plaintiff's estate at the dissolution of the marriage is deemed to be nil;

7.9 The Defendant's estate has accrued substantially during the subsistence of the marriage;

7.10 As a result, the Plaintiff is entitled to payment to the Plaintiff of one half of the difference between the accruals of the parties' respective estates;

7.11 The Plaintiff does not have the full particulars of the value of the Defendant's estate and is entitled to obtain full particulars of the value of the estate of the Defendant with documentary proof thereof in terms of Section 7 of Act 88 of 1984.” (Own emphasis added)

[56] According to the applicant she does not believe that the estimation provided by the respondent is a true reflection of the parties' current net value of their respective estates. She seeks an opportunity to institute a counterclaim for not only spousal maintenance but also for a division of the accrual and an

order that the trust established by the respondent, be regarded as his *alter ego* for purposes of calculation of the accrual in his estate. The respondent denies this.

- [57] On 7 October 2024 the applicant's attorney directed a letter to the respondent's attorney, confirming that the applicant intends bringing an application for rescission of the September divorce order and a condonation application. Furthermore, a request is made for the urgent granting of access to the electronic court filing system, and that the respondent agrees to the rescission of the divorce order and to reinstate all the previous payments made by the respondent to the applicant. Apparently, the respondent stopped the payments he had always made to the applicant after the September order. The respondent was requested to reinstate these payments until the matter is settled. The respondent's attorney responded that their instructions are not to consent to a rescission. They undertook to provide dates for a meeting between the parties as requested and access to CaseLines.
- [58] The respondent informed the applicant that he had a meeting with his attorneys on 7 October 2024. He tendered R500,000.00 in full and final settlement to her. He informed her that they should consider a revised cohabitation agreement that provides for R30,000.00 per month for a period of 6 months in respect of spousal maintenance and that they must talk before the end of that day as they were "*running out of time*". The respondent denies that the offer that he made had any bearing on spousal maintenance and the R500,000.00 payment was conditional on the applicant transferring her 50% portion in the matrimonial property to him.
- [59] On 9 and 11 October 2024, the applicant's attorney again requested to be provided with access to the matter on CaseLines. Her attorney was provided with access to the electronic court filing system on Friday, 11 October.
- [60] On Monday, 14 October 2024 the applicant consulted with her legal representatives in respect of the rescission application. During this period the

legal representatives also attempted to settle the matter.

- [61] On Tuesday, 15 October 2024, the respondent forwarded emails to the applicant regarding a vacation trip he planned for them to Dubai from 14 to 20 January 2025. The respondent had already communicated with the travel agent in this regard barely a month after the September divorce order was granted.
- [62] After the respondent became aware of the applicant's intention to institute the rescission application, he sent a WhatsApp on Wednesday 16 October 2024, which read: *"Okay, so the gloves are off now, got the notification of your intentions, so cut your emotional crap and let the war begin."* The respondent attempted to provide context to this WhatsApp in his answering affidavit. The message was sent out of frustration as he believed that the applicant is doing everything possible to drag out the finalisation of the divorce.
- [63] According to the applicant, the respondent is resorting to bullying tactics as he wants to litigate her into submission and force her into a settlement. In support of her vulnerable emotional and state for the past few years and her perception and experience of the respondent's conduct, she provided a letter from her treating therapist. The applicant's therapist is a clinical psychologist. The psychologist's correspondence dated 21 October 2024 indicates that the applicant suffers from anxiety and depression, partly related to her dysfunctional home environment and that the applicant has reported suffering from emotional, financial and sexual abuse during her marriage to the respondent over the past 23 years. The therapist further goes on to state as follows:

"The home has reportedly been characterised by excessive alcohol abuse and emotional manipulation. Mrs I__ has been trying to survive a very difficult marriage and did not believe that Mr I__ was serious about getting a divorce.

She was in denial about the reality of her current situation after years

of being bullied and manipulated. She now understands that a dismissive attitude has serious consequences.

I request that she be given a second chance to respond to the summons and address any harm that could come her way....”

[64] The respondent denies that he bullied the applicant and according to him, she verbally and physically abused him.

[65] On Thursday 24 October 2024 the application for rescission was served.

ADDITIONAL ARGUMENTS RAISED IN OPPOSITION TO THE APPLICATION FOR RECISSION:

[66] In his answering affidavit, the respondent seeks that the rescission application be dismissed with an appropriate punitive costs order. The thrust of his opposition is that he was procedurally entitled to the order as the summons and notice of set down were served personally on his wife. On the voluminous papers filed by the respondent including a 86-page affidavit, with a further 50 pages of annexures, it was never his case that there was no need to institute an application to rescind the decree of divorce and that the applicant would irrespective of the divorce order already having been granted, still be entitled to institute a spousal maintenance claim.

[67] However, at the hearing of the rescission application on 15 November 2024, Ms Vermaak-Hay SC appearing with Mr Braga on behalf the respondent, handed up heads of argument wherein new grounds of opposition to the rescission application were raised. The argument included that a Section 7(2) spousal maintenance claim in terms of the **Divorce Act** survives the granting of a decree of divorce and that the court can still grant a separation of issues in the present circumstances. Consequently, the applicant is not non-suited as she can still institute a claim for spousal maintenance and division of the accrual.

[68] Ms Vermaak-Hay SC also handed up a draft order providing for the

dismissal of the application on a punitive Scale C including the costs of two counsel, a separation of issues and that the applicant be granted leave to file a plea in opposition to the separated issues in terms of the September order and her counterclaim within 10 days. In addition, the draft order provides that pending the finalisation of the separated issues and the issues to be raised by the applicant in her counterclaim, she is entitled to utilise the provisions of Rule 43 and will not be prejudiced by the fact that the decree of divorce was already granted. Counsel, however, qualified the draft order by recording that the respondent is in not admitting that the applicant has a right to claim any maintenance.

[69] The applicant's counsel Ms Stroebel, objected to the respondent's new line of argument. She correctly in my view pointed out that in the answering affidavit the basis for the opposition was that the applicant failed to demonstrate good cause, as required by Rule 31(2)(b) and the common law. This included that she was aware of the ongoing divorce proceedings due to the service of the summons and notice of set down, that she was awarded the opportunity to defend the matter but chose to do nothing and that her intended claim for spousal maintenance was purely for purposes of delaying the respondent's claim.

[70] In similar vein, the answering affidavit also dealt with the reasons why the respondent was of the view that the applicant had not made out a case in terms of Rule 42(1)(a) as the applicant failed to demonstrate that the respondent was not procedurally entitled to the order as the applicant had received notice of the proceedings and he had also informed her on the morning of 9 September that he is on his way to court to obtain a divorce order.

[71] It is trite that legal arguments not specifically raised on the papers in motion proceedings may be advanced if they arise from the facts alleged.¹⁰ Ms Stroebel argues that the legal argument which the respondent now attempts

¹⁰ *Van Rensburg v Van Rensburg en Andere* 1963 (1) SA 505 (A) at 509E – 510B; *Heckroodt N.O. v Gamiet* 1995 (4) SA 244 (T) at 246A - C

to advance at the hearing does not arise from the facts as stated in his answering affidavit. In addition, none of the subsequent correspondence exchanged between the parties' respective attorneys indicate a change in the argument or basis for opposition on behalf of the respondent.

[72] Although the argument of Ms Stroebel is legally sound, I deemed it in the interests of justice and due to the novelty of the argument that in the present circumstances where no plea and counterclaim was filed a Section 7(2) claim in terms of the **Divorce Act** still survives a decree of divorce, to allow the new argument raised. However, the parties were afforded the opportunity to file supplementary heads of argument to address the new issues raised.¹¹

[73] The costs order that I intend to grant however reflects the court's displeasure in the way the respondent not only opposed the application for condonation and rescission, but also in the manner that it has been done. In my view Ms Stroebel raises a valid question - if the court is to accept the respondent's argument that irrespective of whether the divorce is rescinded or not the applicant will in any event, still be entitled to institute a claim for spousal maintenance, why was the application for rescission so vehemently opposed if the rescission would have no effect?

CONDONATION FOR THE LATE FILING OF THE RECISSION APPLICATION:

[74] Rule 31(2)(b) provides that a defendant may apply within 20 days after acquiring knowledge of a judgment granted in accordance with subrule (2)(a) for the rescission of such judgment and that the court may, on good cause shown, set aside the default judgement on such terms as the court deems fit.

[75] The applicant instituted the rescission application approximately 10 days after her attorney received access to CaseLines and approximately a week after the expiry of the 20 day period.

¹¹ Supplementary heads were filed by the end of November 2024.

- [76] I am satisfied with the explanation provided by the applicant for the late filing of the application. The founding affidavit provides a full explanation for the delay and the steps taken by the applicant and her attorney to not only obtain access to the CaseLines profile but also the attempts to settle the matter. The application could not have been drafted without the applicant's legal representative having full access to the papers filed on CaseLines, including the divorce summons. Consequently, I am satisfied that the applicant has provided a sufficient explanation that allows the court to understand the reason for the late filing and condonation is consequently granted.

**REQUIREMENTS FOR RECISSION IN TERMS OF RULE 31(2)(b),
ALTERNATIVELY THE COMMON LAW:**

- [77] The requirements for recission in accordance with the provisions of Rule 31(2)(b) and the common law overlap to some extent. Generally, where an application does not fall within the confines of Rule 31 or 42, recission in terms of the common law may apply when sufficient cause is shown.
- [78] It is settled law that our courts generally expect that an applicant in a recission application is to show good cause for the recission. This includes not only showing an absence of willfulness but also by giving a reasonable explanation for the default, showing that the application is made *bona fide* and that the applicant has a *bona fide* defence to the plaintiff's claim, which *prima facie* has some prospects of success.¹² It is a trite principle that the court has a wide discretion in evaluating what constitutes good cause in the circumstances of the matter in order to ensure that justice is done between the parties. The court may also consider the prejudice to the parties.
- [79] I am satisfied, having regard to the common cause facts read together with the facts that are not seriously disputed or disputed on a *bona fide* basis by the respondent, that the applicant has shown a good cause, not only for the

¹² **Silber v Ozen Wholesalers (Pty) Ltd** 1954 (2) SA 345 (A) at 476 – 477; **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)** [2003] 2 All 113 (SCA) 27 at para 11

late filing of the condonation application but also for the rescission in terms of Rule 31(2)(b) and in the alternative in terms of the common law. From the chronology of events prior to the September divorce order the parties' relationship consisted of a pattern of fighting, threatening with divorce proceedings and then making amends thereafter. The saying "*Stop it I like it*" comes to mind when considering the relationship dynamic between the parties.

- [80] Section 4 of the **Divorce Act** provides that a court may grant a decree of divorce on the ground of the irretrievable breakdown of the marriage if the court is satisfied that the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of the marriage relationship.¹³ Subsection (3) further provides that if it appears to the court that there is a reasonable possibility that the parties may reconcile through counselling, reflection or treatment, the court may postpone the proceedings in order that the parties may attempt a reconciliation.
- [81] Although the respondent did from time to time threaten with divorce proceedings he never followed through until summons was served during March 2023. Before and after the service of the summons the parties kept on arguing and making up and continuing with their dysfunctional relationship. The parties still enjoyed marital *consortium*, even though they were living in separate bedrooms for approximately two years. Marital *consortium* includes a whole gamut of relations which includes from caring for each other, to eating and sleeping together and other personal interaction that would characterise a "normal" marital relationship.¹⁴ What is "normal" for parties in their marital relationship depends on the facts – what is normal for one marriage may not be normal for another.
- [82] Whether the cessation of life together as husband and wife or civil partners in a civil union has occurred resulting in the irretrievable breakdown of a

¹³ Section 4(1).

¹⁴ **Schäfer Family Law Service** (Vol 1) Juta at D2 para (a)

marriage will depend on the facts of each case.¹⁵ The *consortium* between parties may end even if parties remain under the same roof, but no longer communicate and irrespective of whether they are still sexually intimate or not.¹⁶

[83] In ***Naidoo v Naidoo*** the court granted decree of divorce despite the fact that the parties continued to cohabit and have sexual relations a few days before the divorce hearing, as the court was satisfied that on the other evidence provided by the wife that the marriage had irretrievably broken down.¹⁷ In the present matter I am not persuaded given the factual matrix that the marriage relationship had irretrievably broken down.

[84] Although the parties' marriage did deteriorate and there were threats of a divorce, such threats must be considered within the context of the arguments between the parties and the relationship dynamic that existed. Despite these arguments, the facts show that the *consortium* between parties continued. The facts before this court supports the applicant's version that the parties had made amends during June 2023 and this is further supported by the fact that the respondent took her on a holiday to Thailand in 2024. During this holiday they enjoyed various activities as a couple, which is indicative of the marital *consortium* still being in place at that time. In October 2024 the respondent arranged for another holiday together to Dubai – why would the respondent make such arrangements if the *consortium* had ended?

[85] Ms Vermaak -Hay SC argues that the fact that the parties have not shared a bedroom or bed for the past two years is indicative of the irretrievable breakdown of the marriage.¹⁸ I do not agree with this generalisation as it

¹⁵ When reference is made to husband and wife or spouses, the reference also refers to civil partners in a civil union married in accordance with the **Civil Union Act**, 17 of 2006

¹⁶ ***Holland v Holland*** 1975 (3) SA 553 (A) where there had been no sexual intercourse for 14 years but neither party wished to rely on the absence of marital privileges as a reason for the breakdown of the marriage

¹⁷ ***Naidoo v Naidoo*** 1985 (1) SA 366 (T)

¹⁸ Section 4(2)(a) of the **Divorce Act** provides as follows:

“(2) Subject to the provisions of subsection (1), and without excluding any facts or circumstances which may be indicative of the irretrievable break-down of a marriage, the court may accept evidence -

ignores the unique dynamics within each marital relationship and that all the evidence must be reconcilable with the *consortium* coming to an end resulting in the irretrievable breakdown of the marriage.

- [86] A marriage is more than just the sharing of a bed. The fact that the parties lived in separate bedrooms cannot, in my view be the overriding factor. The court needs to consider all the facts holistically. The fact that parties might not be sharing a bedroom or bed, does not automatically mean that the marital *consortium* has come to an end. There may be various reasons - personal, physical and/or medical - for the parties deciding not to share a bedroom or bed. In any event, the cohabitation agreement the respondent provided to the applicant, indicates that the respondent still wanted the *consortium* to continue post-divorce and is not reconcilable with a relationship that has irretrievably broken down.
- [87] Even if I am wrong on the issue of whether the marriage relationship had irretrievably broken down or not, the applicant has in any event met the requirements for the rescission of the September order.
- [88] The applicant has provided a detailed and reasonable explanation for her default including the circumstances surrounding the tearing up of the summons and the notice of set down. She does not attempt to excuse her emotive behaviour. She does however provide a reasonable explanation for her behaviour within the unique relationship dynamic that existed between her and the respondent and her emotional and mental state at the time.
- [89] Irrespective of the summons and notice of set down being served on the applicant, her intentions on the day of the hearing were clear. On 9 September 2024 the applicant made multiple attempts to enquire about where and when the hearing will take place. She made it clear that she seeks a postponement to obtain legal advice as she wants to institute a

(a) that the parties have not lived together as husband and wife for a continuous period of at least one year immediately prior to the date of the institution of the divorce action;”

claim for spousal maintenance. The respondent not only read but also responded to some of these messages before the court proceedings commenced at 9:30.

- [90] The applicant has explained fully in a manner that allows this court to truly understand the reasons for her non-appearance on 9 September 2024 and that this was not willful or due to her gross negligence.
- [91] In addition, the applicant has provided sufficient detail regarding the counterclaim she intends to institute if the divorce order is rescinded. Her counterclaim is *bona fide* and not merely aimed at delaying the finalisation of the matter. Having regard to the duration of the marriage, the parties' standard of living, her age and that she has been unemployed for the past 16 years, there is a *prima facie* case for spousal maintenance in terms of Section 7(2) of the **Divorce Act**. The fact that the respondent provided her with a cohabitation agreement a few days after the divorce order was granted, *prima facie* indicates an acknowledgement of her need for financial support and his ability to contribute thereto.
- [92] The argument that the applicant indicated during the marriage that she has no desire to be maintained by him or that she has waived her right to maintenance, is not supported by the probabilities and the facts before me. In any event, it is settled law that a spouse can only waive the right to claim spousal maintenance on divorce and not before then.¹⁹
- [93] The applicant also has a *prima facie* defence to the respondent's accrual claim and a *bona fide* accrual claim against him. The respondent's estimation of the value of the parties' respective estates provided to the applicant during October 2024 supports her version that his estate has shown the larger accrual. In addition, she provided sufficient facts to indicate to the court the triable issues she wishes to raise in the divorce action. Despite the voluminous answering affidavit, the respondent has not

¹⁹ **ST v CT** 2018 (5) SA 479 (SCA) at para 174 and 178

furnished sufficient evidence that serve to contradict or undermine the facts as alleged by the applicant.

- [94] The present circumstances and facts before the court support the argument that is appropriate to rescind the whole of the order granted on 9 September 2024. In my view the facts of this matter do not leave scope for a rescission of the judgement in part as argued by Ms Vermaak-Hay SC for the reasons as more fully dealt with hereunder.
- [95] I am satisfied that the applicant's application is made *bona fide* and that she has a *bona fide* defence to the respondent's claims which *prima facie* have some prospect of success. I cannot find on the facts before me that the rescission application has been instituted for the purpose of delaying the respondent's claim in the divorce action.
- [96] I have also considered the prejudice to the parties. Ms Vermaak-Hay SC argues that the parties are *ad idem* that the marriage relationship has broken down irretrievably and consequently with reference to the judgment in **CC v CM**, the respondent should be afforded the opportunity to go on with his life and not be shackled to a dead marriage.²⁰ The respondent contends that if a rescission is granted it will prevent him from moving on with his life. He will be forced back into a "*loveless and frenzied marriage*". He will be barred from an opportunity to find new love and the possibility of entering a meaningful marriage with someone else for the next five years if the matter proceeds to trial. Unfortunately for the respondent the facts do not support his argument.
- [97] The facts of the present matter are distinguishable from the facts in **CC v CM** where the parties had been living separately since 2003 and the husband had an extra marital affair resulting in the birth of a child during 1999. The husband, his new partner and the minor child were residing together as a family unit when he issued divorce summons and subsequently requested a

²⁰ **CC v CM** 2014 (2) SA 430 (GJ)

separation of issues in accordance with the provisions of Rule 33(4). The husband sought a decree of divorce and that his wife's section 7(2) and (3) claims be postponed *sine die*. The court found that in those circumstances a separation of issue was convenient, the advantages of separation outweighed the disadvantages, and the separation was in the interest of the court and the parties. The court also considered the section 28 rights of the minor child enshrined in the Constitution when considering the separation and prejudice.²¹

[98] In the present matter the facts do not support the respondent's argument that he will be prejudiced if the decree of divorce is rescinded. On his own version, he was involved in extramarital relationships with two individuals during 2013. The marriage relationship at that stage did not bar or hinder him in pursuing other romantic liaisons. Furthermore, there is no indication in the answering affidavit that the respondent has met a new romantic partner. The facts speak to the contrary. If the divorce order is set aside, it will be of no consequence for the respondent as he still wants to cohabitate with the applicant, financially support and go on dates and holidays with her.

[99] On the other hand, if the September divorce order is not rescinded the applicant will be non-suited in respect of spousal maintenance post-divorce for the reasons more fully discussed hereunder. She will be severely prejudiced as she will be denied her access to justice.

RESCISSION OF THE ORDER IN TERMS OF RULE 42(1)(a):

[100] Even if I am wrong in finding that the applicant meets the requirements of Rule 31(2)(b), I am satisfied that the applicant has also made out a case in the alternative in terms of Rule 42(1)(a).

[101] Rule 42(1)(a) states:

²¹ *Supra* at para 43 and 44

“The court may, in addition to any other powers it may have, mero moto or upon application of any party affected, rescind or vary:

(a) An order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby.

[102] In ***Van Heerden v Bronkhorst*** the Supreme Court of Appeal (SCA) held:²²

“Generally, a judgement is erroneously granted, if there existed at the time of its issue, a fact of which the court was unaware, which would have precluded the granting of the judgement and which would have induced the court, if aware of it, not to grant the judgement.”

[103] The first requirement that the applicant must satisfy is that she must be a party affected by the judgement. Because of the personal nature of the litigation being divorce proceedings, the applicant is directly affected by the September order.

[104] The second requirement the applicant must satisfy is that the judgement must have been granted in the absence of the party. The applicant also meets this requirement

[105] The third requirement is that the judgement must have been erroneously sought or granted and I will deal with this requirement shortly. If the three requirements are met, the applicant must also satisfy the court that the court should exercise its discretion in favour of the granting of the rescission.

[106] Regarding the third requirement that the order was erroneously sought or erroneously granted, it is trite that a judgement to which a party is procedurally entitled cannot be said to have been erroneously granted in the

²² [2020] ZASCA 147 at para 10

absence of the affected party.²³

- [107] The CC 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***, held that it was not enough that a party was absent at the time that the order was granted.²⁴ An applicant must also show that the order was erroneously sought or granted. The CC held that an applicant seeking to demonstrate that an order was erroneously sought or granted must: “... [s]how that the judgement against which they seek rescission was erroneously granted because ‘there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgement and which would have induced the Judge, if aware of it, not to grant the judgement’”.²⁵
- [108] The requirements as set out in ***Zuma*** needs to be contextualised within the present factual matrix. Although the respondent technically may have been procedurally entitled to proceed on an unopposed basis to obtain the order, he sought on 9 September 2024, he conveniently withheld vital information from the court hearing the unopposed divorce regarding notice to the applicant. This includes that the applicant had torn up all the documents served on her before familiarising herself with the content thereof and that the applicant often behaved in an erratic and emotive way. Given the facts before me I cannot agree with an argument which results in sacrificing the applicant’s constitutional right of access to justice on the altar of procedural formalism.
- [109] The respondent in his answering affidavit does not indicate that he informed the applicant about the precise date, and which court the matter would be heard despite her repeated requests. Furthermore, it is not clear on the papers before me to what extent the respondent shared with his legal representatives the *consortium* the parties still enjoyed, what transpired

²³ ***Freedom Stationary (Pty) Ltd v Hassam*** 2019 (4) SA 459 (SCA) at para 25; ***Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd*** 2007 (6) SA 87 (SCA) at para 27

²⁴ 2021 (11) BCLR 1263 (CC) para 62 and the reference in footnote 30

²⁵ *Supra* at para 62

when the summons and notice of set down were served, and the subsequent discussions and WhatsApp's between the parties on 5 and 9 September 2024. What is disconcerting is that the court was not informed of these facts in the evidence affidavit filed or when the matter was called on 9 September 2024.

- [110] It is not uncommon for parties to appear in the unopposed motion court on the day of the hearing, even where a matter has become settled. Had this court been aware on 9 September 2024 of the fact that the applicant clearly communicated her desire to be present at court, that she wanted to address the court and institute a counterclaim the order would not have been granted.
- [111] Furthermore, had this court had the benefit of the history between the parties, and in particular the discussions during June 2024, and that the parties still enjoyed marital *consortium*, I would not have been persuaded that the marriage had broken down irretrievably without the prospects of a reconciliation.
- [112] I was referred to various judgments where the rescission of the divorce order was refused in circumstances where the applicant knew about the date of the hearing of the divorce matter and was not present and where in other instances the court granted a partial rescission.²⁶ However the cases referred to are markedly distinct from that which is before me as either a notice to oppose or pleadings have been exchanged and/or the one party was already remarried when the application for rescission was brought or the parties agreed to a partial rescission.
- [113] The provisions of Rule 42(1)(a) provide the court with a discretion to rescind or vary an order if an applicant meets the other requirements. The court is

²⁶ **KN v GN** (410192020) [2023] ZAGPJHC 179 (13 March 2023); **Mofokeng v Mofokeng** 2011 JDR 0639 (GNP); **D v D** A3079/15 (12 February 2016 Wepener J and Crutchfield AJ) at para 56; **TKG v MN** case number: 44477/2021 [2023] ZAGPJHC 418 at para 41; **M v M** (5710/2010) [2014] ZAFSHC 170 (5 September 2014); **Togo v Molabe and Another** (29059/2014) [2016] ZAGPPHC 666 (26 July 2016)

merely empowered with a discretion and is not compelled to grant a rescission if all the jurisdictional requirements are met.²⁷ As held by the SCA in **Chetty** the discretion to be exercised by a court is “... *influenced by considerations of fairness and justice, having regard to all the facts and circumstances of the particular.*”²⁸

[114] When the order was granted on 9 September 2024 there existed facts of which the court was unaware, which would have precluded the granting of the order and which would have induced the court, if aware of it, not to grant the order. I have already dealt with these facts and do not intend repeating same.

[115] Consequently, I am satisfied that the applicant has also in the alternative made out a case in terms of the provisions of Rule 42(1)(a).

INSTITUTING A CLAIM FOR SPOUSAL MAINTENANCE POST-DIVORCE:

[116] One of the main arguments raised on behalf of the applicant in support of the rescission of the September divorce order is that for her to institute a maintenance claim the decree of divorce must be rescinded. If the divorce order is not rescinded, she will be legally barred from instituting a claim for spousal maintenance as the reciprocal duty of support spouses owe each is intrinsically linked to the beginning and the end of a marriage.

[117] The applicant relies on the SCA judgements in **Schutte**²⁹ and **Zwiegelaar**.³⁰ In **Schutte** and **Zwiegelaar** the SCA held that the reciprocal duty of support during a marriage ceases upon the dissolution of such a marriage and that the duty of support between spouses can only be extended post-divorce by a court in terms of the provisions of Section 7 of the **Divorce Act** at the

²⁷ See **Zuma** *supra* at para 53

²⁸ **Chetty v Law Society, Transvaal** 1985 (2) SA 756 (A) at 761D – E

²⁹ 1986 (1) SA 872 A

³⁰ 2001 (1) SA 1208 (SCA) at paras 12 and 14. In this matter the SCA was confronted with the argument whether it was competent for the court granting the decree of divorce to also order a lumpsum payment for household necessities in accordance with the provisions of Section 7(2) of the Divorce Act. The SCA held that it was competent in terms of the provisions of the subsection.

dissolution of the marriage.

- [118] It is firmly established in our law that the reciprocal duty of support arises between spouses upon the marriage and comes to an end when the marriage is either dissolved by way of death or a decree of divorce.
- [119] The duty of support between spouses is further protected when a spouse passes away without making provision for the other spouse in respect of maintenance. The surviving spouse may institute a claim for spousal maintenance against the estate of the deceased spouse in terms of the **Maintenance of Surviving Spouses Act**.³¹ The **Intestate Succession Act**³² and the **Maintenance of Surviving Spouses Act** provides remedies to spouses whilst they are married. These remedies are not applicable when the marriage has ended.
- [120] A spouse is not entitled to spousal maintenance as of right post-divorce. Consequently, if a spouse wants to extend the duty of support post-divorce this can be achieved by either following the route in accordance with section 7(1) or (2), of the **Divorce Act**.³³
- [121] Section 7(1) provides that the court granting the decree of divorce may, in accordance with the written agreement between the parties make an order regarding the division of the assets of the parties or the payment of maintenance by the one party to the other. In the absence of such agreement, section 7(2) is applicable. Section 7(2) states:

“(2) *In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, that respective earning capacities, financial needs and obligations, the age*

³¹ 27 of 1990

³² 81 of 1987

³³ See the discussion in the dissenting judgment by Schippers AJ in **DHB v CSB** [2024] ZACC 9 at para 96

of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, the conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in his favour the order is given, whichever event may first occur.”

[122] Ms Vermaak-Hay SC argues that upon a proper construction of Section 7(2) and the lack of the qualifying words “*a court granting a decree of divorce*” which is specifically included in subsections (1) and (3) whilst no such qualifications is found in subsection (2), does not disallow or bar of the institution of a spousal maintenance claim after the decree of divorce has been granted. In support of this argument reference was again made to **CC v CM**.³⁴

[123] In my view the argument is flawed. In the present matter the question before this court is not whether the parties agree that the marriage has broken down irretrievably and that the court consequently does not have a discretion whether a decree of divorce should be granted or not as was the position in **CC v CM**. The question before me is whether the applicant will be deprived of her right to institute a claim for spousal maintenance in terms of Section 7(2) if the divorce order is not rescinded. In my view, the authorities are clear. The applicant cannot institute a section 7(2) claim after the decree of divorce has been granted. The authority in respect of a section 7(2) vests in the court which grants the decree of divorce.

[124] In **CC v CM** the court did not consider the application for a separation of issues within the context of the findings of the SCA in **Schutte** and the

³⁴ 2014 (2) SA 430 (GJ) at 438 para 39

question of whether a section 7(2) claim survives the granting of the decree of divorce where no such claim has been instituted. In addition, in the present matter the applicant is not before the court as she has not filed a plea and counterclaim, and the question arises whether it is legally competent to institute a spousal maintenance claim post-divorce. The position of the applicant in the present matter is factually and legally markedly distinct from **CC v CM**.

- [125] The authorities the respondent relies on in support of the argument that a Section 7(2) claim survives the granting of a divorce within the context of an application for the rescission of the divorce order, all concern matters where pleadings have been exchanged between the parties, and/or a party had not instituted a section 7(2) claim, and/or agreed to the rescission.³⁵ The authorities referred to are factually and legally distinct from that which is before me.
- [126] The respondent's argument ignores the context in which the SCA in **Schutte** held that a spousal maintenance claim in terms of Section 7 of the **Divorce Act** cannot be granted after the dissolution of the marriage. The SCA distinguished between the provisions in Sections 7 and 8 of the **Divorce Act** and its predecessor the 1953 **Matrimonial Affairs Act**.³⁶ Section 10(1)(a) of the **Matrimonial Affairs Act**, provided that a court may only grant spousal maintenance to the innocent spouse.³⁷
- [127] In **Schutte** the SCA further considered whether the legislator intended that the court's authority to amend a court order in terms of Section 10(1) of the

³⁵ **CC v CM** *supra*; **D v D** A3079/15 (12 September 2016): Wepener J and Crutchfield AJ; Lekhuleni JD: The rescission of divorce order for purposes of claiming spousal maintenance (**De Rebus**: 1 April 2021)

³⁶ 37 of 1953

³⁷ Section 10(1): The court granting a divorce may, notwithstanding the dissolution of the marriage –

- (a) make such order against the guilty spouse for the maintenance of the innocent spouse for any period until the death or until the remarriage of the innocent spouse, whichever event may first occur, as the court may deem just; or
- (b) make any agreement between the spouses for the maintenance of one of them an order of court,

and any court of competent jurisdiction may, on good cause shown (which may be a cause other than the financial means of either of the respective spouses) rescind, suspend or vary any such order."

Matrimonial Affairs Act and Section 8(1) of the **Divorce Act** can, by way of a contractual stipulation be limited or done away with.³⁸

- [128] Van Heerden, JA remarked that the wording of Section 10(1) of the Matrimonial Affairs Act referred to the authority of the court “*granting a divorce*”. The wording of Section 10(1) specifically referred to the “*guilty spouse*” and the “*innocent spouse*” which can only be when the parties are still married and consequently the section could only have a reference to the court granting the divorce.³⁹ The ambit of Section 7(2) is much wider than Section 10(1)(a) of the **Matrimonial Affairs Act** as the latter only empowered the court to make a maintenance order and in respect of the innocent spouse.⁴⁰ However, the important fact is that the powers provided for in section 7 vests in the court which grants a decree of divorce and a maintenance order cannot be granted after the dissolution of the marriage.⁴¹
- [129] Schippers AJ in the dissenting CC judgment in **DHB v CSB** interpreted the provisions of section 7 by considering the language of the provision, read in the context and having regard to its purpose and remarked:

³⁸ Section 8(1): A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to the access to a child, be suspended by a court if the court finds that there is sufficient reason therefore: Provided that if an enquiry is instituted by the Family Advocate in terms of section 4(1)(b) or (2)(b) of the Mediation in Certain Divorce Matters Act, 1987, such an order with regard to the custody or guardianship of, or access to, a child shall not be rescinded or varied or, in the case of an order with regard to the access to a child, not be suspended before the report and recommendation referred to in the said 4(1) have been considered by the court.

³⁹ 1986 (1) SA 872 (A) at 881F - G

⁴⁰ *Supra* at 881H – 882D

⁴¹ *Supra* at 882C – F. The matter is in Afrikaans and I translate the relevant portion as follows and add my own emphasis: *For present purposes, however, the important fact is that the powers provided for in section 7 are vested in a Court "which grants a divorce decree". This phrase differs somewhat stylistically from the one contained in section 10 of the 1953 Act and which was discussed above, but substantively there is no distinction. The Legislature must have been aware of the interpretation of the Courts consistently attached to the latter phrase, and therefore must have intended that the corresponding phrase in section 7 of the 1979 Act would carry the same meaning.*

It therefore follows that a maintenance order cannot be granted in terms of section 7 of the 1979 Act after the dissolution of a marriage. This consequence is of crucial importance because only a maintenance order could be revoked, amended or suspended according to section 8(1) of that Act. If a maintenance order was not granted upon dissolution of the marriage, art 8(1) cannot be applied. Specifically, a Court is not competent to amend an undertaking concerning the payment of maintenance, in respect of which no order has been made."

[85] On its plain language, section 7(1) makes it clear, firstly, that the power to make a spousal maintenance order, or an order regarding the division of assets, is ancillary to the court's power to grant a decree of divorce. The "written agreement" envisaged in section 7(1) of the Divorce Act is therefore confined to a settlement agreement when divorce is actually pending or contemplated.

.....

[87] Thirdly, the purposes of section 7 are evident from the provision itself. It is aimed at the fair and equitable distribution of the economic consequences of the marriage and its breakdown and to ensure that a party in need of spousal maintenance post-divorce, is not left destitute. These economic consequences and the means and needs of the parties, are difficult, if not impossible, to predict in advance. Instead, the full impact of the marriage and its breakdown and the parties' means and needs are things that only become apparent over time, and are manifest at the point of divorce.

.....

[96] Parliament has decreed that post-divorce spousal maintenance is obtained in one of two ways. First, through a settlement agreement in a pending or imminent divorce, which may be approved or rejected by an order of court contemplated in section 7(1). Second, in the absence of such agreement, by an order of court under section 7(2). In both instances, the divorce court must consider the factors in section 7(2) in deciding what amount of spousal maintenance is appropriate and just. Those factors guide the court in exercising its discretion under section 7(1)."⁴² (Own emphasis)

⁴² *DHB v CSB* [2024] ZACC 9 (22 May 2024) at para 83 – 88 and 96 to 96

[130] Consequently, the authorities do not support the argument of the respondent. Furthermore, to interpret subsection 7(2) in any other manner than that such claim must be instituted before a decree of divorce is granted in my view would lead to an absurdity. This would mean that irrespective of when a divorce is granted, a party can *ex post facto* and after the court has put finality to all the claims resulting from the marital relationship, have a second bite at the cherry and approach the court to revive the reciprocal duty of support that ceases to exist the moment the marriage relationship is dissolved.

[131] Schippers AJ further remarked at paragraph 106 and referencing **Schutte**⁴³ in footnote 74 of the dissenting judgment, as follows: ⁴⁴

“[106] The suggestion that the applicant is entitled to apply for an order under section 7(2) of the Divorce Act is also illogical. How can the applicant sensibly seek maintenance from the respondent, when he is already contractually obliged to provide her with spousal maintenance? And the ouster of the court’s power under section 8 of the Divorce Act to vary a maintenance order is self-evident. The result? The applicant is left without a remedy: an order under section 7 cannot be granted after dissolution of the marriage. This, in turn, may cast the burden of the applicant’s support onto the state, which is manifestly unjust in a case where the respondent has the means to provide spousal maintenance.”
(Own emphasis)

CONDUCT OF THE RESPONDENT’S LEGAL PRACTITIONERS:

[132] Counsel who appeared when the unopposed divorce was moved on 9 September 2024, remained involved as the junior counsel when the

⁴³ *Supra* at 884A

⁴⁴ 2024 (5) SA 335 (CC) (22 May 2024) at para 106 and footnote reference omitted

opposing papers in rescission application was drafted and the matter argued before me. In my view it is not appropriate that a counsel against whom allegations is made of potential inappropriate conduct, remains involved in the matter, especially in preparing the affidavit on behalf of the client. Counsel should never be in a position where counsel's own interests as an officer of the court and the duty towards the court on the one hand may conflict with his duty towards his client.

- [133] It is unfortunate that much time was spent in the 86-page answering affidavit to deal with how the marriage had declined since 2010, explaining the respondent's extramarital affairs and providing his context regarding the alleged admittance by the applicant during August/September 2022 that she had been having an extramarital affair for 7 years with their elderly neighbour. The applicant denies all these allegations except the fact that the respondent had extramarital affairs during their marriage.
- [134] It is unsatisfactory that the same attention to detail was not given to answering the serious allegations made in the founding affidavit that the respondent and/or his legal representative failed to disclose the applicant's clear and unequivocal intention to attend the court proceedings on 9 September and that she wanted to obtain legal representation to oppose the divorce action instituted by her then husband.
- [135] Irrespective of the extent of what the respondent disclosed to his legal representatives, counsel should have at the very least alerted the court on 9 September to the fact that his client had indicated to him that his wife wants to come to court and then leave it to the court to decide how the process was to unfold further.
- [136] It was not for the respondent's legal representatives to decide whether the applicant's evidence will be relevant for the court or whether the court would be interested in what the applicant had to say. When legal representatives withhold information from the court, it negatively impacts on the trust relationship between the Bench and legal representatives appearing before

it.

- [137] Had the respondent's legal representative disclosed to this court on 9 September the information (however limited it may have been at that stage) provided to them by their client this matter would probably not have snowballed to the voluminous application that it has become, including the raising of concerns such as whether the legal representatives should be referred to the regulatory body because of their failure to inform the court of certain facts.
- [138] In *Ex parte Minister of Home Affairs and Another*, the CC reaffirmed the ethical and moral duty legal practitioners owe the public, and in particular their clients and to the courts and they must uphold the rule of law, and act diligently and professionally.⁴⁵
- [139] The granting of a decree of divorce has profound legal, personal and patrimonial consequences for a party. Consequently, it is of utmost importance that legal practitioners remain vigilant and act with scrupulous integrity to ensure that a procedurally fair and transparent process is followed. This can only be achieved when practitioners make full and frank disclosure of all relevant facts even if such disclosure may negatively impact on the relief their client is seeking on the day that the matter serves before the court.
- [140] The Deputy Judge President of the Gauteng Division, Johannesburg, remarked on the dependence of judges on ethical conduct by legal practitioners and the ethical duties of disclosure and non-disclosure as follows:⁴⁶

The primary duty of legal practitioners is to the court rather than to

⁴⁵ 2024(1) SA 58 (CC) at para 103 - 104

⁴⁶ As referred to by Opperman J in *Sheffryk v MEC for Police, Roads and Transport, Free State Province* [2022] JOL 53933 (FB) para 3, with reference to article by Sutherland DJP: The Dependence of Judges on Ethical Conduct by Legal Practitioners: The Ethical Duties of Disclosure and Non-Disclosure (*South African Judicial Education Journal* (2021) 4 (1) at p 47, ISSN: 2616-7999)

the client and thus legal practitioners are obliged to actively support the efficacy of the court process. One aspect of this dependence is illustrated in this article: the duty of legal practitioners to respect and support the process of court by making proper disclosure and not mislead the court. It is argued that the culture of contemporary litigation must be more respectful of this interrelationship between the judge and a legal practitioner to produce efficient and fair litigation.

- [141] Unopposed and settled divorces are usually heard in the unopposed motion court. In the Gauteng Division these matters are dealt with by the court sitting as the Family Court in accordance with the *Consolidated Practice directive*. It often happens that a party, with or without legal representation, decides to appear in the unopposed motion court on the day of the hearing, even where a matter has become settled and without a formal notice to oppose.
- [142] It is a well-established practice that the moment that a legal representative appearing for the applicant/plaintiff moving the unopposed motion or divorce becomes aware of the respondent/defendant's presence at court or intention to appear in court to immediately inform the Presiding Officer of this. It is then for the court to decide on how to procedurally further deal with the unexpected appearance. This practice forms part of the unwritten rules of conduct and trust which exists between the Bench and its officers of court to ensure a fair and transparent legal process.
- [143] Legal practitioners should always be mindful of Section 34 of the Constitution which provides that everyone has the right to a fair public hearing before a court or other impartial tribunal or forum to resolve any disputes that can be decided by law. The right to access to justice is a fundamental to the rule of law, and a cornerstone in protecting our Constitutional values.

[144] In addition, the Code of Conduct for all legal practitioners⁴⁷ provides that legal practitioners, candidate legal practitioners and juristic entities shall *inter alia*:

“3.2 Uphold the Constitution of the Republic and the principles and values enshrined in the Constitution, and without limiting the generality of these principles and values, shall not, in the course of his or her or its practice or business activity, discriminate against any person on any grounds prohibited in the Constitution;”

[145] The Code of Conduct further provides that although the interests of clients are paramount, a legal practitioner’s conduct shall always be subject to their duty to the court, the interests of justice, observance of the law and maintaining the ethical standards prescribed by the code and any ethical standards generally recognised by the profession.⁴⁸

[146] One would have thought that common sense and the interest of justice dictates that the moment that a legal representative is aware that the opposing party, in particular a party who is unrepresented, is at court or has indicated the wish to appear at the hearing to address the court, that under such circumstances the court must be informed immediately. The respondent’s argument that there is no express written ethical rule in this regard is misplaced. Not all the ethical rules and conduct that have developed over time have been reduced to writing yet this does not detract from its relevance and applicability.

[147] Was it not for the fact counsel is still a junior practitioner and that this court would speculate regarding the precise nature of what transpired between the respondent and his legal representatives including what he indeed shared with them before and on 9 September 2024, I would have referred the legal representatives to their respective regulatory bodies. This judgement should

⁴⁷ Made under the authority of Section 36(1) of the **Legal Practice Act**, 28 of 2024

⁴⁸ Section 3.3

heed as a cautionary tale to legal representatives in unopposed and settled divorces to ensure they do not usurp the function of the court and take it upon themselves to decide whether an opposing party has the right to be heard or not.

COSTS:

[148] Costs remain in the discretion of the court and in my view, a punitive costs order is warranted in this matter. The applicant had initially in her notice of motion sought costs only sought in the event of opposition.

[149] I agree with the argument raised by Ms Stroebel that the way the respondent opposed the application by the filing of a voluminous affidavit replete with unnecessary repetition of allegations accompanied by voluminous attachments of which the purpose was nothing more than to create atmosphere and to litigate the applicant into submission. This constitutes an abuse of process that warrants the censure of the court with an appropriate costs order.

[150] In addition, I am disallowing the fees of the respondent's legal representatives as their conduct in my view did not meet that of what is expected of officers of this court. The fees of Ms Vermaak-Hay SC are not affected by my order as senior counsel only became involved after the application for rescission was served.

ORDER:

[151] In the circumstances, I make the following order:

1. Condonation for the late filing of the application for rescission is granted.
2. The order granted on 9 September 2024 by Haupt AJ under case number B1349/2023 is set aside.

3. The Applicant is ordered to file her plea and counterclaim within 15 days from the date of granting of this order.
4. The Respondent is ordered to pay the costs of the application on an attorney and client scale, such costs to be taxed on Scale C and to include the appearance on 4 and 15 November 2024, the filing of heads of argument, including supplementary heads of argument and the preparation of a authorities bundle.
5. The Respondent's legal representatives (attorneys and junior counsel) are disallowed any fees associated with preparing the matter for enrolment in accordance with the *Practice Directive for Unopposed Divorces* for the roll of 9 September 2024 and the consultations, drafting and filing of the answering affidavit in the rescission application, appearance on 9 September, 4 and 15 November 2024, and the preparation of heads of argument and supplementary heads of argument and a bundle of authorities.
 - 5.1 Insofar as the Respondent's legal representatives have received fees, in this regard, such fees are to be repaid.
 - 5.2 The Respondent's attorney of record is to file and upload to the CaseLines/Court Online profile an affidavit on/before 31 March 2025, confirming compliance by the attorney(s) and counsel, in respect of the repayment of their fees as ordered.

HAUPT AJ
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This Judgment was prepared and authored by the judge whose name is reflected and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines system and by release to SAFLII. The date for hand down is deemed to be 17 February 2025.

For the Applicant: Adv J Stroebel
Instructed by: Bernadine Follett Attorneys

For the Respondent: Adv I Vermaak-Hay (SC) with Adv E Braga
Instructed by: Manley Incorporated

Matter heard on: 15 November 2024
Date of judgment: 17 February 2025