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

Case Number: 108650/2023

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

In the matter between:

K[...], N[...] N[...] K[...]

Applicant

and

K[...], V[...] W[...]

Respondent

JUDGMENT

BRICKHILL AJ:

Introduction

[1] Divorce is generally expected to be final. This, however, is an application to rescind a final decree of divorce and a subsequent order regarding the distribution of the joint estate of the applicant and respondent.

[2] The applicant, Ms N[...] N[...] K[...] (“Ms K[...]”), and the respondent, Mr V[...] W[...] K[...] (“Mr K[...]”), were married in community of property on 25 April 2004 and had two children, one of whom was still a minor when the application was made.

[3] Ms K[...] sued for divorce. She did not prosecute the divorce, but Mr K[...] sought and obtained default judgment in her absence. On 7 February 2023, Louw AJ made an order under case number 2021/3099 granting a decree of divorce and addressing custody of the minor child, maintenance for the child and division of the joint estate, and dismissing Ms K[...]’s claim for spousal maintenance (“the First Order”). Each party was ordered to pay their own costs.

[4] Mr K [...], in turn, subsequently brought a further application regarding the distribution of the joint estate. On 22 January 2024, Senyatsi J made a further order under case number 2023/108650 regarding the division of the joint estate (“the Second Order”). Ms K[...] delivered notice of intention to oppose, but did not deliver answering papers. Settlement discussions took place, which I discuss further below. The Second Order records: “BY AGREEMENT among the parties, it is ordered”. The order deals with the transfer of one immovable property in the joint estate to the exclusive ownership of Ms K [...], and of two other properties to Mr K [...] alone. The Second Order directs Mr K [...] to settle all outstanding bond, services and rates payments and obtain all necessary documents and certificates; and it directs Ms K [...] to sign the necessary transfer documents and, in the event that she fails to do so, authorises the Sheriff to sign on their behalf. Senyatsi J made no order as to costs.

[5] Ms K[...] seeks the rescission of both the First Order and the Second Order. In argument, Ms K[...]’s counsel clarified that the rescission of the First Order was sought not in relation to the decree of divorce but only in relation to the part of the order that dismissed her claim for spousal maintenance. Ms K[...] brings the application in terms of Rule 31(2), alternatively Rule 42(1)(a), or in the further alternative the common law.

[6] Ms K[...] seeks the rescission of both orders on the basis that the orders were erroneously sought by Mr K [...]; erroneously granted by the court; material facts were

not placed before the Court which, had it been made aware of the facts, would not have granted the orders; and that the orders are unconstitutional and infringe Ms K[...]’s rights to property.

[7] Mr K[...] opposed the rescission application in respect of both orders, arguing that Ms K[...] had no reasonable explanation for her default and that, in any event, she had no bona fide defence.

Requirements for rescission

[8] The requirements for rescission of an order of court are well-established. Ms K[...] relies on Rule 42(1)(a), Rule 31(2) and the common law as alternative legal bases for rescission.

[9] To the extent that Ms K[...] relies on Rule 42(1)(a) of the Uniform Rules of Court, he must show that the orders were erroneously sought or erroneously granted, in which event they need not show good cause and the eviction order ought to be rescinded without more.

[10] In relation to the ‘absence’ ground and its relationship to the ‘error’ ground, 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* Khampepe J, writing for the majority of the Constitutional Court, held:

“At the outset, when dealing with the ‘absence ground’, the nuanced but important distinction between the two requirements of rule 42(1)(a) must be understood. A party must be absent, and an error must have been committed by the court. At times the party’s absence may be what leads to the error being committed. Naturally, this might occur because the absent party will not be able to provide certain relevant information which would have an essential bearing on the court’s decision and, without which, a court may reach a conclusion that it would not have made but for the absence of the information. This, however, is not to conflate the two grounds

which must be understood as two separate requirements, even though one may give rise to the other in certain circumstances.”¹

[11] Khampepe J in *Zuma* emphasised that the issue of ‘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”.² As Khampepe J explained, if everything turned on actual presence, it would be too easy for litigants simply to absent themselves and then seek to rescind the order by pleading the “absent victim”.³

[12] Ms K[...] also relied, in the alternative, on Rule 31(2). Rule 31(2) on its own terms applies to action proceedings, not applications. Previous decisions of this division have held that the rule is not applicable to the rescission of orders granted pursuant to application proceedings.⁴ Rule 31(2) would therefore be applicable to the First Order, which was a default judgment arising from a divorce action, but not the Second Order, which was an order made on an unopposed basis in motion proceedings. I do not need to decide whether Rule 31(2) is capable of extension to application proceedings in the present circumstances, given the conclusion that I reach regarding the rescission of the Second Order.

[13] In respect of Mrs K[...]’s reliance, in the further alternative, on the common law, he needs to show sufficient cause, which means that: (i) there must be a reasonable explanation for the default; (ii) the rescission application must be

¹ *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* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) at para 57.

² *Id* at para 60.

³ *Id*.

⁴ *Ramakone and Others v City of Johannesburg and Another* [2023] ZAGPJHC 916 (15 August 2023) para 26; *Eskom Holdings SOC Ltd v Akgwevhu Enterprise (Pty) Ltd* (unreported, GJ case no 4554921 dated 22 November 2022) at paragraphs [19]–[20]; and see *ADB Financial Services (Pty) Ltd v Mercantile Bank Limited* (unreported, GP case no 42352/2020 dated 8 February 2023) at paragraph [21].

made bona fide; and (iii) she must have a bona fide defence, which *prima facie* carries some prospect of success.⁵

[14] I turn to consider the applications to rescind the First Order and the Second Order. For the reasons that I give below, I conclude that the rescission application in respect of the First Order must fail, but that the Second Order falls to be rescinded in terms of Rule 42(1)(a).

The First Order

[15] The First Order granted a decree of divorce, dealt with custody of the minor child and maintenance for the child and division of the joint estate, and dismissed Ms K[...]’s claim for spousal maintenance. It was made on 7 February 2023 by Louw AJ. Accordingly, the present application for rescission of the First Order was made some 18 months after the order was handed down.

[16] The applicant’s explanation for default in respect of the First Order is that her erstwhile attorneys were negligent. Ultimately, she alleges that on the eve of the set down of the matter, she agreed on the advice of her attorneys not to attend the proceedings and to seek a postponement on the basis of illness.

[17] It is unclear, even on Ms K[...]’s own papers, whether she was indeed ill or whether this excuse was contrived to secure a postponement because her attorneys were not ready to proceed. In her founding papers in the present application, she avers that her attorneys “advised me not to attend Court when the divorce hearing took place and advised me that they will secure a medical certificate on my behalf and have the matter postponed.”

[18] Neither Ms K[...] nor her attorneys, Mashele Attorneys, attended court. She was represented by counsel, Mr Mazibuko. Mr Mazibuko applied for a postponement on the basis of an electronic copy of a medical certificate referring to a

⁵ *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) 1042. See also: Joffe: *High Court Motion Procedure – A Practical Guide*, Service Issue 15, July 2022, 1-84 to 1-85.

gynaecological condition. In the exchanges with the court, he further confirmed that he had only been briefed shortly before the set down. He confirmed that he had only consulted with Ms K[...] on 2 February 2023, 5 days before the matter was set down. Ms K[...] had also taken no steps to prepare for trial, despite being plaintiff in the divorce action.

[19] Louw AJ refused the postponement and Mr Mazibuko then excused himself. Mr K[...], represented by Mr Mushet, proceeded to seek and obtain default judgment.

[20] There are strong indications that the purported medical certificate was obtained dishonestly by Mashele Attorneys with the knowledge of Ms K[...], given that she confirms that it was their advice that she not attend and that they “advised that they will secure a medical certificate on my behalf and have the matter postponed”.

[21] In this court, Ms K[...] sought rescission of the First Order on the basis that Mashele Attorneys had negligently failed to prosecute her divorce action. Even if her attorneys had negligently failed to prepare for the trial, Ms K[...] has failed to provide a reasonable explanation for her absence from court on the day of the divorce proceedings. She was aware that her legal representatives intended to seek a postponement on the basis of a purported medical certificate and acquiesced in that advice.

[22] In addition, the delay in bringing the present rescission application was extensive. The application was brought over 18 months after the First Order was handed down. Ultimately, the applicant has failed to offer a reasonable explanation either for the original default or her delay in bringing this rescission application.

[23] The second requirement to rescind the First Order is that it was ‘erroneously granted’ under Rule 42(1)(a), or that there was a bona fide defence under the common law. The application fails on this ground, too, in respect of the First Order.

[24] On behalf of Mr K[...] it was argued that, in any event, the First Order was not erroneously granted because there was no fact of which the court was unaware which would have precluded the granting of the First Order. On behalf of Ms K[...],

Mr Matlapeng clarified that she does not seek rescission of the decree of divorce itself, but only of paragraphs 3 to 5 of the First Order relating to custody and maintenance of the minor child, granting division of the joint estate and dismissing the claim for spousal maintenance.

[25] In dealing with bona fide defence in her written submissions, the main contention advanced on Ms K[...]’s behalf is that she initiated the divorce because she had been victim of abuse and infidelity. That issue, which was raised in general terms, has no bearing on any claim for maintenance on either her own behalf or that of the minor child, and does not constitute a bona fide defence with any prospect of success.

[26] The application to rescind the First Order therefore fails because there is no reasonable explanation for Ms K[...]’s absence and she is unable to establish that the order was granted erroneously in terms of Rule 42(1)(a) or that she had the requisite bona fide defence required both under Rule 31(2) and, at common law. In any event, she has also failed to explain the excessive delay in bringing the application to rescind the First Order.

The Second Order

[27] The Second Order dealt with distribution of the immovable property in the joint estate pursuant to the decree of divorce made in the First Order. It was made by Senyatsi J on 22 January 2024. The application to rescind the Second Order was made seven months after the order was handed down.

[28] In respect of this delay, Ms K[...]’s explanation is that she only became aware of the Second Order in August 2024 when her new attorneys wrote to the attorneys for Mr K[...] and were informed of the order, and that she launched the rescission application on 28 August 2024 in the same month. In the circumstances, I find that the application was brought in a reasonable time for purposes of Rule 42.⁶

⁶ *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 (C) at 421F-G.

[29] On the face of the order, Senyatsi J made the Second Order on the basis that the terms of the order were agreed between the parties. While Senyatsi J would still have exercised the appropriate discretion in considering the order, it would have materially influenced the court that the terms of the order were purportedly agreed. But was there agreement?

[30] The high-water mark of the case for Mr K[...] is that the parties had concluded a settlement through correspondence that amounted to consent to the terms of the Second Order.

[31] On 14 December 2023, AKA Attorneys (acting for Mr K[...]) wrote a letter to Mashele Attorneys (representing Ms K[...]) marked "WITHOUT PREJUDICE" in which they proposed terms of settlement regarding the transfer of three properties as between the parties. The letter stated, "Our office will forward a Draft Order to your office in respect of the above, there being no necessity to draft opposing affidavits and oppose the Application which is set down on the unopposed roll for the 22nd January 2024."

[32] Later on 14 December 2023, Mashele Attorneys replied and advised that:
"Our client is amenable to the terms as referred to above.
Our client is also ready to sign all the necessary paperwork required to facilitate the transfers.
We hereby consent to the terms of the settlement agreement forming part of the Draft order as proposed."

[33] On 16 January 2024, AKA Attorneys sent a letter to Mashele Attorneys enclosing a draft order and requested, "Kindly confirm that same is in order via return."

[34] Mashele Attorneys did not reply. They shared the draft order with Ms K[...], who responded to her attorneys that she was unhappy with its terms.

[35] The next day, on 17 January 2023, and less than a week before the set down date of 22 January 2023, Mashele Attorneys informed Ms K[...] that they were withdrawing as her attorneys due to non-payment of fees and “conflict of interest”. They informed her that they would deliver a notice of withdrawal as attorneys of record to AKA Attorneys and the court.

[36] In the present application, Ms K[...] stated as follows in her founding affidavit:

“54.10.1 I had instructed my legal representatives that I rejected the offer made by the Respondent;

54.10.2 There was no settlement agreement that I signed or which was presented before court which would form the basis for the order to be made by agreement;

...

54.10.3 The Respondents legal representatives, (sic) were informed by my erstwhile legal representatives that they had withdrawn as my legal representatives on 18 January 2022, four days prior to the hearing and yet they proceeded to move for an Order ‘by agreement’ which is not the case as I had not given such mandate to my erstwhile legal representatives nor to the Respondent’s legal representatives”.

[37] The version on behalf of Ms K[...] accords with the notices and documents placed before court in this matter. That version is that she had *not* finally agreed the terms of any draft order and that AKA Attorneys were aware of this and aware that her attorneys had withdrawn, but moved for an order by agreement before Senyatsi J in unopposed court.

[38] In his answering affidavit, Mr K[...] did not deny these averments. He answered all of the paragraphs above as follows: “The contents of these paragraphs are noted, however there is no legal space for the First Respondent to reply to such allegations.”

[39] In argument, Mr K[...]’s representative was unable to explain what was meant by the statement that he had “no legal space” to respond. In any event, on the

ordinary application of *Plascon-Evans*,⁷ Ms K[...]’s version was not denied and stands to be accepted on these issues.

[40] I find that, although there had been settlement discussions that had progressed significantly and reached in-principle agreement on a potential settlement, Ms K[...]’s attorneys had not replied to confirm agreement to the terms of the draft order and had instead withdrawn as attorneys of record for Ms K[...].

[41] The duty of Mr K[...]’s representatives was to inform Senyatsi J of these developments. There is nothing on the papers to suggest that they did so. Instead, every indication – consistent with Ms K[...]’s version that was not denied – is that they moved for an order by agreement, knowing that Ms K[...] was unrepresented. Mr K[...]’s answering affidavit effectively accepts this to be the legal position by simply ‘noting’ the averments in the founding papers.

[42] In the circumstances, the court was induced to make an order, in the absence of Ms K[...], that was subject to a material error. There was no agreement on the terms of the draft order.

[43] In somewhat analogous circumstances, the Constitutional Court in *Occupiers of Erven 87 and 88 Berea v De Wet N.O and Another* considered an appeal against the High Court’s refusal of an application to rescind an eviction order on the basis that the order had been granted purportedly by agreement.⁸ In that matter, certain individual occupiers had purported to consent for all the occupiers, but the majority of occupiers had in fact not consented. Mojaelo J concluded that in relation to the non-appearing occupiers, there had been an ‘error’:

“The basis of granting the order against them was that they had validly consented thereto. In the absence of valid consent, there was no procedural entitlement to the eviction order. The eviction order was thus granted against them in error.”⁹

⁷ *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

⁸ *Occupiers of Erven 87 and 88 Berea v De Wet N.O and Another* [2017] ZACC 18; 2017 (8) BCLR (CC); 2017 (5) SA 346 (CC).

⁹ *Id* at para 73.

[44] In the present matter, the Second Order was similarly obtained purportedly on the basis of agreement when there was no agreement. In-principle agreement on the potential terms of a settlement is not the same as consent to the specific terms of a draft order. An ‘almost-settlement’ is no settlement.

[45] In the circumstances, the Second Order falls to be rescinded in terms of Rule 42(1)(a). Upon the setting aside of that order, Ms K[...] will have the opportunity to deliver her answering affidavit, if any, within the ordinary period of fifteen days from the date of this judgment.

Conclusion and costs

[46] I have concluded that the application to rescind the First Order fails but that the Second Order falls to be set aside in terms of Rule 42(1)(a) on the basis that it was erroneously granted in the absence of Ms K[...]. The principal reason for this conclusion is that the order was obtained as a consent order “BY AGREEMENT” in circumstances where, to the knowledge of Mr K[...]’s legal representatives, Ms K[...] had not agreed to the terms of the draft order. They were also aware that she was not legally represented.

[47] The application to rescind the First Order failed in large part because of the conduct of Ms K[...] in absenting herself from the divorce proceedings on the basis that her then attorneys would secure a medical certificate on her behalf and apply for a postponement. The delay of 18 months in bringing the application was also excessive. Ordinarily, this conduct would occasion a costs order.

[48] However, the application to rescind the Second Order succeeds because that order was obtained on the basis that the parties had agreed the terms of a draft order, when that was not true. It may still have been possible for Mr K[...] to obtain the Second Order by disclosing the full circumstances to the court and arguing that Ms K[...] was unreasonably and wilfully absent. However, it could not be granted by agreement.

[49] It is unconscionable for legal practitioners to seek orders on the unopposed motion roll on the basis of agreement when no agreement between the parties has been reached. The court must be able to rely fully on submissions made by counsel, especially where the other side is absent and unrepresented, for the administration of justice to function healthily. Ordinarily again, the conduct of Mr K[...] in relation to the Second Order would warrant a costs order to follow the result.

[50] However, the parties have enjoyed partial success, each succeeding in one of the two rescission applications made in this matter.

[51] Given that each of the parties achieved success in relation to one of the orders whose rescission was sought, in light of conduct of both parties that warrants censure and bearing in mind the interests of their minor child, I have determined to make no order as to costs in the application.

[52] It is to be hoped that the application regarding the distribution of assets of the former joint estate can now be resolved without undue delay.

Order

[53] The following order is granted:

1. The application to rescind the order made by Louw AJ dated 7 February 2023 under case number 2021/3099 is dismissed.
2. The order made by Senyatsi J on 22 January 2023 under case number 2023/108650 is rescinded and set aside.
3. The applicant is directed to deliver her answering affidavit to the application under case number 2023/108650, if any, within fifteen days of the granting of this order.
4. No order is made as to costs.

**J BRICKHILL
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 2 September 2025

DATE OF HEARING: 3 June 2025

JUDGMENT SUBMITTED FOR DELIVERY: 2 September 2025

APPEARANCES:

For the Applicant: Adv M Matlapeng, Instructed by Kgobokoe & Company Inc.

For the Respondent: Mr E Naicker (Attorney with rights of appearance), instructed by Elogran Naicker Attorneys