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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

CASE NO: 2023-072735

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

DATE: 15 SEPTEMBER 2025

In the matter between:-

S[...] V[...] D[...] M[...]

APPLICANT

and

A[...] V[...] D[...] M[...]

RESPONDENT

WRITTEN REASONS

MAZIBUKO AJ

INTRODUCTION

[1] The applicant seeks an order rescinding and setting aside a divorce order granted by Acting Judge Bokako on 3 July 2024 under the above-mentioned case number (hereinafter referred to as "the Bokako judgment"), coupled with

a condonation application for the late filing of the rescission application outside

the prescribed 20 days or within a reasonable time. The order for rescission is

sought either in terms of Rule 31¹ of the Uniform Rules of the High Court (the Rules) or the common law. The applications are opposed.

BACKGROUND

- [2] The applicant and the respondent were married out of community of property with the inclusion of the accrual system on 30 November 2018. Two minor children were born from the marriage relationship, one was born on 13 December 2020 and the other on 14 December 2022.

- [3] During March 2023, the respondent vacated the matrimonial home with the minor children. In July 2023, she instituted divorce proceedings against the applicant. The applicant defended the divorce action. He filed his notice of intention to defend on 16 August 2023 and his plea and counterclaim during September 2023.

- [4] In November 2023, the respondent filed a plea to the applicant's counterclaim. On 3 November 2023, the applicant's erstwhile attorneys withdrew as attorneys of record. On 9 November 2023, the respondent served and filed her plea to the applicant's counterclaim in the divorce proceedings.

- [5] On 11 November 2023, the applicant had supervised Contact with the minor children. On 12 November 2023, the applicant travelled abroad with a friend. On 26 January 2024, the notice of set down in the divorce proceedings was served on the applicant by email. Whilst still abroad, in February 2024, the applicant was arrested and detained after being found to be in Thailand illegally.

- [6] On 2 March 2024, the respondent appointed a Social Worker, Ms Tanya Kriel (Ms Kriel), to provide insight into the history and the current emotional state of

¹ Rule 31(2)(b) A defendant may, within 20 days after acquiring knowledge of such judgment, apply to the court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.

the minor children and to make recommendations on the way forward. On 2 May 2024, the respondent launched an application to strike out the defence of the applicant in the divorce proceedings, which was granted on 3 June 2024.

[7] On 3 July 2024, the Bokako order was granted, as follows:

"1. *A decree of divorce;*

2. *In respect of the two minor children born of the marriage, subject to prayer 4, that both parties will retain full parental rights and responsibilities as contemplated by Section 18(1) and 18(2), read with Section 1(1) of the Children's Act, 38 of 2005 ("the Act") pertaining to the*

minor children:

2.1 *That the parental rights and responsibilities with regards to the guardianship of the minor child, as contemplated in section 18 (2)(c) and 18 (3) of the Act remained with both parties;*

2.2 *The minor children will primarily reside with the plaintiff;*

2.3 *The defendant will exercise reasonable Contact with the minor children, which shall at all times be supervised by the minor children's parental grandmother and subject to prayer for hearing*

below as follows:

2.3.1 *Every alternative weekend from Friday on or before 18:00 where the defendant will collect the minor children from the*

plaintiff's residence until Monday where the defendant will return the children to their school between 7:30 and 8:00 am alternatively, until Sunday at 17:00 where the plaintiff will collect the minor children from the defendant's residence or a mutually agreed upon place.

- 2.3.2 *Every alternative Easter, Christmas Day, and Public Holiday.*
- 2.3.3 *Father's Day;*
- 2.3.4 *The defendant's birthday;*
- 2.3.5 *Half of the long school holidays in July/August and December/January, alternating annually between the parties as to who has the minor children for the first half of*
the holiday (same is subject to change dependent on the school term annual change for the next year);
- 2.3.6 *One short school holiday during April and October, alternating annually between the parties (same is subject to change dependent on the school term annual change for the next year);*
- 2.3.7 *Half of the minor children's birthdays.*
- 2.3.8 *Telephonic Contact:*
- 2.3.8.1 *Reasonable telephone contact with the minor children between 18:00 hours to 19:00 pm.*
- 2.3.8.2 *The telephonic Contact will be subject to change in accordance with the minor children's age.*
- 2.3.9 *Contact during the week:*
- 2.3.9.1 *The defendant will have Contact with the minor children once a week on a Wednesday between 16:00 pm and 19:00pm.*
- 2.3.9.2 *The Contact will be conducted in a public place.*

3. *An order that the parties contribute to the maintenance of the two*

minor children as follows:

3.1 ... to 3.7

4. *Either party may approach this Court on receipt of the report and recommendations of Ms Tanya Kriel for a variation of prayer 2 as*

contained hereinabove.

5. *An order that the defendant render to the Plaintiff an account supported by documentary proof containing full particulars of the value of the Defendant's estate in order to determine the difference in accrual between the parties' respective estates.*

6. *Debatement of the aforementioned account.*

7. *Payment to the plaintiff of any amount to which the plaintiff may be entitled to in terms of the provisions of Chapter 1 of the Matrimonial Property Act 88 of 1984.*

8. *Costs of suit."*

[8] The applicant returned to South Africa on or about 4 September 2024. On 20 February 2025, an application for the rescission of the Bokako order was launched and defended in March 2025.

[9] On 20 August 2025, the matter came before this court, and the applicant sought

the following relief:

"1. *That condonation be granted for the late filing of their rescission application.*

2. *That the divorce order under the case number 2023-072735, which was*

handed down on 3 July 2024 in the above Honourable Court by the Honourable Justice Bokako AJ, be rescinded and set aside.

3. *That the applicant be granted leave to defend the main action and to file*

his plea within 20 days from the date of this order.

4.

5."

[10] His application for condonation for the late filing of the rescission application was not successful. It was refused. The reasons for that order follow.

ISSUE

[11] The issue for determination was whether the applicant had made out a case for

condonation of the late filling of his rescission application, and whether he had been successful in making out a case for the court to rescind and set aside the

Bokako order.

CONDONATION APPLICATION

ASSERTIONS

[12] On behalf of the applicant, it was submitted that he was absent from South Africa for a period of approximately 10 months from November 2023 to 3 September 2024, which was the period of his detention in Thailand. He was without any means of Contact or communication with anyone in South Africa, as his cellphone was stolen. He therefore never received the court processes and correspondence dispatched to him during that period. He only became aware of the finalisation of the divorce proceedings and the Bokako order in October 2024 and filed his application to rescind same in February 2025.

[13] Upon his return, he made attempts to exercise Contact with children and was referred to Ms Kriel. Between October and November 2024, he met with her and informed her, among other things, that the divorce action was already finalised. Furthermore, in consultation with Ms Kriel, he formed an opinion that Ms Kriel was biased towards him and favoured the respondent due to her previous engagements with the respondent. He then realised he needed to procure legal representation so to obtain more contact rights with the children and to have a maintenance order according to his affordability. He sought legal representation but could not secure one as many attorneys turned him away,

as he had no financial means to pay an initial consultation fee. On 10

December

2024, Legal Aid South Africa refused his application as they opined that his matter was with no merit.

[14] It was also argued that the dies non period of the High Court ran from 21 December 2024 to 7 January 2025 in terms of the Practice Directives. The attorneys' offices closed for the festive season from 15 December 2024 until 6 or 13 January 2025, which factor derailed his legal process by another 4 to 5 weeks.

[15] During the week of 29 January 2025, he consulted with his attorneys. They realised his erstwhile attorneys withdrew as attorneys of record on 3 November

2024 and provided his last known address and his email address to the respondent's attorneys. Furthermore, he no longer resided at that address, had

lost access to his email account, and could not perform a SIM swap for his cellphone.

[16] In reply, he averred that during the hearing that resulted in the Bokako order, only the respondent's evidence was considered, as he could not partake in the proceedings due to reasons related to his detention in Thailand. His

Constitutional rights, including the right to a fair trial, were denied regarding paragraphs 2, 4, and 7 of the Bokako order, as his voice was not heard, his opinions were not considered, his financial position was not assessed, and his contact rights towards the children were compromised and prejudiced. He had also been deprived of the consequences of their marital regime, should the respondent's estate show a greater accrual than his.

- [17] The respondent, through her counsel, argued that according to Ms Kriel's report, on 17 September 2024, the applicant informed Ms Kriel that he and the respondent were divorced. Thus, the applicant knew in September 2024 about the Bokako order, not in October as asserted. However, he failed to sufficiently explain the delay in bringing the rescission application. The messages exchanged between the parties on 3 November 2023 revealed that the applicant indicated that he would no longer respond to the respondent's attorneys' communication. Further, there are no merits in the application for rescission as there are no prospects of success even if the applicant were granted leave to defend the divorce proceedings.

THE LAW

- [18] "... Condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related, then the date, duration and extent of any obstacle on which reliance is placed must be spelled out."²
- [19] In exercising the court's discretion in respect of good cause for condonation, the following was stated in the matter of Ngwenya v Trustees for the time being of Sishen Iron Ore Company Community Development Trust and Another,³ the

² Uitenhage Transitional Local Council v SA Revenue Services

³ (2024) 45 ILJ 1220 (LAC), para 14.

⁴ Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003(6) SA 1 (SCA) at 9C–F, para [11]

Court stated:

"[14] The grant of condonation involves the exercise of a discretion, with a decision to condone a party's non-compliance with the rules of the court or directions constituting an indulgence granted by the Court. Such an application should be granted if, having regard to the particular circumstances of the matter, it is in the interests of justice to do so, and refused if it is not. To reach a decision, regard is to be had to factors including the nature of the relief sought, the extent and cause of the delay, the reasonableness of the explanation for the delay, the importance of the issue to be raised, issues of prejudice and the prospects of success. As a general proposition, the factors to be considered are not individually decisive of an application for condonation but are all considered to determine what is in the interests of justice."

[20] The test for a rescission under the common law is trite, which is that good cause

must be shown, i.e. that there is a reasonable explanation for the default, that the application is made bona fide, and that there is a bona fide defence to the plaintiff's claim which prima facie has some prospect of success.⁴

[21] *"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 access to a child, be suspended by a court if the court finds that there is sufficient reason therefor: 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 access to a child, not be suspended before the report and recommendations referred to in the said section 4 (1) have been considered by the court."*

(2) A court other than the court which made an order referred to in subsection (1) may rescind, vary or suspend such order if the parties are domiciled in the

*area of jurisdiction of such first-mentioned court or the applicant is domiciled in the area of jurisdiction of such first-mentioned court and the respondent consents to the jurisdiction of that court."*⁵

DISCUSSION

- [22] Condonation should be granted if, considering the circumstances of the applicant's matter, it is in the interests of justice to do so, and refused if it is not. In order for the court to reach a decision, it is required to consider factors like the nature of the relief sought, the extent and cause of the delay, the reasonableness of the explanation for the delay, the importance of the issue to be raised, issues of prejudice and the prospects of success.
- [23] Regarding the nature of the relief sought, the importance of the issue to be raised, issues of prejudice and the prospects of success. The recourse is already tailored for in the impugned order, when regard is had to paragraphs 2 to 4 of the Bokako order read with section 8 of the Divorce Act.
- [24] The applicant's explanation for the delay in bringing the rescission application within the prescribed 20 days or within a reasonable time after learning of the Bokako order was due to a lack of timely securing legal representation, as the attorneys he approached were high-priced. The letter from Legal Aid South Africa, refusing to grant legal aid, is dated 10 December 2024. I therefore accept that in December 2024, the applicant did attempt to source legal representation.
- [25] I have difficulty in accepting his explanation that he could not consult with his attorneys in December 2024 and the beginning of January 2025 since most law firms had closed for the festive season, and the non-dies period in December 2024 and January 2025 prevented him from securing legal representation. He averred that he consulted with his attorneys on 29 January 2025 and only lodged the rescission application on 20 February 2025.

⁵ Section 8 of the Divorce Act 70 of 1979.

- [26] His explanation for the delay is scanty. It gives a broad and non-specific account of what steps he took. In his founding affidavit, he placed his reliance on the fact that he struggled to secure legal representation, as it was pricey. It is not clear when he was able to instruct his attorneys. There is no account of what happened between the date of instruction, consultation and the date of filing the application. No full details and an accurate account were presented before the court as to what exactly happened between the period of his arrival in South Africa in September 2024 and February 2025.
- [27] In my view, the applicant's explanation for the delay has not displayed good cause as the explanation is incomplete, unsatisfactory and unreasonable for the purposes of setting out and itemising in dates in which specific steps were taken or even attempted after he learnt about the Bokako order. The applicant has failed to meet the requirements for the granting of condonation. He has not shown good cause for his delay, and the explanation is not reasonable. Consequently, granting the condonation application is not justified and not in the interest of justice. The condonation application therefore stands to fail. There will thus be no need to deal with the merits of the rescission application.
- [28] Consequently, I make the following order:

Order

- [28.1] The applicant's condonation application is dismissed with costs, and that of counsel scale B.

N. MAZIBUKO

Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

This judgment was handed down electronically by circulation to the parties' representatives by email by being uploaded to Case Lines. The date for hand-down is deemed to be on 5 September 2025.

Representation

For the applicant: Advocate L. Liebisch
Instructed by: O'Donoghue & Marais Attorneys

For the respondent: Advocate A. Jansen van Vuuren
Instructed by: Van Zyl Johnson Attorneys

Hearing date: 20 August 2025
Delivery date: 15 September 2025