REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NOS 2015/18402; 2014/42472

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

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DATE SIGNATURE

In the matter between:

S, S Applicant

and

H, P Respondent

JUDGMENT

SNYCKERS AJ:-

Rescission – of Rule 43 order and order relating to parental rights – inappropriateness instead of fresh application – section 8(1) of Divorce Act 70 of 1979 applicable to Rule 43 orders for maintenance – conflicting authority in this regard

Rescission – of order of division of property in joint estate as part of a divorce decree – severability of such order from decree of divorce for purposes of rescission – such order severable and capable of independent rescission

Proof of foreign law without experts – application of presumption that same as South African law – not when judicial notice of foreign law possible when readily ascertainable through Civil Code invoked by party in affidavit and sections of statute readily available on internet with sufficient reliability and capable of being considered by court in German

Divorce - Proprietary consequence of marriage – rule that marital property regime determined by law of domicile of husband at time of marriage – <u>quare</u> whether requires development to comport with constitutional principle of equality

A. <u>INTRODUCTION</u>

1. The applicant as husband and the respondent as wife were married in 2008, in South Africa, and one child was born of the marriage. The child, a daughter, L, was born in 2009. A decree of divorce was granted in this court on 12 May 2016. I shall refer to the parties as the father and the mother, and to the child as L.

2. An order in terms of Rule 43, for maintenance in favour of the mother and L, and for a contribution to costs *pendente lite,* was handed down in this court on 6 August 2015.

3. On 21 May 2015, an interim order was issued in this court, dealing with the father's contact rights with respect to L. The context of this application was a serious allegation of sexual abuse of L by the father, having occurred in December 2014. The allegation was corroborated by the findings of the social worker Ms de Weerdt, who had conducted interviews with L. Although I understand that Ms de Weerdt's report is not necessarily decisive of this issue, it struck me as *prima facie* sufficiently credible to have rendered prudent interim protection such as issued in the interim order of 21 May 2015. The main focus of the 21 May 2015 interim order was to have the question of the appropriateness of the father's access and parental rights vis-à-vis L determined as responsibly and conscientiously as possible, with the facilitation of the Family Advocate and Family Counsellor. For this purpose, the father's co-operation was of course important.

4. The upshot was a final order issued on 10 June 2016, a month after the divorce, in which essentially the father's parental rights and responsibilities were suspended and he was interdicted from contact with L.

5. The divorce decree granted on 12 May 2016 was accompanied by ancillary orders dividing the joint estate and extending the Rule 43 order pending the final determination of a series of prayers in the particulars of claim relating to shared parental rights and responsibilities and maintenance of L and of the mother, the latter for five years. These prayers were postponed *sine die.*

6. The mother was the plaintiff in the divorce action. She had sought orders relating to shared parental rights and responsibilities. These are the prayers

postponed in the decree. The particulars were issued in November 2014, before the alleged incident of abuse. The urgent application that led to the final interdict and suspension of all rights in June 2016 would, given the postponed and still pending prayers c-g in the divorce action, be revisited if and when these prayers are set down for determination.

7. The Rule 43 order, the divorce decree and the final interdict were all granted by default – the father did not appear.

8. This application is a combined rescission application brought by the father to rescind the Rule 43 order (6 August 2015), the divorce decree and its ancillary orders (12 May 2016) and the final interdict cutting off his parental rights and interdicting him from contact with L (10 June 2016). The application was launched in early March 2017.

9. The father is resident in Switzerland. The mother launched a counter-application for security for costs of this rescission application on the basis that the father was a *peregrinus* who held no immovable property in South Africa. Security was ordered in May 2018. This order spawned an interlocutory application by the mother to dismiss the rescission application when the security was not forthcoming. The security was then produced. The security proceedings are partly the reason why this rescission application has been on the roll for more than two years.

B. <u>THE RESCISSION APPLICATION AND ITS TARGETS</u>

10. The application is aimed at various court orders, the first more than a year and a half prior to the launch of the application, the second and third some seven to eight months prior to its launch.
11. There is no attempt in the father's papers to separate out his version in relation to each order and to explain precisely why with respect to each he failed to appear. The father's version in his founding papers is essentially that he had left everything up to attorney S to take care of, and attorney S had let him down. He also invokes his own depression and treatment in Switzerland and difficulties communicating with his attorneys. Evidence corroborating his medical predicament is noteworthy for the extent to which it is thin. One letter from a psychiatrist is produced to the effect that this professional consulted the father for depression. No details are given of the date or dates of any sessions, treatment regimes, or the extent to which this affected the father's ability to see to his affairs.

12. The father says he laid a complaint with the relevant Law Society against attorney S, and produces the complaint and an acknowledgement of receipt from the relevant Law Society. He tells of numerous emails and telephone calls following up with his attorney. No documentary evidence of this is produced as evidence in substantiation. We know from his chronology that he consulted with attorney S about the interim urgent proceedings, and that the report from Ms de Weerdt was discussed with him and there was a discussion about procuring his own report. Eventually attorney S withdrew for purposes of the urgent application, and the father appointed his current attorneys of record. The father says he was unaware of the Rule 43 proceedings and

order, and unaware of the grant of the final interdict. Although he pleaded to the divorce action, he was not made aware of the trial date.

13. On 1 August 2016 the mother's attorneys wrote to the father's new attorneys and advised them of the fact that a decree of divorce had been granted, and referred to defaults on the part of the father in respect of his maintenance order.

14. There was correspondence between the attorneys in which the father's attorneys sought documents and pleadings and these were not forthcoming. We are told that the reason for this was that photocopying charges were not tendered, but these were also not demanded.

15. Matters came to a head when the Swiss authorities provided copies of the divorce decree, the Rule 43 order and the final interdict to the father on 11 October 2016, under cover of a letter in German. The father, who is proficient in German, said this letter first needed translating before he could spring into action. This is credible in relation to what the Swiss authorities might have been telling him about enforcement of the property and maintenance orders in Switzerland, but not credible in relation to acting upon the South African court orders themselves, as their import was clear enough and in English.

16. There followed, according to the father, logistical difficulties in consulting, a holiday season, and an aborted attempt to get a draft affidavit finalised, which led to the delay in the launch of the application.

17. The father's basis for seeking rescission of all three orders is the same: he did not know of them until 11 October 2016; he experienced logistical difficulties

in acting expeditiously from that date to 6 March 2017; he was depressed, and he had, until he was shocked by what the Swiss authorities revealed to him, left everything up to attorney S to deal with, and thereafter to his current attorneys.

18. For the first time in reply, the father adds another excuse for not following up on his matters in South Africa. He says the mother laid a criminal complaint against him in relation to the alleged abuse of L. He says that in May 2015, attorney S advised him to remain outside South Africa to avoid arrest, and that he was terrified of being arrested. The allegation that attorney S advised him to be a fugitive from justice does not feature in the complaint to the Law Society attached to the father's papers.

19. In response to the mother's evidence of the father's travels around the world, including to sporting events such as the cricket World Cup in New Zealand, the father avers, in a manner that tests credulity to the hilt, that these travels formed part of his therapy for his depression.

20. The father states that the order in the decree of divorce separating the joint estate was wrong in law, as the law of the marital propriety regime was Swiss law, not South African law, and that at Swiss law there would have been no joint estate to divide, because the Swiss essentially operate a system similar to our accrual system as the default in the absence of any contract regulating the proprietary consequences of marriage. The father offers no substantive basis for overturning the decree of divorce itself.

21. The father offers no substantive grounds at all for overturning the Rule 43 order or the final interdict. He relies exclusively on the contention that he was

not afforded an opportunity of putting his side of the story, without giving any indication whatsoever of what that story would be, save to deny the allegations of abuse.

22. Although the application cites Rule 42, Mr *Chetty*, appearing for the father, disavowed any case on Rule 42 before me and relied exclusively on a common law rescission. There was no suggestion of procedural defects in relation to the procurement of any of the orders in question.

C. IS RESCISSION AN APPROPRIATE REMEDY FOR THE RULE 43 ORDER AND THE INTERDICT?

23. I consider first the appropriateness of the rescission remedy when it comes to the Rule 43 order and the final interdict.

24. The final interdict is an order dealing with the best interests of the child. The father in fact invokes this as the main reason the court should come to his assistance. But this is a reason why rescission is *prima facie* an inappropriate remedy, whatever the rights and wrongs of the grant of the interdict in June 2016. If there are good grounds for the interdict to be discharged, for the father to be granted parental rights, and for Ms de Weerdt's report to be questioned, these would be available to the father to advance in a new application to court. As for the Rule 43 order, if the father believed such an order should not continue, he could apply for its variation or discharge. It is in any event by its nature an interim order, and it endures only until the postponed orders in the divorce decree traversing the same ground are set down for determination.

25. It seems that rescission applications in relation to Rule 43 orders have been entertained, and these orders therefore regarded as sufficiently final at least to be susceptible to rescission (see for example *BT v GT* 2016 JDR 1242 (ECP), Tshiki J). But it has also been held on what appears to me the better authority in this court (*Terblanche v Terblanche* 1992 (1) SA 501 (W), not following *Davids v Davids* 1991 (4) SA 191 (W) in this regard), that a Rule 43 maintenance order is a maintenance order granted in terms of the Divorce Act 70 of 1979 (given the definition in section 1 of "divorce action"), which would mean that such an order is susceptible to variation and discharge under section 8(1) of the Divorce Act. This would therefore not require entry via Rule 43(6), which requires changed circumstances to be proved *to allow the summary and informal Rule 43 process to be employed for a variation* (my emphasis). Mr *Chetty* argued that rescission of the Rule 43 order was required, because without changed facts he would not be able to assail the order under Rule 43(6). In my view, this incorrectly regards the requirement of changed circumstances as a basis for using Rule 43 itself in varying a Rule 43 order as creating a general requirement of changed circumstances before a court can revise or discharge a Rule 43 order (see *Grauman v Grauman* 1984 (3) SA 477 (W) at 479).

26. These are weighty reasons against entertaining the rescission of the final interdict and the Rule 43 order.

D. <u>NO SUBSTANTIVE CHALLENGE TO RULE 43 AND INTERDICT ANYWAY</u>

27. Mr *Chetty* submitted that without a rescission, the father would remain in default of arrears under the original order. That may well be so.

28. But it then becomes important to consider the complete absence of any suggestion in the rescission application that the Rule 43 order was inappropriate on the merits. As with the order relating to his parental rights, the father prefers raising hypothetical opportunities of stating a case to actually putting forward at least the bare bones of what the substance is for interfering with the orders. There is, accordingly, nothing put forward in the application as to what would constitute the equivalent of a *bona fide* defence in relation to the orders relating to maintenance and access or parental rights. What does appear in the papers, instead, is evidence of the failure of the father to co-operate with the Family Advocate in the inquiries subsequent to the interim order.

E. RELIANCE ON THE ATTORNEY

29. There is another serious difficulty in the application. It is often difficult to decide where to draw the line between allowing a litigant to "hide behind his attorney's default" and unfairly visiting the defaults of the attorney on the ignorant litigant. Mr *Marais*, who appeared for the mother, urged me to adopt the stern approach followed in *Salojee NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 141B-E (which related to condonation of non-compliance with court rules), and to find fatally culpable the father's failure to follow up on his South African matters after his attorney had on his version clearly let him down on too many occasions. I am mindful, however, of the fact that the full court in *City of Tshwane Metropolitan Municipality v*

Brooklyn Edge (Pty) Ltd & another [2017] 1 All SA 116 (GP) held reliance on *Salojee* as trumping some prospects of success in the context of rescission to be a “misdirection” (para 50).

30. Yet the striking feature of the father’s version in relation to his reliance on attorney S is that one is given no indication at all of what S was advising the father at various times in relation to the status and progress of the matter and what was expected to happen next and when. There is a large degree of silence and an absence of frankness on what exactly passed between attorney S and the father on what was expected in the proceedings, which fairly raises the inference that the true facts in this regard would not be favourable or sympathetic to the father’s plight.

F. <u>PAPERS SUGGEST NO SERIOUS INTENTION TO PROSECUTE CASE ON RULE 43 AND INTERDICT</u>

31. The weight of the papers is such as very strongly to suggest the absence of any serious intention on the part of the father to press any true grounds, when given the opportunity, as to why the orders in relation to maintenance and contact were in fact wrong. It is this element that lies at the heart of a *bona fide* rescission application that is missing from the father’s application when it comes to the Rule 43 and the interdict orders. There is no sense of a “*bona fide* presently held desire on the part of the applicant for relief actually to defend the case in the event of the judgment being rescinded” (see *Mnandi Property Development CC v Beimore Development CC* 1999 (4) SA 462 (W) at 464 and authorities cited there). Suffice it to say that a father who was truly intent on proving to a court that he ought to have contact with his child for the

child's best interests would have acted very differently in response to the orders granted against him than the father did in the instant case.

32. The excuse of being a fugitive from justice comes close to clothing the whole rescission application with the odour of *ex turpi causa*. It can hardly be a factor used in favour of granting rescission.

33. In all the circumstances, no sufficient cause has been shown to render it just to rescind the Rule 43 order or the final interdict order.

G. THE DIVORCE DECREE AND THE DIVISION ORDER

34. In my view, the division order in the divorce decree stands on a different footing.

35. Unlike the case in relation to the interdict and the Rule 43 order, the father puts up his substantive defence to the division order: it was wrong to have applied South African law to the proprietary consequences of the marriage; Swiss law ought to have been applied, and had this been done, the Swiss version of the accrual system would have applied, not the division of a joint estate such as flows from a marriage in community of property under South African law.

36. In this regard, the matter takes a strange turn. The pleadings in the divorce action did not form part of the papers, but were provided to me on request.

The mother as plaintiff sought a division of the joint estate and the father as defendant pleaded that (a) the law of the husband's domicile at the time of the execution of the marriage determined the marital property regime (b) the father was domiciled in Switzerland at the time of the marriage and (c) in terms of Article 120B(1) of Part 2: Family Law (Swiss Civil Code), Article 181 (A) of Part 2: Family Law (Swiss Civil Code) and Chapter 2 of Part 2: Family Law (Swiss Civil Code), in the absence of a contract the statutory marital property regime of participation in acquired property applies and the marital property regime of participation in acquired property comprises the property acquired during the marriage and the individual property of each spouse, making the marriage one out of community of property with "community of acquests" (I paraphrase the pleaded case). In response, the mother denied that the father was domiciled in Switzerland at the time of the marriage.

37. In the rescission application, the father again asserts that Swiss law was applicable. But he no longer bases this assertion squarely or very clearly and exclusively on the allegation that he was domiciled in Switzerland at the date of marriage. Instead, he invokes the fact that the marriage was registered in Switzerland after being concluded in South Africa, and that the father is the defendant in the divorce action and that he "is" ("am") domiciled in Switzerland, as the reasons why Swiss law applies. Later in the affidavit he invokes his Swiss permanent residency and citizenship as the reasons why Swiss law applies. He then embarks on what Mr *Marais* correctly submitted is an irrelevant foray into Swiss Private International Law about which legal system applies when, before referring in a more paraphrased way than in the

pleadings to the marital property regime as applied in Switzerland, in the following terms:

> *"In terms of Articles 196-200 of the Swiss Civil Code of 1907, as amended, if there is no selection of a marital regime, the default Swiss property regime of "Shared Acquired Property" will apply. Under that regime, the assets of each spouse owned before the marriage is not shared between them upon dissolution of the marriage. However, the assets that either or both acquire during the marriage is required to be shared."*

38. The allegations in the affidavit relating to domicile are vague when it comes to the point in time for which the domicile is asserted – they speak in the present tense and invoke other irrelevant matters such as current citizenship and the registration of the marriage in Switzerland, not to mention the misguided invocation of the principles of Swiss choice of law principles when a South African choice of law principle is at issue. These allegations do not seem to be those of someone wishing simply and clearly to assert and substantiate that which was pleaded in the action, namely that he was domiciled in Switzerland at the time of the marriage.

39. Yet the heavy preponderance of the allegations in the founding affidavit that relate to domicile do strongly suggest a domicile of Switzerland at the time of marriage – especially the fact that in paragraph 29 the father alleges that *"shortly after our marriage in South Africa, the Respondent and I returned to my home in Switzerland, which became our matrimonial home and domicilium."*

40. Mr *Marais* correctly pointed to the important distinction between a current domicile of choice at the time of marriage and a domicile of choice acquired after the marriage, even if immediately after the marriage, with reference to *Frankel's Estate & another v The Master* 1950 (1) SA 220 (A). He submitted that the references to present domicile at the time the affidavit was deposed to did not necessarily translate into evidence of what the domicile was at the time of the marriage.

41. This is true. But it is also true that *Frankel* is still the law, despite cogent suggestions that a common law principle that accords decisive weight to the husband's domicile appears to conflict with the constitutional principle of equality (see for example the LAWSA discussion of the principle espoused in *Frankel*). This means that, at the very least for the purposes of determining the merits of the father's *bona fide* defence to the division order in a rescission application, if the papers reveal that the father was probably domiciled in Switzerland at the time of the marriage, then it was incorrect to have applied South African law and to have ordered a division of the joint estate on that basis, without developing the common law to alter the meaning of the *lex loci domicilii*.

42. The answering affidavit is also strange in this respect, as it does not engage squarely with this issue either, and in fact offers, in passing, the strongest support for the father's case with the reference, undeniably in the context of the time of the marriage, to the father's "primary residence in Switzerland".

43. Mr *Marais* submitted that it was up to the father to make out his case clearly for the basis upon which he invoked Swiss law, and the oblique nature of his case in this regard means that the "case to answer" was not one (as in the pleadings) of Swiss domicile at the time of marriage, meaning one cannot fairly use the evidence of his "home" at the time of marriage and his "primary residence" at the time of marriage as establishing a case he was not advancing in the affidavit.

44. But the fact remains that the only evidence of the father's domicile at the time of the marriage in the papers overwhelmingly establishes it as Swiss. Given the father's invocation of his Swiss domicile as at least one of the reasons for having Swiss law apply, one would have expected the mother, if there were a case to support the denial in the pleadings that the father's domicile was Swiss at the time of the marriage, to have at least said so in the affidavit, and also to have offered some evidence in support of the denial if it were available. Instead, she offered evidence supporting the father's domicile being Swiss at the time of the marriage, and rendered it common cause that his "home" and "primary residence" at the time of the marriage was Switzerland.

45. I am of the view that no reasonably fair reading of the affidavits can avoid the conclusion that, on the evidence they contain, the father was domiciled in Switzerland at the time of the marriage.

46. This means that it seems that, subject to the possibility of developing the common law to alter the rule in *Frankel* to have it comply with the constitutional imperative of equality, the marital property regime applicable was Swiss. This in turn would mean, not only that there is a *bona fide* defence

with some prospects in relation to the division order, but that the division order appears on the face of it to be wrong, given these common cause facts.

47. Of course, this does depend on the further proposition that the Swiss law is different from the South African in this regard.

48. The affidavit sets out the position alleged to apply under Swiss law in terms of the Civil Code. It refers to a system that is essentially similar in character to our accrual system, and therefore significantly different from a pure community of property regime.

49. The answering affidavit took no issue with this statement of the Swiss law at all. It merely denied that Swiss law applied. It appeared to do so on the mistaken premise that, as the marriage was concluded in South Africa, and its subsequent registration in Switzerland was irrelevant, South African law applied.

50. This leaves the statement as to Swiss law unchallenged.

51. But Mr *Marais* states that the statement is inadmissible, as it is not offered by an expert in Swiss law.

52. Mr *Chetty* pointed out that there was no strike out application or objection to the statement relating to the content of the relevant Swiss law, and the statement must be taken to stand.

53. At issue is the principle that foreign law is a question of fact, proved by experts, in the absence of evidence of which the foreign law is presumed to be the same as the South African law. But this is subject to the important

exception that a court can take judicial notice of foreign law to the extent that it is readily ascertainable and certain. A good example of how far the Supreme Court of Appeal was willing to go to regard foreign law as readily ascertainable and certain occurred in *Kwikspace Modular Buildings Ltd v Sabodala Minig Co SARL and another* 2010 (6) SA 477 (SCA). Here, a building contract had a choice of law clause designating the law of the state of Western Australia as the choice of law for the contract. The parties were content to apply the presumption that the law was the same as South African law. The Supreme Court of Appeal considered the Australian law to be sufficiently ascertainable to allow for judicial notice, despite the fact that this required interpretation of the import of a line of Australian precedent, which conflicted with certain English authorities, and a conclusion essentially on what the Australian courts would have made of this.

54. In the present case it is not necessary to be so bold. The father invokes a marital property regime as being determined by the Civil Code. He tells us what the statute says, albeit paraphrased. *Prima facie* verification of this proposition, that Swiss law applies a kind of accrual system in the absence of contractual regulation to the contrary, should be relatively straightforward with reference to the Code, or at least verification whether this appears to be so.

55. The paraphrase quoted in the affidavit is a verbatim echo of a passage in a publication available on the internet by one Jeremy Marley in *International Family Law*, save that Marley refers to Articles 196-220 and the affidavit refers to Articles 196-200. The only other difference is that Marley also provides the

French term for “Shared Acquired Property”, namely “participation aux acquêts".

56. I have considered an English translation of the Code freely available on the web, but its wording was corrupted and its Article numbering appeared dubious. I then consulted two German versions of the Code (*Zivilgesetzbuch*) available on the net, and confirmed their Article numbers corresponded as to content. The more official one is from a public governmental site *Der Bundesrat; Das Portal der Schweizer Regierung*.

57. I am able to read the German and can verify to my satisfaction, with reference to Articles 197 – 242, that a type of accrual system as described in the plea and paraphrased in the affidavit applies as the default regime in the absence of any contractual regulation to the contrary. This sharing in the accrual is called *Errungenschaftsbeteiligung*.

58. It may be that there are nuances to the application of this Code that are not readily ascertainable by a mere consideration of the statute and that require elucidation by Swiss lawyers. But, at least for the purposes of establishing a very strong case on rescission for a *bona fide* defence to the division order, the combination of the uncontested averment in the affidavit as to the content of the relevant Swiss law and my own verification by reference to the cited Code suffices to create a strong probability that the division order ought not to have been granted, again at least in the context of a rescission.

59. Is this enough to overcome the defects in the father’s attempts to set up sufficient cause considered above?

60. The case law tends in both directions on this. There are cases that indicate that even a very strong defence cannot always compel rescission, if the delay or explanation for default is so hopeless as to render it unjust to upset the judgment merely because it can be shown to have been wrong. See for instance *Simpson v Beaton NO* 2018 JDR 1252 (GJ) and the discussion in *Nkata v Firstrand Bank Ltd* 2014 (2) SA 412 (WCC); see also *Chetty v Law Society Transvaal* 1985 (2) SA 756 (A) at 768C:

> *"This is not to say that the stronger the prospects of success the more indulgently will the Court regard the explanation of the default. An unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits."*

61. Against this there are cases that emphasise the extent to which default is to be assessed as an index to the existence or absence of a true defence (*Mnandi Property Development CC v Beimore Development CC* 1999 (4) SA 462 (W)), or that focus on the extent to which a strong defence can rescue a weak explanation:

> *"unless, perhaps the weak explanation is cancelled out by the defendant being able to put up a bona fide defence which has not merely some prospect, but a good prospect of success" - Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9F.

62. It has even been held that established wilful default does not *ipso facto* preclude a finding of sufficient cause at common law to rescind a judgment where the merits appear strong: *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T), paras 8 and 9.

63. Where does that leave the division order?

64. In my view, the strong defence just manages to tip the scales in this case. Unlike the situation with the Rule 43 and interdict orders, the father has not acted as obviously as someone with no real interest in defending the matter at hand. The issue that appears to present a strong defence was an issue that he pleaded in the action. The apathetic handling of the serious business of the interim interdict and the failure to co-operate with the Family Advocate that inhered in the interdict scenario do not apply to the division order. The inappropriateness of seeking to rescind the order, instead of approaching a court for a new order on solid evidence, does not exist in the case of the marital property regime. No steps appear to have been taken that would render overturning the division order prejudicial in the same way as overturning the interdict. The father can more readily be forgiven for relying more heavily on his attorney in relation to dealing with the property consequences of divorce than in relation to dealing with an order affecting his parental rights to contact with his child.

65. This means that there is sufficient cause in my view for rescinding the division order in the divorce decree.

H. <u>SEVERABILITY</u>

66. An order dividing the joint estate in a marriage in community of property tends to issue forth joined at the hip to the decree of divorce itself.

67. Is the division order severable and capable of independent rescission?

68. No basis has been put forward for rescinding the decree of divorce itself. There is no suggestion that there had not been irretrievable breakdown and neither party wishes the marriage to be reinstated.

69. I raised this issue with the parties and after some research on their part was referred to some helpful cases where ancillary property orders (such as forfeitures) were separated from the question (and ultimately decree) relating to irretrievable breakdown.

70. Most in point was an article in the October 2018 edition of *De Rebus* to which Mr *Chetty* referred me, namely “The Rescission of Divorce Orders: A Note of Caution to the Courts” by James D Lekhuleni. The author refers to cases where ancillary orders, such as the division order, were rescinded while leaving the divorce decree itself in place, especially where reinstatement of the marriage would be highly undesirable – for example *M v M* (FB) 5710/2010 (15 September 2014) (Motlaung AJ) and *D v D* (GJ) A3079/15 (12 February 2016) (Wepener J and Crutchfield AJ).

71. I take comfort in the precedent, especially from an appeal court of this Division, for treating property orders in divorce decrees as severable from the divorce decrees themselves for the purposes of rescission, as I regard it as

appropriate, with sufficient cause existing, to rescind the division order but not the decree of divorce.

I. COSTS

72. The father failed in two out of the three rescission applications and most of the one remaining. But on the usual principles, his success in relation to the division order would carry costs of what was brought and argued as one application.

73. In the instant case, the conduct of the father, and especially his reliance on his own fugitive status as a ground for his neglect of his South African litigation, is deserving of censure. Furthermore, the decisive *bona fide* defence established in relation to the division order was not squarely presented in the affidavit, but had to be gleaned from the common cause facts addressing a different emphasis, combined with the law.

74. It is also not a remote possibility that the father will once again default in relation to the determination of the issue of the proprietary consequences of the divorce if this is set down and becomes ready for trial. He now knows that property orders may chase him in Switzerland, so perhaps he might participate henceforth.

75. In my view it would be appropriate to direct the costs of this application to be costs in the divorce action, which still remains pending and postponed in

relation to prayers c-g of the particulars of claim. The fact that the division order now falls away allows that issue to be tried together with the postponed issues (or to be separated by way of Rule 33 (4) if thought convenient).

J. ORDER

a. Paragraph 2 of the order of this court granted on 12 May 2016 (coram Wright J) under case number 2014/42472 is rescinded.

b. Save as set out above, the application is dismissed.

c. The costs of the application are directed to be in the cause of the postponed divorce action 2014/42472.

F SNYCKERS AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

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Date of judgment	: 23rd May 2019
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