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

Case Number: A3001/2020

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED. NO
30 August 2021

In the matter between:

D.S.O Appellant

And

E.N.O Respondent

JUDGMENT

FISHER J:

Introduction

[1] This is an appeal against the refusal of an application for rescission of part of a divorce order handed down in the Kliptown Magistrate's Court. Although the appellant casts the application as one to vary the order the application, is on its terms, squarely one of rescission. The part of the order which is sought to be rescinded is the order which reads as follows:

‘The defendant is to forfeit the patrimonial benefits arising from the marriage in community of property in favour of the Plaintiff, including the Immovable property situated at [....] D[....] Street, Klipspruit West and the movable assets therein.’

Procedural history

[2] The respondent issued summons against the appellant on 27 October 2017. The summons was served on the appellant on 5 February 2018, personally. The appellant was aware of the divorce proceedings but never filed an appearance to defend. The matter was set down for hearing on 26 June 2018. The respondent attended Court in person and testified under oath. The divorce was granted, inclusive of the forfeiture order as claimed.

[3] The appellant sought ‘variation’ of the divorce order by application filed by the appellant on 12 December 2018. The Notice of Motion does not state how the order should be varied but, from the founding affidavit, it is clear that the appellant is dissatisfied only with the forfeiture order and seeks its rescission.

[4] The rescission application was dismissed by Regional Magistrate Zakwe.

Material facts

[5] The parties were married in community of property on 07 February 1978. They separated during 1982. At the time of their separation they were living together in the property. Appellant has not lived in the property since she left the matrimonial home in 1982. They have children in common who are all now adults – the youngest being 32 years of age. One of the children, L[....] is, depending on the version, completely blind or partially blind. She continues to live in the property.

[6] The property was acquired in 1978 by means of what the respondent calls a ‘Rent to Buy contract’ entered into with the City of Johannesburg.

[7] The respondent alleges that he paid all the instalments on the property up until it was, at his instance, registered in the name of the parties in 2006. The respondent states that the only reason why the appellant's name appears on the title deed, is because they were officially married in community of property at the time of registration and that this was thus unavoidable.

[8] The appellant does not dispute that the instalment payments were made by the respondent. She alleges however that she has spent monies on improvements to the house totalling an amount of approximately R20 000 in respect of doors, tiles, and burglar bars.

[9] Both parties have long moved on with their separate lives. They have established new families with other people. The appellant has had four children with another man. The parties do not state how many children they have in common. The appellant says that the children were abducted and taken to Swaziland by the respondent when they were young. The respondent alleges that the appellant abandoned him and the children in 1982 when their youngest child was not yet a year old and that he had no choice but to take them to be cared for by his mother in Swaziland. These disputes have been overtaken by the passage of time in that the children are, as I have said, adults.

[10] What is not in dispute is that the parties are not on good terms. Both speak of an enmity between them which has spanned at least the decades that they have lived apart. They have, it seems, weaponised the protections afforded by the domestic violence courts in that each has applied for protection orders against the other over the years. They each allege violence and abusive conduct against the other. It seems that their daughter L[....] has also become embroiled in these applications and she has herself brought proceedings against the respondent. It seems that the parties have had constant interaction because their daughter resides in the property. The appellant says that she attends at the house every day to tend to her daughter.

[11] It is against this background that the facts which are pertinent to the decision of the Magistrate must be examined. In essence, the version of the appellant is that

she did not defend the proceedings because she and respondent had agreed orally that he would not proceed with the divorce action. He then proceeded to take the order unopposed. In essence, the appellant accuses the respondent of fraud.

The appeal

[12] This is not a matter where there is any error in procedure. Rather, it is a case based on what is alleged to be a failure to disclose to the Court that there was an oral agreement between the parties that the divorce would not be proceeded with.

[13] in *Lodhi 2 Properties Investments CC and Another v Bondev Development (Pty) Ltd*[1] Streicher JA held as follows[2] :

> Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment, if granted, cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A court which granted judgement by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought.'

[14] In terms of Magistrates Court rule 49(1), in order to succeed in a rescission or variation of an order the applicant must show 'good cause'.

[15] In the Magistrates Court the position under the old rule 49(7) was that a judgment could not be rescinded if the defendant was in wilful default. This rule was repealed and thus the wilful or negligent or blameless nature of the defendant's default became just one of the various considerations which a court will take into

[1] 2007 (6) SA 87 (SCA).
[2] Ibid at para 27.

account in the exercise of its discretion to determine whether or not good cause is shown.

[16] The general approach of the courts to applications for rescission was restated thus by Smalberger J, (as he then was) in the case of *HDS Construction (Pty) Ltd v Wait*[3] :

'In *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) Brink J, in dealing with a similar provision, held (at 476) that in order to show good cause an applicant should comply with the following requirements:

(a) He must give a reasonable explanation of his default;
(b) his application must be made *bona fide*;
(c) he must show that he has a *bona fide* defence to the plaintiff's claim.'

[17] Divorce actions being what they are, the proprietorial aspects of the marriage are often fraught with disputed facts and conflicting views. This position is worsened when a fault based approach comes into play, as is the case with forfeiture claims. In my view, prima facie, a defence to contest the forfeiture order should, in this case, be assumed in favour of the appellant. Although, I must state that the prospects of success in establishing a defence seem weak in the circumstances of this case – which are somewhat unusual.

[18] This appeal thus turns on whether the Magistrate erred in rejecting the explanation of the appellant's default and finding against her bona fides in relation to the bringing of the application.

[19] A further procedural point was taken to the effect that the Magistrate did not allow for oral argument to proceed but decided the matter on the heads filed.

I move to deal with these points in turn.

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[3] 1979 (2) SA 298 (E) at 300F-301C in the following terms:

The Magistrate's rejection of the appellant's version.

[20] The Magistrate to my mind gave careful consideration to the facts of the matter and the manner in which the appellant dealt with her case as to her default. His view was that the probabilities were against the agreement not to persist with the divorce. He questioned why the respondent would not proceed where he had gone to the trouble and expense of instituting divorce proceedings. He furthermore considered that the relationship of the parties was acrimonious and hardly based on trust or goodwill. He thus said that it was unlikely that the agreement relied on had been concluded.

[21] Apart from there being no feasible explanation as to the motivations of the appellant in deciding not to proceed with the divorce there is also scant particularity as to the circumstances surrounding the conclusion of the agreement. Many questions arise. Where was it concluded? On what date was it concluded? Who was present? Was it concluded telephonically or in person. These vital particulars which may have gone some way to establishing a semblance of bona fides, were simply not provided

[22] This lack of detail taken with the unusual relationship between the parties and the fact that serious allegations of fraud are made, suggests a lack of bona fides.

[23] To my mind the Magistrate cannot be faulted in his weighing up of the matter and the way in which he exercised his discretion in deciding that the explanation for the default was neither reasonable nor reasonably made out.

The failure to hear argument

[24] The record of the proceedings shows that the following occurred as to the arguing of the matter. The matter was argued fully by the attorneys for the respective parties. At the end of her argument the respondent's attorney sought to hand up heads of argument. The appellant's attorney Mr Mia then complained that he had been 'hit below the belt' by the respondent's attorney handing up heads. He said he had not been given a copy and objected to the court receiving the heads. Obviously,

this was not a proper approach. A party may file heads without notice to the other side.

[25] The Magistrate nonetheless gave Mr Mia the opportunity to file heads as well.

[26] There was no basis to suggest, as the appellant's counsel seems to, that after the filing of heads Mr Mia should have been given a further opportunity to address the Court on the heads. There was no such obligation on the part of the Magistrate and what is more, no further opportunity was sought by Mr Mia.

[27] In the circumstances I find that Mr Mia was given more than a fair opportunity to advance the case of the appellant and the point raised is without substance.

Order

[28] I thus make the following order:

The appeal is dismissed with costs.

FISHER J
HIGH COURT JUDGE
GAUTENG LOCAL DIVISION, JOHANNESBURG

I concur,

MTHIMKULU AJ
HIGH COURT ACTING JUDGE
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 20 July 2021.
Judgment Delivered: 30 August 2021.

APPEARANCES:

For the Appellant	**:** Adv B. Hechter.
Instructed by	**:** A.K Mia Incorporated.
For the Respondent	**:** Adv D Maritz.
Instructed by	**:** Soweto Law Clinic.