IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 21264/2019
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED

30 September 2022

In the matter between:

K [....] P [....] **PLAINTIFF**

And

N [....] O [....] **DEFENDANT**

Delivery: This judgment is delivered electronically by circulation to the parties' legal representatives by email. The date of issue is deemed to be 30 September 2022**.**

Summary: Application for the rescission of an order making a settlement agreement the order of the court. The application brought eighteen months after the settlement agreement was made the order of the court. Application to cancel the underlying agreement.

Application to compel referral of the dispute to mediation in terms of rule 41A of the Rules. The rule does not make provision to compel referral to mediation. The legal principles governing rescission restated. The consequences of making a settlement agreement an order of court discussed.

Application to separate the issues in terms of rules 33(4) and (5) of the Rules. The principles governing the rule 33 of the Rules discussed.

JUDGEMENT

MOLAHLEHI J

Introduction

[1] This is an application in which the applicant, Ms O [....] (the respondent in the main divorce action), seeks to rescind the order made by Monama J, as he then was, on 14 December 2020. In terms of that order, the agreement concerning amongst others the appointment of a referee, Mr Lewis, was made an order of the court.

[2] The appointment of the referee was made in terms of section 38 of the Superior Courts Act o1 of 2013, as amended. The mandate of the referee was to evaluate the respective estate of the parties as governed by their marital regime.

[3] Ms O [....] estranged husband, Mr K [....], instituted the main divorce action against her.

[4] After concluding the agreement for amongst others the appointment of a referee and which was made an order of court by consent, Ms O [....] instituted this rescission application unassisted and as a lay litigant. The notice of motion for the rescission of the order referred to above can be discerned from paragraph 4 of her founding affidavit, which reads as follows.

> " 4. I am applying to have the court order of 14 December 2020 rescinded and the cancellation of the report on the basis that new information has been presented showing that the plaintiff obfuscated his financials and did not declare tax rebates or the value of assets in the Netherlands such as the immovable property of G [....] M [....] [....], Utrecht, the Netherlands.

[5] In addition to the rescission application. Ms O [....] seeks the following orders:

(a) cancellation of the agreement to appoint of the referee, Mr Lewis,

(b) the cancellation of the underlying agreement between the parties.

(c) the adjudication of the divorce action for the dissolution of the marriage be separated from the adjudication of the division of the estate.

(d) Compel compliance with the provisions of rule 41A of the Uniform Rules of the High Court (the Rules).

[6] Mr Kuersten opposed both the applications for rescission and the cancellation of the referee's report including the underlying agreement. He raised several points in *limine* in his opposition to all of the applications.

[7] The agreement which Ms O [....] seeks to cancel was concluded in the context whereby the parties agreed to appoint Mr Lewis as a referee. His duty was to investigate and determine the composition and value of the respective estates of the parties. The investigation was to be conducted in and outside South Africa. The parties further agreed in terms of paragraph 2.7 of the agreement that:

> ". . . the findings of the referee will be final and binding on both of them unless either party institutes proceedings for the setting aside or variation of such report and/or such other relief as may be appropriate within 30 days of receipt of such report on the basis that the finding of the referee are unreasonable, irregular and/or wrong, or on such other appropriate legal basis".

[8] The referee submitted his report on 30 June 2021. The thirty days for filing, the rescission or cancelling the referee's report expired on 12 August 2021. It is common cause that the parties agreed to make the agreement an order of court.

[9] It is also common cause that neither of the parties made an application before the expiry of the thirty days for setting aside or varying the referee's report.

Consequently, the findings made in the report became final and binding as per the agreement between the parties.

Grounds for rescission

[10] Ms O [....] does not dispute the existence of the agreement between her and Mr K [....] concerning the appointment of the referee and all other terms thereof. She, however, challenges the methodology of the referee's report on the following grounds:

> "a. The plaintiff has not declared the immovable asset of G [....] M [....] [....] in Utrecht, the Netherlands, which has the current municipal value of E2300000.00 (R39053887,30) (see appendix for Kadaster report (title deed)/municipal value for G [....] M [....] [....]). Therefore, the net asset of the plaintiff cannot be R1 185 001.00 because the plaintiff owns 70% of the G [....] company in the Netherlands, of which the G [....] M [....] [....] is part of.
>
> b. The plaintiff is 100% financially successful as 70% owner of G [....] in the Netherlands and CEO of Workshop 17 in South Africa and Mauritius. Both businesses are successful co-working spaces in numerous cities in these countries. The plaintiff is also a partner in the international consulting firm, Kessels and Smit — The Learning Company, with head offices housed at G [....] M [....] [....]. All these businesses pay out annual dividends, which the plaintiff has not declared.
>
> c. The plaintiff blocked the defendant's citizenship application in the Netherlands because the plaintiff was receiving tax rebates in the Netherlands for alimony that he does not pay (see appendix). The defendant was only able to get this information once she regained residency in the Netherlands. Thus, this information was only available post the 30-day period to oppose the report.
>
> d. Furthermore, the Accrual Regime allows for adjustments, implying that new information can be used to challenge the methodology of the report.

e. The plaintiff has also not declared tax rebates on the immovable asset or the property (the joint marital home) to the value of 65442.00 (R92 451,78) annually (see appendix for "Total heffingskorttng" transl. Total tax credit).

f. Therefore, the methodology of the report showing a decrease in the plaintiff's estate is questionable since the plaintiff's estate has grown significantly since the date of marriage, 26 October 2013.

g. In 2020, the plaintiff was collecting a salary of R200 000.00 and 66 500.00 (R110 398,29) respectively per month in both South Africa and the Netherlands (see the report). h. The net asset of the defendant has decreased significantly due to ongoing unemployment (since mid-October 2020) and costly legal fees which is why the defendant is a lay litigant.

i. The defendant challenges the amount for the accrual calculation because the defendant will be severely disadvantaged if payment is made against her equity in the marital home due to her age and lack of employment (see Matrimonial Property Act 88 of 1984 of South Africa and EU Matrimonial Property Regime Regulations 2016/1103 of 24 June 2016 appended)."

[11] Ms O [....] avers in her affidavit that she concluded the agreement because of lack of funds and the threat made by Mr K [....] attorneys to institute action *communi dividundo*.

[12] The reason for not challenging the methodology used by the referee in determining the value of their respective estates was, according to her, due to the fact that she had run out of funds to pay her attorneys.

[13] The referee's report reflects that Ms O [....] owes Mr K [....] the sum of R1 777 948.00. She contends that the methodology used to arrive at this calculation was wrong because it did not take into account the following factors:

(1) That her "living standards have significantly deteriorated.

(2) Mr. K [....]'s living standard has grown higher since the marriage between the two of them.

(3) She does not have the amount which the referee found to be due by her.

(4) That Mr K [....] "obfuscated his financial assets in the Netherlands.

(5) Mr K [....] "sabotaged (her) chances of gainful employment at Leiden University and Nelson Mandela University.

The grounds for cancellation of the referee's report.

[14] The grounds for the cancellation of the report is similar to those in the rescission application. Ms O [....] avers that Mr K [....] delayed in submitting his Financial Disclosure Forms (FDF) and thus, having seen her FDF adjusted his liabilities "thereby allowing him to absorb the marital home within his estate."

[15] The reason for not challenging the methodology of the report, according to her, was due to financial constraints. She further contends that the findings of the report, are disputed despite the expiry of the thirty days for challenging the report, because of new information that has come to light showing fraudulent tax rebates on alimony by Mr Keurstan.

[16] The last point made by Ms O [....] is that the thirty-day period for challenging the report should be waived because the "Accrual Regime allows for adjustment post-divorce, especially if the monies were not declared."

[17] It seems apposite to deal first with the issue of compelling referral to mediation before dealing with the merits of the rescission application.

Referral of the matter to mediation.

[18] Ms O [....], under the heading "APPLICATION FOR FORMAL MEDIATION", seeks an order compelling Mr K [....] to submit their dispute to mediation in accordance with the provisions of rule 41A of the Rules.

[19] Rule 41A was introduced as an amendment to the Rules and came into effect on 9 March 2020. Its underlying objective is to make it mandatory for litigating parties to consider mediation at the inception of litigation. (my emphasis). The general rule requires that every action or application should be accompanied by a notice to be delivered by either the plaintiff in an action or applicant in motion proceedings indicating whether any party agrees to or opposes referral of the dispute to mediation. Each party is required in their respective notices to indicate why there is, or there is no belief that, the mediation is an appropriate dispute resolution mechanism.

[20] There is no provision in rule 41A to compel any party to submit to mediation. There is also no sanction provided in the rule for non-compliance. However, the court may, in the exercise of its inherent jurisdiction, postpone a matter and grant the parties leave to consider mediation.

[21] In the present matter, there is no substantiation or motivation as to why and on what legal basis this court should compel Mr K [....] to submit to mediation. It is also unclear whether mediation is sought concerning the main dispute or the rescission application. It would appear on the facts of this matter that the request for the compulsory mediation would not relate to the divorce action as such proceedings were instituted before rule 41A amendment came into effect. The amendment to rule 41 was promulgated three years after the institution of the proceedings in the main action. Accordingly, the application to compel referral to mediation is unsustainable and thus stands to fail.

Legal principles governing rescission

[22] It is evident from the reading of the applicant's founding affidavit that the application in this matter is brought in terms of the common law. In this respect, the applicant quotes the correct approach to be followed in dealing with the rescission of a judgment in terms of the common law. The approach is set out in Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others, as follows:

> *"In terms* of *common law,* a *court has discretion to grant rescission* of j*udgment where sufficient or good cause has been shown. But it is clear that in principle and in the long-standing practice* of *our Courts, two essential elements "sufficient cause" for rescission of* a *judgment by default are:*
>
> *10.* 1 *that the party seeking relief must present* a *reasonable and acceptable explanation for his/her default, and*
>
> *10.2 that on the merits such party has* a *bona fide defence, which prima facie, carries some prospect of success."*

[23] In Ntlabezo v MEC for Education, Culture & Sport Eastern Cape 2001(2) SA 1073 (TkH) the court held that:

> "The only question which remains is whether this finding has the result that rescission must be granted without considering factors such as the *bona fides* of the application for rescission. In Georgias v Standard Chartered Finance Zimbabwe Ltd (supra) the Zimbabwe Supreme Court, sitting on appeal, held that, in deciding whether to rescind a judgment given by consent, regard must also be had to (1) the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered; (2) the bona fides of the application for rescission and (3) bona fides of the defence on the merits of the case which prima facie carries some prospect of success (at 132G - I). At 132C - D Gubbay CJ said the following: 'Although lack of consent is undoubtedly the predominant factor in the decision of whether or not to set aside a judgment purported to have been given with the consent of the parties, regard must also be had, in my view, to the factors alluded to by Blackie J and mentioned

by Mr De Bourbon. I think that only where the defence offered to the action is virtually unarguable, or the delay in bringing the application inordinate and unsatisfactorily explained, should a Court decline the relief of rescission.' I agree with this approach."

[24] In essence, for an applicant to succeed in a rescission application under the common law, he or she is required to prove that there is "sufficient" or "good cause" to warrant rescission.

[25] 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, [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021). the Constitutional Court restated the two requirements that need to be satisfied under the common law as being the following:

"First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that it has a *bona fide* defence which prima facie carries some prospect of success on the merits. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind."

[26] The court further held that:

"rescission as an avenue of legal recourse remains open, but only to those who advance meritorious and bona fide applications, and who have not, at every turn of the page, sought to abuse the judicial process."

[27] [20] In De Wet v Western Bank Limited 1977 [4] SA 770, the court held that under the common law, a judgment could be altered or set aside only under limited circumstances.

Mr K [....]'s opposition

[28] Mr K [....] opposed the application and raised several in *limine points.* Some of the issues raised are the following: (a) the alleged failure by the applicant to institute the proceedings timeously, (b) failure to challenge the referee's report in terms of the procedure set out in the court order, (c) the improper forum chosen to challenge the referee's report. (d) that the applicant lacks *bona fides* in instituting these proceedings. The point concerning the attempt at compelling compliance with the provisions of rule 41A is discussed above.

[29] The other point relates to the dispute of fact about the alleged non-disclosure of information to the referee by the respondent.

[30] The respondent has, in addition, instituted a counter-application seeking an order separating the adjudication of the divorce action dissolving the marriage between the parties and the determination of the value of their respective estates from each other.

Evaluation

[31] It is apposite to note that this application seeks to rescind an order of the court which was made by consent. There is no dispute about the agreement's validity, and in particular, making the same court order. Of importance also is the fact that the parties agreed that the findings of the referee should be final and binding. The initial binding effect of the agreement was that either of the parties was entitled to challenge the conclusion made by the referee within thirty days of the submission of the referee's report.

[32] At the time of the conclusion of the agreement and making the same an order of the court, the applicant was legally represented. After that, the matter was at the instance of the applicant and referred to case management and since then Ms O [....] was self-represented.

[33] In my view, Ms O [....] has failed to satisfy the jurisdictional factors for a rescission application. She inordinately delayed in instituting the application and further failed to satisfactorily explain the delay in her founding affidavit.

[34] The agreement, which appointed the referee to evaluate the respective parties' estates, was concluded on 24 November 2020 and was by agreement made the order of the court on 14 December 2020. This means that the applicant instituted her rescission application about eighteen months after Monama J's order.

[35] The referee presented his report on 3 June 2021, a period of approximately one year to the date of the institution of these proceedings. This means that the applicant was, as of that date, aware of the findings made by the referee. She had thirty days in terms of the court order to assess and decide whether there was a need to challenge the order. She, through her attorneys, indicated in correspondence that she accepted the finding made by the referee.

[36] Furthermore, Ms O [....] had the opportunity to raise the complaint about the report or Monama J's court order during the case management meetings that this court facilitated. She never did. She, however, confirmed at the beginning of the case management facilitation that the report resolved the proprietary aspect of the divorce action relating to the accrual system.

[37] As I understood the parties, the issue that remained for determination concerned the co-ownership of the immovable property in the Netherlands. This is supported by the approach made by Ms O [....] prior to the rescission application, when on 8 April 2022, she addressed correspondence to the court seeking a meeting to discuss the allocation of the trial date.

[38] The averment that the order stands to be rescinded is based on the allegation that "new information has been presented" and that Mr K [....] did not make full and frank disclosure to the referee. This, in my view, does not sustain a claim for the rescission of the order. The applicant has failed to take the court into her confidence by explaining what she means by the information was "presented." She further does not explain when and how the "new information" came to her attention. She also does not indicate the extent to which the information would have impacted on the findings made by the referee.

[39] The other ground upon which Ms O [....] seeks to have the order rescinded relates to the jurisdictional complaint. The complaint, it would appear, is that the respondent wrongly chose the South African jurisdiction rather than the Netherlands. She never raised this issue in the main divorce action. She now presents the issue opportunistically in a rescission application that is instituted more than eighteen months after the order was made.

[40] In light of the above, I am not persuaded that the applicant has made out a case for the rescission of the order made by Monama J on 14 December 2020. Accordingly, the application stands to fail.

[41] Following the above analysis and conclusion, I do not deem it necessary to deal with the issue of the cancellation of the agreement or the referee's report. It is trite that once an agreement has been made, an order of the court has the same effect as any other court order. In this respect the Constitutional Court (CC) in *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC) held that:

> " 29 Once a settlement agreement has been made an order of court, it is an order like any other. It will be interpreted like all court orders."

[42] In paragraph [31] of the judgment the CC said:

> "[31] The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties; the *lis* becomes *res judicata* (literally, "a matter judged"). It changes the terms of a settlement agreement to an enforceable court order."

Separation application

[43] The applicant in the separation application is Mr K [....], and the respondent is Ms O [....]. As indicated earlier, the separation application is sought in terms of rules 33 (4) and (5) of the Rules. In his particulars of claim, he seeks the following order

1. dissolution of the marriage between the parties.

2, payment in the amount of R1 773 948.00 by Ms O [....] .

3. termination of joint ownership of the common property on certain terms and conditions;

4. the payment of costs of suit by Ms O [....].

[44] It is common cause that the marriage relationship between the parties has broken down. They have in this regard, not lived together as husband and wife for a significant period. There are no children involved in these proceedings.

[45] Ms O [....] opposed the divorce action and instituted a counterclaim seeking the following order:

1. a decree of divorce

2. determining the value of the accrual of the parties' respective estates at the dissolution of the marriage.

3. directing that at the dissolution of the marriage, she is entitled to an amount equal to one half of the difference of the accrual of the parties' respective estates.

4. that the common property be sold and the balance of the net proceeds be divided equally between the parties; an

5. costs of the suit.

[46] It is evident from the reading of the papers that the issue to be ventilated at the trial is limited to the termination of the co-ownership of the property. The

secondary issue relates to the pecuniary adjustment about the sale of the common property.

[47] In support of this application, Mr K [....] contends that it is "convenient, appropriate if not obvious, to separate the issue of the decree of divorce from the *actio* claims in order to allow it to proceed on an unopposed basis."

[48] Mr K [....] further contends that Ms O [....] will not suffer any prejudice by the separation of the divorce adjudication for the following reasons:

> "108.1. the amount payable by her to me in terms of the accrual system has already been determined and is fixed as set out above;
>
> 108.2. the applicant will be free to move on with her life and engage in whatever relationships she may so desire;
>
> 108.3. the dissolution of our marriage will have no effect, whatsoever, on her entitlement in terms of the action claims;
>
> 108.4, the applicant will not be required to incur any legal costs by virtue of the separation of the decree of divorce;
>
> 108.5. finalising the divorce can only contribute to any animosity that the applicant still harbours against me."

[49] Ms O [....] opposed the separation application on the basis that the marriage has been abusive and Mr K [....] has used his power and financial "dominance to strong-arm her from her right claim to the property." According to her, granting the separation of the issues will extend the abuse by Mr Keusten. She further contends that the separation application should not be granted until the financial matters between the parties have been resolved.

[50] I agree with counsel for Mr K [....] that technically and practically, the separation application stands unopposed. The alleged abuse by Ms O [....] is

unsubstantiated and thus has no bearing on the consideration of whether the separation of issues should be granted. The allegation of abuse by Ms O [....], suggests the need to expedite the dissolution of the marriage to end the abuse, if it exists.

[51] In light of the above analysis, I find that the requirements of rules 33 (4) and (5) have been satisfied. Accordingly, the application for separation of the issues of the termination of the marriage relationship between the parties and their financial issues stands to succeed.

Costs

[52] In relation to the costs for the application to rescind the order of 14 December 2020, Ms O [....] requested that each party should bear his or her costs in line with the order made in the application to amend the particulars of claim by this court under the same case number dated 7 March 2022.

[53] It should be noted that the order as to costs in the judgment dated 7 March 2022 was made in the circumstances different to those in the present matter. The costs order in that matter was made in the context where the applicant applied for the amendment of the particulars of claim and the plea in reconvention. The court did not apply the basic rule that costs should follow the result on the ground that the defendant was a lay litigant who may not have appreciated the consequence of opposing the application.

[54] I agree with Mr K [....]'s legal representative that the rescission application by Ms O [....] was unnecessary and reckless. I see no reason why the costs should not follow the result and, for that matter, be on a punitive scale as prayed for Mr K [....].

[55] As for the separation application, I again do not see why the costs should not follow the results. I am afraid I, however, have to disagree that the costs should be punitive in the circumstances.

Order

[56] In the circumstances, the following order is made:

(1) The rescission application is dismissed with costs on the attorney and client scale.

(2) The separation application is granted with the respondent, Ms O [....] having to pay costs on attorney and client scale.

(3) The remaining issues as appear from the pleadings are postponed *sine die.*

E MOLAHLEHI J
Judge of the High Court of South Africa
Gauteng Division, Johannesburg

Representation:

For the applicant: adv. HP van Nieuwenhuizen

Instructed by: Steve Merchak attorneys

For the respondent: Ms N [....] O [....] Ismail

Instructed by: Self representing

Date of hearing: May 2022

Delivered: 30 September 2022.