IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 59936/2013

DATE: 30 SEPTEMBER 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

M[...] J[...] M[...] **APPLICANT**

AND

I[...] C[...] M[...] **FIRST RESPONDENT**

ANDRIES NKOME **SECOND RESPONDENT**

JUDGMENT

LEPHOKO AJ

[1] This is an application for rescission of an order granted by default on 07 May 2013 appointing the second respondent as receiver and liquidator of the joint estate of the applicant and the first respondent.

[2] The first respondent instituted divorce proceedings against the applicant on 15 January 2010 under case number 2255/2010 and obtained a decree of divorce on 15 October 2010. On 23 February 2012 and under case number 37584/2009 the applicant launched an application for the rescission of the divorce order. On 18 March 2013 whilst the application for recession of the divorce order was still pending the first respondent launched an application for the appointment of the second respondent as receiver and liquidator of her and the applicant's joint estate. The second respondent was appointed as receiver and liquidator by order of court on 07 May 2013.

[3] On 13 November 2013 and under case number 59936/2013 Phatudi J granted an order staying the execution and enforcement of the court order of 07 May 2010 appointing the second respondent as liquidator of the applicant and first respondent's joint estate pending the rescission application for the setting aside of that appointment. The court order appointing the second respondent was granted on 07 May 2013 and reference to 07 May 2010 in the application and the court order must be accepted as a clerical error.

[4] The first respondent raised two points *in limine*, namely, that the issue is *lis pendens* and that the point in issue is *res judicata.*

RES JUDICATA

[5] Res judicata is simply a plea or a defence that the point or issue has already been decided between the parties. The doctrine of *res judicata* is founded on the basis that there must be an end to litigation. For the defence of *res judicata* to succeed it has to be established that the judgment relied on was a final or definitive decision; it emanated from a competent court; the judgment was between the same persons; and the "cause of action" was the same not in the strict sense but in respect to the same matter having been in in issue: see *MV Silvergate Tradax Ocean Transportation SA v MV Silvergate Properly Described As MV Astyanax And Others* 1999 (4) SA 405 (SCA) at paragraphs 53 and 54. See also *Horowitz v Brock* 1988 (2) SA 160 (AD) at 178H to 179C; *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (AD) at 472; *Le Roux v Le Roux* 1967 (1) SA 446 (AD) 463A-D. See also, *Garment Workers Union W.P v Industrial Registrar* 1967 (4) SA 316 (TPD).

[6] The first respondent argued that the current application for rescission of the appointment of the second respondent as receiver and liquidator is *res judicata* in that it is the same matter in respect of the same parties and in relation to the same relief that was adjudicated upon by Phatudi J on 13 November 2013.

[7] It is however common cause that the current application is about the setting aside of the appointment of the second respondent as receiver and liquidator whereas the issue before Phatudi J was the staying of the order appointing the second respondent pending the outcome of this application. The two applications are not remotely about the same issue and the same relief.

[8] Counsel for the respondent also based his argument of res judicata on the fact that the applicant had sought the same relief as in the present application in the alternative when the matter came before Phatudi J. That may well be, but the question still remains whether the order made by Phatudi J on 13 November 2013 is final and definitive. The order by Phatudi J, being nothing more than an interdict *pendente lite,* is by its very nature not final and definitive of the rights of the parties affected thereby. As it is not, the argument of *res judicata* cannot prevail.

LIS PENDENS

[9] *Lis pendens* is a defence that there is pending litigation between the same parties on the same cause of action. In *Nestle (South Africa) (Pty) Ltd v Mars Inc* 2001(4) SA 542 (SCA) at paragraph 16 the court stated that "*The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (res judicata). The same suit, between the same parties, should be brought only once and finally".*

[10] The first respondent relying on *lis pendens* argued that the matter is still pending under case numbers 37584/2009 or 2255/2010. This argument was later abandoned, in my view correctly so, as case number 37584/2009 concerns an application for rescission of the divorce order granted on 15 October 2010 under case number 2255/2010 as clearly appears from the founding affidavit supporting that application. That application was issued on 23 February 2012. Case number 2255/2010 is the case number under which the divorce action was instituted. It seems that the issuing of the divorce rescission application under case number 37584/2009 can be attributed to a clerical error. This is so because the issue pending under case number 37584/2009 or that would be pending under case number 2255/2010 had the correct case number been used is the rescission of the divorce order, which is not the same relief of setting aside the appointment of the second respondent as is sought in the present application. *Lis pendens* would therefore not substantively advance the first respondent's case.

RESCISSION OF ORDER

[11] In order to succeed with an application for rescission the applicant must show that he was not in willful default, that the application is *bona fide* and not made with the intention to delay the plaintiffs claim and that he has a *bona fide defence,* which *prima facie* has some prospects of success. See *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476 - 477, *Morkel v ABSA Bank Bpk* 1996 (1) SA 899 (C) at 903D - E, *Standard Bank of SA Ltd v EL-Naddaf* 1999 (4) SA 779 (W) at 784.

[12] The applicant alleges that he was not in willful default and did not oppose the application for the appointment of the second respondent as receiver and liquidator because he was not served with the application. The response to this allegation is a bare denial without any indication or proof that service was indeed effected. The court is entitled to assume that the allegations of the applicant in this regard are correct. Service is fundamental in ensuring that a party that is brought before court is afforded the right to state his case and be heard. See also *Steinberg v Cosmopolitan National Bank of Chicago* 1973 (3) SA 885 (RA) at

895C where the court stated that it is a corner-stone of our legal system that a person is entitled to notice of legal proceedings instituted against him. See also *Clegg v Priestley* 1985 (3) SA 950 (W) at 954F where the court stated that it is a fundamental principle of our law that a court will not make a final order that may prejudice the rights of a person without notice to him.

[13] In *Dada v Dada* 1977 (2) SA 287 (T) at 288C-E the court stated that "*when an action has been begun without due citation of the defendant, the subsequent proceedings are null and void, and any judgment is of no force and effect whatsoever..... Upon proof of invalidity on this ground, the decision may be disregarded without the necessity of a formal order setting it aside"*. See also *Minister Virginia Cheese and Food Co* 1961 (4) SA 415 (TPD) at 422. It has been held that a judgment obtained without service is erroneously granted and may also be set aside in terms of rule 42(1)(a) notwithstanding the absence of good cause: see *Fraind v Nothmann* 1991 (3) SA 837 (W) at 839H; *Topol And Others v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 648D-649F.

[14] As good cause for bringing the application the applicant alleges that there is an application pending before court for the rescission of the divorce order granted in default. This is admitted by the respondents. He further alleges that if that application was successful he would be able to defend the divorce action and also raise a counterclaim against the first respondent for forfeiture of the immovable property and the pension fund.

[15] There was already a pending application for rescission of the divorce order when the first applicant launched the application for the appointment of the second respondent. The first respondent brought the application to appoint the second respondent shortly after being served with the application for rescission but before the rescission application was adjudicated upon. Whilst the first respondent denies that she was ever served with the application for rescission of the divorce order, the court papers indicate that that application was indeed served on her attorneys on 27 February 2012. It can be inferred from the first respondent's alleged conduct that she was determined to finalize the division of the joint estate as soon as possible regardless of the applicant's intention to have the divorce order rescinded.

[16] The first applicant sought an order that the second respondent be appointed as receiver and liquidator of their joint estate with the powers set out in the relevant court order. The second respondent had already acted in terms of those powers and attempted to dispose of the immovable property notwithstanding the pending application for rescission of the divorce order. In my view, it would constitute good cause for the applicant to allege as he does, that he is prejudiced in his attempt to defend the divorce action and that had he been served with the application for the appointment of the second respondent he would have opposed it on the ground that the appointment would be premature as the divorce action had not been finally determined.

In the premises I would make the following order:

1. The court order granted on 07 May 2013 appointing the second respondent as receiver and liquidator of the assets of the applicant and first respondent's joint estate is hereby rescinded.

2. The respondents are ordered to pay the costs of the application.

Heard on: 31 July 2014.

Judgment delivered on: 30 September 2014.

For the Appellant: Adv N Erasmus.

Instructed by: Shapiro & Ledwaba Inc.

For the Respondent: Adv M J Letsoalo

Instructed by: A J Masingi Attorneys.