IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case Number: 1275/2021

THABO AARON MOTHABENG Applicant

and

MAPASEKA FRANSIENA MOTHABENG Respondent

HEARD ON: 21 APRIL 2022

CORAM: AFRICA AJ

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be have been at 11h00 on 12 May 2022.

JUDGMENT

INTRODUCTION

[1] This is an opposed application for the rescission of a divorce order, granted on 20 May 2021, by default, in favour of the respondent.

[2] In support of the application for rescission of judgment, the applicant, under oath deposed to and filed his founding affidavit, with the respondent, filing her opposing affidavit on 24 February 2022. The replying affidavit was filed on 10 March 2022. It is common cause that the divorce summons, was personally served on the Applicant on 14 April 2021.

BACKGROUND

[3] It is common cause that the parties, were married in community of property on 04 December 2012, and no children was born of the marriage. The applicant is employed within the South African Polices Services for the past 29 years and the respondent was unemployed at the time when the summons was issued. The marriage appeared to be marred with acrimony, prompting the respondent to institute divorce proceedings and even to leave the common home. After the summons was so received by the applicant, the parties agreed to make another attempt, at salvaging the marriage.

[4] On 7 May 2021, the respondent moved back into the communal home in an effort to work through their problems, which included marriage counselling, at some stage. Be that as it may, it appears that there was an agreement between the parties, that the divorce proceedings, at that juncture, will be kept in abeyance.

[5] Consequently, it would appear that the applicant, as a result of these reconciliation attempts, did not take any further steps to defend the matter. Applicant submits that he had no reason to believe that the respondent would proceed with the divorce action, behind his back. Despite their best efforts, the

animosity between the parties continued and on 17 May 2021, respondent told her attorney to proceed with the divorce action, because according to her, the applicant told her to do so. On 19 May 2021, she moved out of the communal home, having taken only some of her belongings. The decree of divorce, was subsequently granted on 20 May 2021. In opposing the rescission application, respondent submit that the applicant is in wilful default, firstly, because he knew that their reconciliation attempts have failed; secondly, because the applicant told her to proceed with the divorce and lastly, because the applicant was indifferent about the consequences of his failure to take any further steps to defend this matter.

[6] It is common cause that the parties still shared the communal home at the time that the decree of divorce was granted and that the respondent only left the common home, during June 2021. So too, is it common cause, that the applicant was only informed on Sunday, 20 June 2021, of the decree of divorce, by the respondent. In response hereto, the applicant "laughed it off" whereupon the respondent invited him to her home, in order for her to show him an actual copy of the decree of divorce. It is common cause that the applicant did not receive any notice that the unopposed divorce action would proceed on 20 May 2021.

[7] Applicant submits that he would have defended the divorce action, had he known about the respondent's intentions because: (a) they were only married for 17 months; (b) respondent is claiming division of the joint estate, which includes half of his pension fund, (c) respondent is claiming spousal maintenance in the amount of R5000 per month, which applicant allege, he is unable to afford. The applicant approached his attorneys on the 30th of June 2021 to obtain advice with regard to the rescission of the divorce order. On 1 July 2021, a letter was addressed to the respondent's attorney explaining that the applicant did not receive notice of the divorce and wish to rescind same. This was followed by a series of correspondence between the respective legal representatives, which appears to have died a natural death after 22 July 2021.

[8] The applicant brings this application for rescission, in terms the common law and submit that there was no *mala fides* in bringing this application in January 2022, nearly 7 months after he obtained knowledge, of the default order. The applicant avers in his replying affidavit, that he was awaiting the valuation of the property to enable him to show this court the value of the estate and why it will be fair and just for the respondent to forfeit the benefits of the marriage in community of property, under these circumstances. The applicant further avers that the respondent has misled him in believing that she will withdraw the summons which she never did and then went behind his back to obtain this divorce order, without notice and in his absence.

[9] The Respondent raised two points *in Limine* in that:

1. *In Casu*, the applicant has been ordered to pay maintenance in the amount of R5000.00 per month, but to date being aware of the said court order, have failed to make a single payment to respondent. In the premise, the Respondent requests this court not to hear this application, until the defect is cured, by paying the aforementioned amount due.
2. The late filing of the application; at common law, should have been brought within a "reasonable time".

THE APPLICIBLE LEGAL PRINCIPLES

[10] "In terms of the common law, the court has the power to rescind a judgment obtained on default of appearance provided that sufficient cause for the rescission has been shown. The term 'sufficient cause' defies precise or comprehensive definition, but it is clear that in principle and in the long-standing practice of our courts, two essential elements are: (1) that the party seeking relief must present a reasonable explanation for the default, and (2) that on the merits that party has a *bona fide* defence, which, *prima facie*, carries some prospect or probability of success"[1] (my emphasis)

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1 Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 765A-E.

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.[2]

[11] The respondent in his heads of argument, draws this courts attention to the fact that Rule 31(2)(b) of the Uniform Rules prescribes, that a rescission application must be issued within a period of 20 days after the applicant obtained knowledge of the default judgment and in *Government of Islamic Republic of Iran v Berends*[3] it was held that the underlying purpose of the aforementioned rule was to ensure that a rescission application is brought without any delay and this is achieved once the application is filed with the registrar or served on the respondent.

[12] Conceding that the common law does not contain a similar provision, counsel for the respondent argues that logic will dictate that what constitutes a reasonable period depends upon the facts of a particular case, but as a point of departure, seven months can never be considered as reasonable, when 20 days, in terms of Rule 31(2)(b), is used as a yardstick.

[13] Indeed, the legislature has deliberately carved out specific grounds for a rescission, because the notion of rescinding court orders, constitutes an affront to the general rule, that orders, are final. This, it was emphasized[4], is important because if orders of the court are too readily set aside, the administration of justice would be compromised by chaos. The inherent jurisdiction of the High Court does not include the right to interfere with the principle of finality of judgments, other than in circumstances specifically provided for in the Rules or at common law.[5] The courts should guard not to depart from the cardinal tenets

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2 Government of the Republic of Zimbabwe v Fick [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) at para 85.

3 1998 (4) SA 107 (NMH) at 120 C-F.

4 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 (11) BCLR 1263 (CC).

5 De Wet v Western Bank Ltd 1977 (4) SA 770 (T).

of the Rule of Law and ill-fated applications for rescissions can find no panacea within the ambit of the Rules or at common law.

[14] It is argued[6] on behalf of the respondent that seven months cannot be considered as reasonable period, and therefor in the absence of an application for condonation being made out in the founding affidavit, fully setting out the time delay, this application cannot succeed. In rebuttal, counsel for the applicant argues that at common law the requirement is a "reasonable time" and it was therefore not necessary for a condonation application to explain the time delay. Further, that at common law, the applicant was entitled to explain the delay in his founding affidavit and expound thereupon in the replying affidavit.

[15] It is trite that a court will exercise its discretion on the merits of each individual case, the evidence presented and with such care as may be appropriate in any particular case. This view has admirably been summarised by Jones J in *De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd 1994 (4) A 705 (E) at 711E:*

"An application for rescission is never simply an enquiry whether or not to penalise a party for his failure to follow the rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the application for rescission is not bona fide...The court should also do his best to advance the good administration of justice. In the present context this involves weighing the need, on the one hand, to uphold the judgements of the courts which are properly taken in accordance with accepted procedures and, on the other hand, the need to prevent the possible injustice of a judgement being executed where it should never have been taken in the first place, particularly where it is taken in a party's absence without evidence and without his defence having been raised or heard."

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[6] Paragraph 10 and 11 of the heads of argument.

[16] It will be a misdirection by this court on the facts, to consider the question of the explanation for the applicant's default, in a vacuum. The proper approach to be adopted by this court, is by looking at the total picture presented by all the facts, and not consider the explanation and the defence in a piecemeal.

[17] In the present matter, upon learning of the divorce order, the applicant on 30 June 2021, approached his attorney to obtain advice. Although rule 42(1) does not specify a time-limit, it is a discretionary remedy. Like all discretionary remedies, rescission under rule 42(1) must be sought within a reasonable period of time.[7] The same applies to rescission at common law.[8] What is reasonable will depend on the circumstances of the case[9], but the 20-day period laid down in rule 31(2)(b) provides some guidance as a starting point. The reason for a time-limit is that there must be finality in litigation and that prejudice can be caused if rescission is not promptly sought. There is therefore no reason in principle why a litigant should have more time when seeking rescission under rule 42(1) or common law, than under rule 31(2)(b). It is for this reason that the time delay must be fully explained, for the court to assess factually, whether the application for rescission was brought in a reasonable time.

[18] The applicant in the present case has not satisfactorily explained the lengthy delay in seeking a rescission. The absence of a satisfactory explanation appears, when one observes the glaring gaps after the last correspondence by applicant's attorney on 22 July 2021 and the filing of this application on 18 January 2022.
Counsel for the applicant correctly argues that the applicant must stand or fall by the factual averments contained in his founding affidavit.
This complete silence in the founding affidavit, after referencing the last correspondence dated 22 July 2021, cannot simply be ignored, even if this court has regard to the *dies non* period, where many offices are closed. Oddly, the founding affidavit extensively deals with why the respondent will unduly benefit if

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7 (see First National Bank of Southern Africa Ltd v Van Rensburg NO: In re First National Bank of southern Africa Ltd v Jurgens 1994 (1) SA 677 (T) at 681B-G).

8 (see Roopnarain v Kamalapathy & Another 1971 (3) SA 387 (D) at 391B-D).

9 (Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz & Others 1996 (4) SA 411 (C) at 421F-H).

a forfeiture order is not sought, but does not explain the delay, in why the rescission application was not brought sooner.

[19] Counsel for the respondent further argued that even though the GEPF letter is annexed to the founding affidavit, dated 30 November 2021, it still does not explain how this letter impacted on the delay caused, in bringing this application. At paragraph 5.1.2, it reads "My Pension Fund of 29 years at the South Africa Police Service, and I attach hereto a printout of my Pension fund value marked Annexure E" This paragraph does not address the issue why this application was not brought within a reasonable time. Similarly at paragraph 5.1.1[10]; it simply states "My immovable property is situated at 17861 Hillside View, Bloemanda, Bloemfontein and I attach hereto the market value of the property marked Annexure D". This paragraph falls under the heading "Our communal estate" It is therefore evident that this paragraph does not address the delay caused, in obtaining such evaluation report.

[20] Upon realising that the founding affidavit does not address the issue of the delay caused in obtaining the abovementioned documents (D, E), an attempt is made to address this oversight in paragraph 5.1 of the replying affidavit, which reads "I confirm that I approached my attorney of record on 30 June 2021 and there are no *mala fides* in the application only being issued during January 2022…I awaited the valuation of the property to be able to show this honourable court the value of the estate …" (my emphasis)

This averment, is not contained in the founding affidavit and this court cannot consider the *bona fides* or *mala fides* of the applicant, in the absence of detail. To my mind, not even this attempt in the replying affidavit, addresses the questions of when the valuation report was requested; by whom was the report requested and what was the nature of the delay in obtaining such a report. The explanation proffered in this regard, is simply inadequate.

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[10] Of the founding affidavit.

Further, At paragraph 5.6[11], it reads " In so far as it will be necessary I hereby apply for condonation for the late issuing of the application and submit that the is no prejudice to any party involved in this application" (my emphasis) It is correctly argued that condonation is not for the mere asking, an Applicant must provide a full, detailed and accurate account of the delay and their effects to enable the court to understand the reasons for the delay.

[21] It is the view of this court that there is an interdependence of, on the one hand, the reasons advanced for the delay in bringing the application and determining whether the application was brought within a reasonable time. The applicant was enjoined to explain at the very least, the period of delay between 23 July to 30 November 2021. 'In the absence of a full, detailed and accurate account of the delay, this court finds that the rescission application was not brought within a reasonable time. Further, where the applicant invoked this court's jurisdiction in terms of common law, condonation is still required as the rescission application, in the present matter, was not brought within a reasonable time and the sketchy reason advanced appears to be so flimsy, in the absence of detail, so as to be rejected as being improbable in the circumstances.

[22] The explanation must be reasonable. In other words, plainly, the explanation must be cogent and not inherently improbable. In an unreported decision of the full bench of this court in *Loretto CC & Another v Distillers Corporation Ltd [Case No. A1090/07 (GNP)], I*smail AJ (as he then was) at paragraph 11 held as follows: "The explanation which a party seeking rescission sets out to give, must be "reasonable or satisfactory". The significance of this is that not just any explanation would pass muster to the test and rescission would be given no matter how poor the explanation or excuse for the default judgment having taken place."

[11] Replying affidavit.

[23] It is common cause that the respondent did not give the applicant notice of the date of hearing of the divorce matter, bearing in mind that the action was undefended before the court. It is further common cause that the parties agreed that the divorce action will be held in abeyance, affording the parties an opportunity to salvage the marriage. Further, it is common cause that the summons was served on 14 April 2021, informing the applicant that he has 10 (ten) days to file his notice of intention to defend. The respondent states that the applicant arrived at her house on or about 5 May, informing her that he is desirous to save the marriage. The respondent informed him that she was prepared to keep the divorce proceedings in abeyance and she moved back into the communal home. The applicant's 10 days to file his notice of intention to defend would have lapse around the 29th of April 2021. Again, there is a deafening silence as to the lapse of the 10-day period to file his notice of intention to defend.

[24] If the explanation is sufficiently adequate and is set out in a such a manner that it is clear to the court that the applicant has taken it into his confidence, it seems to me that the court should be slow to refuse an applicant entirely the opportunity of having his defence heard.

[25] In *Duncan t/a San Sales v Herbor Investments (Pty) Limited*[12] it was held " A litigant who asks for an indulgence should act with reasonable promptitude. Other neglectful acts in the history of the case are relevant to show his attitude and motives...A litigant who asks for an indulgence must be scrupulously accurate in his statement to the court" This court is mindful that "The courts discretion in deciding whether sufficient cause has been established must not be unduly restricted. The mental element of default, whatever description it bears, should be one of several elements which the court must weigh in determining whether sufficient or good cause has been shown to exist. A court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or failure in isolation.[13]

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[12] 1974 (4) SA 214 (T).
[13] See Harris v Absa LTD t/a Volkskas 2006 (4) SA 527 (T).

[26] In the present matter, this court is left to mostly speculate, because the applicant "must at least furnish an explanation of his default sufficiently full to enable the court to understand how it really came about and to assess his conduct and motives"[14]

[27] In the present matter, the granting or refusal of condonation is a matter of judicial discretion and the applicant have not made out a case for such an indulgence. In the matter of *Chetty v Law Society, Transvaal 1985 (2) 756 (A) at 765A–C,* it was stated:

"There is a further principle which is applied and that is: without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused". (my emphasis)

[28] In the present matter, in the absence of a condonation application[15], the court finds that this application was not brought within a reasonable time, and that applicant has failed to set out sufficiently full the reasons apart from his lack of knowledge, why the rescission application was only brought after a lapse of nearly 7 months.

[29] For the reasons set out herein, I grant the following order:

[29.1] The second point *in limine* is upheld.

[29.2] The application for rescission, is dismissed with costs.

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[14] Silber v Ozen Wholesalers (Pty) Limited.
[15] In the founding affidavit.

AFRICA, AJ

APPEARANCES:

COUNSEL FOR THE APPLICANT:	Adv. Els Instructed by: Honey Attorneys
COUNSEL FOR THE RESPONDENT:	Adv. Coetzer Instructed by: OJ Van Schalkwyk