

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO:

41019/2020

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|-------|------------------------------------------------------|
| (1) | <u>REPORTABLE: YES / NO</u> |
| (2) | <u>OF INTEREST TO OTHER JUDGES:</u> <u>YES/NO</u> |
| (3) | <u>REVISED.</u> |
| | |
| DATE | |

In the matter between:

G M N

First Applicant

And

K D N
(Nee M)

Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

MAKUME, J:

[1] On the 13th March 2023 I dismissed the application for rescission of a judgement that had been granted on the 4th January 2021 by her Ladyship Maier-Frawley with costs.

[2] The Applicant now seeks leave to appeal that judgement and order on the following grounds:

2.1 That this Court erred in finding that an attorney who withdraws as a representative of a litigant has a duty to inform the opponent the basis and reasons for withdrawal as attorney of record.

2.2 That this Court erred in finding that the Applicant did receive the notice of set down but should have found that the Respondent had fraudulently intercepted the Applicant's private gmail.

2.3 That This Court failed to attach significance to the Applicant's version that the parties were reconciling and hence the Respondent hosting a wedding anniversary celebration party.

2.4 That this Court misdirected itself by making a credibility finding on the Applicant's Founding Affidavit by concluding that the Applicant's claim for fraudulent misrepresentation was but one of his efforts to hoodwink and mislead the Court.

2.5 That this Court erred in finding that the Applicant did not satisfy the requirements of Rule 42(1).

2.6 That this Court erred in finding that the Applicant did not state what his defence was and did not file a pro-forma plea with the Applicant for rescission.

2.7 That this Court erred in finding that the Law of the country of domicile is to be applied at the time of the divorce action.

[3] It is worth mentioning that the application that was dismissed was the second such application the first one having been withdrawn on the 24th March 2022.

[4] For Rescission of Judgement in terms of Rule 42(1) (a) to succeed it is incumbent on the Applicant to satisfy the Court hearing the application that the judgement was either erroneously sought or was erroneously granted in his absence. Both grounds must be shown to exist before a Court exercises its discretion whether or not to grant rescission.

[5] The provisions of Rule 42(1)(a) must be read with the Common Law Rule as espoused by the Appellate Division in the matter of **Silber vs Ozen Wholesalers (Pty) (Ltd) 1954 (2) SA 345 (A)** at page 352 where the Court concluded that an Applicant for rescission must show “good cause and that good cause includes but is not limited to the existence of a substantial defence. The Applicant must in such application demonstrate a desire to actually raise the defence in the event of the judgement being rescinded.

[6] In **Government of the Republic of Zimbabwe vs Fick 2013 (5) SA 325 CC** the Constitutional Court set out the requirements for rescission in terms of the Common Law as follows:

“[85] At Common Law the requirements for rescission of a default judgement are two fold, first the Applicant must furnish a reasonable and satisfactory explanation for its default, second it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success.”

[7] The provision of Section 17(1)(a) of the Superior Court Act 10 of 2013 reads as follows:

“Leave to appeal may only be given where the judge or judges concerned are of the opinion that: -

(a) The appeal would have a reasonable prospect of success or

(iii) there is some other compelling reason why the appeal

should be heard including conflict judgements on the matter under consideration.”

- [8] The Court in **Afrikaanse Pers Beperk v Olivier 1949 (2) SA 890 (O)** and in **Ramakatsa and Others v African National Congress (724/2019) [2021] ZASCA 31 (31 March 2021)** emphasized that reasonable prospects of success constitute more than a mere possibility of success. In particular, in **Ramakatsa** it was held that the test of reasonable prospects of success postulates a dispassionate decision based on facts and the law that a Court of appeal could reasonably arrive at a conclusion different to that of the trial court.
- [9] The basis for seeking rescission was primarily that the Applicant did not know that the divorce action had been set down for the 4th June 2021. He had by that time been made aware of a notice of bar calling on him to file his plea failing which judgement would be applied for by default. He and his attorneys did not respond to that instead the attorney withdrew on the 2nd March 2021.
- [10] The Respondent having been made aware that Menzi Vilakazi attorneys were no longer representing the Applicant took the necessary steps to notify him personally by email about the date of hearing. This still did not result in him doing anything.
- [11] If there was indeed a discussion on reconciliation then surely his attorneys would have in withdrawing inform Respondent’s attorneys that they are withdrawing because there is no longer a need as the parties have reconciled.
- [12] The Applicants reliance on Rule 57(7) of the South African Legal Practice Code of Conduct is misguided. In the first place the rule refers to confidential or privileged information, secondly it has application to instances where it is the attorney who withdraws not the other way round. There is nothing confidential or privileged when an attorney tells his opponent that he has been instructed to withdraw because the divorce is no longer proceeding.

[13] The Applicant did receive the notice of set down this is confirmed by the email that his girlfriend Ms Steele addressed to the Respondent. He decided not to attend court at his own peril. In the result the divorce order was not erroneously granted.

[14] The Applicant does not in his application for rescission nor in this application for leave demonstrate any prospects of success. From a reading of the Applicant's Founding Affidavit his defence seem to be the following:

14.1 That he can't afford exorbitant spousal maintenance.

14.2 That the issue of rehabilitative maintenance was apparently dealt with without regard to the law of the Democratic Republic of Congo.

14.3 That he has intend to approach the maintenance Court to vary the order
but that it will not have retrospective effect.

14.4 That the Divorce Court should have considered the whole of the *lex causae* of the marriage being the DRC before making the order.

[15] In paragraph 39 of this heads of argument the Applicant refers to the decision in MVM wherein the Court dealt with rescission of a maintenance order and left the order in respect of the divorce intact. In this matter the Applicant sought an order rescinding the whole of the order and judgement dated the 4th June 2021 and yet at paragraph 41 he concedes that he does not wish to remain married to the Respondent. If that is what he desires, then he should have proceeded with an application to vary the maintenance order in the Magistrate Court as the order in respect of the proprietary right is still pending.

[16] The **Court in Fusion Properties 233 CC v Stellenbosch Municipality 2021 JDR 0094 (SCA)** confirmed that leave to appeal may only be granted where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospects of success.

[17] I am not persuaded that the Applicant has any reasonable prospects of succeeding with an Appeal. In the result and having regard to the requirements of Rule 42(1) (a) which the Applicant has failed to satisfy this application for leave to appeal falls to be dismissed.

[18] I am also satisfied that a punitive costs order as applied for by the Respondent should be granted in view of the Applicant's abuse of the legal process.

[19] In the result I make the following order:

ORDER

- 1 The Application for Leave to Appeal is dismissed.
- 2 The Applicant is ordered to pay the Respondent's taxed costs on the scale as between attorney and client.
- 3

Dated at Johannesburg on this day of July 2023

**M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

Appearances:

| | | |
|------------------|---|-------------------------|
| DATE OF HEARING | : | 14 JUNE 2023 |
| DATE OF JUDGMENT | : | JULY2023 |
| FOR APPLICANT | : | ADV N RAMBACHAN-NAIDOO |
| INSTRUCTED BY | : | DONOVAN SMITH ATTORNEYS |
| FOR RESPONDENT | : | ADV FEINSTEIN |
| INSTRUCTED BY | : | KOKKORIS ATTORNEYS |