

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



**IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF
KWAZULU-NATAL
HELD AT DURBAN**

Case
no:KZN/DBN/RC1606/2013

In the matter between:

K[...] L[...] N.O

Applicant

and

**N[...] L[...]
Respondent**

Judgment delivered: 23 AUGUST 2019

[1] This is an opposed rescission of judgment application brought by the Applicant in her capacity as *curatrix bonis* to the estate of her father Mr L[...]L[...] (hereinafter referred to as Mr L[...]), pursuant to an order of divorce granted on 5 August 2014 dissolving the bonds of marriage between the Respondent and Mr L[...]. The application

was argued on 21 June 2019 and 16 August 2019 respectively. Mr B Aliphon appeared for the Applicant and Mr K Swart appeared for the Respondent.

Common Cause Facts

[2] It is common cause that:

- (a) Mr L[...] suffered a cerebrovascular accident in 2007;
- (b) Mr L[...] and the Respondent were married to each other on 6 January 2011 community of property;
- (c) Mr L[...] instituted the divorce action against the Respondent in 2013;
- (d) The divorce action was unopposed resulting in the bonds of marriage between Mr L[...] and the Respondent being dissolved on 5 August 2014;
- (e) On 7 August 2015, the Respondent sought an order in terms of which a Liquidator be appointed for the purposes of distributing the assets of the joint estate, which application was not finalised as the Applicant launch an application for her appointment as *curatrix bonis*.
- (f) The Applicant was appointed *curatrix bonis* to the estate of Mr L[...] on 25 January 2018.

Principle submissions by the parties

[3] A number of submissions were made by the parties in the papers and also during argument. In light of the conclusion to which I will come I do not deem it necessary to deal with each of the points raised *ad seriatim*, and will for the purposes of this judgement, focus on the salient submissions made by the parties.

[4] The Applicant in support of this application attached the High Court application papers of her application for her appointment as *curatrix bonis* to the estate of Mr L[...]. The Applicant contended the Respondent and Mr L[...] eloped to Port Shepstone.

[5] This contention was denied by the Respondent as, according to her, they had already decided months before the wedding date to get married. The Respondent indicated that her relationship with Mr L[...] commenced in 2001 whereafter she moved in with Mr L[...] in 2002. At this time, the Respondent was a grade 10 learner at school. After the Respondent matriculated in 2005, she returned to her home in Umlazi. The Respondent avers that she kept in contact with Mr L[...] who during this time was in a relationship with one Fezeka. After Fezeka left, Mr L[...] asked the Respondent to return, which she did in February 2008. The Respondent described the events leading up to the wedding and argued that there is no evidence to indicate that Mr L[...] did not understand the significance and legal implications of the marriage which was legally concluded.

[6] The Applicant argued that Mr L[...], based on the information contained in the medical reports, lacked the necessary mental faculties to make a decision to marry the Respondent. In addition, it was submitted that Mr L[...] would not have been able to communicate such decision to the Marriage Officer in any discernible manner as he was unable to speak. This was disputed by the Respondent who submitted that Mr L[...] was able to say words such as “yes”, “no”, “coffee”, “go” and “food”. The Respondent indicated that Mr L[...] nodded his head when he says “yes” and shakes his head to say

“no”. The Respondent argued that Mr L[...] was able to communicate a very clear message.

[7] The Applicant, upon making certain observations as to Mr L[...]’s condition, took him to the Legal Aid Board to initiate the divorce action against the Respondent. According to the Applicant, Mr L[...] was unable to give evidence on the day when the divorce was finalised and that she essentially gave evidence on his behalf, which was argued, rendered the proceedings null and void. The Respondent on the other hand, contended that Mr L[...] understood the significance of the legal implications of the divorce proceedings on the day when the decree of divorce was granted.

Issues for determination

[8] The crisp issue for determination is whether the divorce order granted was void *ab origine*, providing a basis for the rescission of the order.

Legal Principals

[9] It is trite that an order of a court of law stands until set aside by a court of competent jurisdiction¹. Until that is done, the court order must be obeyed even if it may be wrong;² there is a presumption that the judgment is correct. At common law a court’s order becomes final and unalterable by that court at the moment of its pronouncement by the Judicial Officer, who thereafter becomes *functus officio*. Save in exceptional circumstances it cannot thereafter be varied or rescinded. Section 36 is an exception

¹ *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229B-C; *MEC for Economic Affairs, Environment and Tourism v Kruissenga* 2008 (6) SA 264 (CKHC) at 277C; *Jacobs v Baumann* NO 2009 (5) SA 432 (SCA) at 439G-H.

² *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue* 2009 (1) SA 470 (W) at 473C; *Culverwell v Beira* 1992 (4) SA 494A-C.

and it is submitted that a Magistrate's Court may correct or vary its judgment only in those cases that are covered by the section."³ Section 36(1)⁴ stipulates which judgments may be rescinded or varied.

[10] The Applicant brought the application in terms of section 36(1) (b) of the Magistrate's Act⁵. Rule 49 (8) states that '*[w]here the rescission or variation of a judgment sort on the ground that it is void ab origine or was obtained by fraud or mistake, the application must be served and filed within one year after the application first had knowledge of such voidness, fraud or mistake.*'

[11] The Applicant contended that this application was brought within one (1) year after the *curatrix bonis* obtained the requisite *locus standi* to do so and as such, this application is not out of time.

Discussion

[12] The nature of the judgment which was granted in this matter flows from that fact that the matter on the papers appeared to have been undefended and was finalised on the unopposed roll and disposed of without one of the parties being present

³ Jones and Buckle 'The Civil Practice of the Magistrates' Courts in South Africa' Juta Law [service 25, 2010]

⁴ '(1) The court may, upon application by any person affected thereby, or in cases falling under paragraph (c), *suo moto* -

(a) Rescind or vary any judgment granted by it in the absences of the person against whom that judgment was granted;

(b) Rescind or vary any judgment granted by it which was void ab origine or was obtained by fraud or by mistake common to the parties;

(c) Correct patent errors in any judgment in respect of which no appeal is pending;

(d) Rescind or vary any judgment in respect of which no appeal lies.'

(2) If a plaintiff in whose favour a default judgment has been granted agreed in writing that the judgment be rescinded or varied, a court must rescind or vary such judgment on application by any person affected by it."

⁵ Act 32 of 1944.

in court. Ordinarily, applications for rescission are brought by a party who failed to attend the proceedings who is then required to give a reasonable explanation of the default.⁶

[13] The Applicant contended that she assisted Mr L[...] to institute the divorce action against the Respondent. The question to be answered is whether the divorce order granted on 5 August 2014 was *void ab origine*. In this regard, it is trite that *'[i]n an application for the rescission of a default judgment on the grounds that it is void ab origine the applicant must set out his defence with sufficient particularity so as to enable the court to decide whether there is a valid and bona fide defence. An applicant who applies for a judgment to be rescinded on this ground must do so specifically before the court and must allege and prove facts which vitiate the judgment...'*⁷

[14] To this end, the court only has the documents filed on record to assist the court, as there appears to be no transcripts of the record of proceedings as confirmed by Sneller Recordings⁸.

[15] The Presiding Officer recorded that:

'PI suffers stroke. His daughter is present- K[...] L[...] to assist with the interpretation...'

⁶*Absa Bank LTD v Petersen* 2013 (1) SA 481 (WCC) at Para 2 – 3. See also *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) ([2003] 2 All SA 113), Para 11.

⁷ Van Loggerenberg *'Jones and Buckle The Civil Practice of the Magistrates' Courts in South Africa'* Tenth Ed Vol II The Rules, Rule 49-14, [Service 12, 2016].

⁸ See Exhibit "A".

[16] Further evident is that Mr L[...] was legally represented by N. Kunene at the time of the finalisation of the divorce. The grounds for the breakdown of the marriage are enumerated as follows in the particulars of claim:

- (a) *The Plaintiff has been deprived of his conjugal rights for over a year now;*
- (b) *The Plaintiff has lost all love and affection for the Defendant;*
- (c) *The parties herein are incompatible;*
- (d) *The Defendant goes missing for day without an explanation;*
- (e) *The Plaintiff has no desire to continue with the marriage.'*

[17] Absent from the papers is any reference to Mr L[...] lacking the necessary mental faculties to make a decision to marry the Respondent or that he would not have been able to communicate such decision to the Marriage Officer in any discernible manner as he was unable to speak. As previously stated, an applicant who applies under section 36(b) of the Magistrate's court Act to rescind a default judgment must make a substantive application and must allege and prove facts which vitiate the judgment. The Applicant does not challenge the validity of the summons and neither does the Applicant allege any of the generally accepted grounds which renders

judgments void ab origine.⁹ The grounds relied upon essentially turn on Mr L[...] lacking

⁹ Commentary Jones and Buckle RS 15, 2018 Act-p251: '**Subsection (1)(b): 'Void ab origine'**'. In rule 49(8) the words 'from the beginning' have been substituted for the words 'ab origine'. In this subsection the words 'ab origine' are still used. A judgment is void ab origine when the court had no jurisdiction; when the citation was invalid or there was no citation of the defendant/respondent to appear; whether for want of proper service or through the absence of any specified return day, or because the return day was too short, or the return day in the copy served was two days later than in the original, even though the defendant was shown the original, or the return day was a Sunday and the order was granted the day before; or when the plaintiff knowingly supplied a wrong or incomplete address for the purpose of an edict; or where in an ejectment matter prescribed formalities had not been complied with; where a rule nisi was discharged before the return day without notice to the plaintiff; where a judgment was taken while the action was stayed in terms of rule 52(3); where default judgment has been wrongly granted by the clerk of the court; or where a notice of bar was delivered prematurely. However, where objection to defective service has been waived, the defect is no longer ground for rescission. Where the original judgment was void for lack of service a decree of civil imprisonment based thereon was held valid, the defendant

the necessary mental faculties to make a decision to marry the Respondent and / or that he would not have been able to communicate such decision to the Marriage Officer in any discernible manner as he was unable to speak. As mentioned; this ground is not included in the original pleadings.

[18] The onus is on the applicant to set out a defence with sufficient particularity so as to enable the court to decide whether there is a valid and *bona fide* defence. It is evident that this application was essentially initiated by the daughter of Mr L[...] who is desirous to move for an order to annul the marriage between Mr L[...] and the Respondent on the basis that such marriage was purportedly null and void from the outset and thus the Respondent would not be entitled to her half share of the joint estate, by virtue of the parties' marriage in community of property.

[19] It is trite that '*a void marriage is one which has simply never come into existence...A voidable marriage is a marriage in which grounds are present, either before or at the time of the wedding, on the basis of which the court can be requested to set the marriage aside*'¹⁰ The grounds to declare a marriage null and

having been duly cited to show cause against the decree. An interdict granted under s 30 without notice to the respondent as required by rule 56(1) read with rule 55 is null and void ab origine and can be set aside under this section. An order or judgment granted on an invalid summons is void ab origine. Where, however, a magistrate purported to amend under s 111 a summons which was wholly invalid the order of the court was not null and void and s 36(1)(b) therefore did not apply — the appropriate remedy was an appeal. A defendant who applies under this subsection to rescind a default judgment must make a substantive application and must allege and prove facts which vitiate the judgment: he is not entitled to take the point of invalidity for the first time on appeal. The reason for this is that where fraud or mutual mistake is alleged to have vitiated the judgment, these matters require full investigation and proof of the necessary facts; equally must there be proof by the defendant of an allegation that he has, without proper citation, been condemned in a judgment.'

¹⁰ Cronje DSP, Heaton J 'South African Family Law' (LexisNexis) Second Ed. page 41-42.

void would be trite and include a person who has no capacity to act, such as the mentally ill.

[20] It is clear from Dr Porter's report that *'the nature of the illness is such that any improvement in his condition is extremely unlikely, progressive deterioration instead is to be expected'*¹¹ Mr L[...], has been diagnosed with suffering from Vascular Dementia and global aphasia, resulting in *'disorientation poor memory, lack of insight and judgment.'*

[21] These findings need to be evaluated with the definition of "mentally ill persons". The legal position in this regard is that *'...someone is de facto...mentally ill at the moment he or she enters into a marriage, the marriage is void as a result of his or her incapacity to act. For purposes of concluding a marriage, a person is regarded as mentally ill and consequently lacking the necessary capacity to act, not only when he or she does not understand the nature and consequences of the juristic act, but also when hallucinations caused by a mental illness prompt him or her to enter into the marriage.'*¹² *Certifying someone mentally ill does not affect his or her capacity to act. If a certified person is of sound mind at a particular moment (in other words, if he or she is capable of realising the nature of the juristic act and the consequences which will flow from it and is able to make rational judgments concerning his or her actions), he or she is*

¹¹ Dr Alicia Porter's report dated 18 November 2015, Page 45 of the Index Bundle.

¹² Cronje DSP, Heaton J 'South African Family Law' (LexisNexis) Second Ed. page 19, fn 17 'In Lange v Lange 1945 AD 332 a marriage was dissolved because the husband had suffered from dementia praecox at the time of concluding the marriage and he had experienced hallucinations. The South African Law Commission recommends that a marriage should be void if the consent of either party "was not real consent because that party was mentally incapable of understanding the nature and effect of the marriage ceremony...This wording does not coincide with the common-law rule about capacity to marry as it restricts mental capacity to the ceremony itself; while the common law, as applied in our case law, demands that the person must understand the nature and consequences of marriage itself, and not just the ceremony.'

*considered to have full capacity to act. A marriage which is concluded during such a lucid intervallum (that is, a clear moment) is perfectly valid. The fact that someone has been certified mentally ill however places the burden on him or her to prove that he or she is actually normal, while in the absence of certification, it is the person who alleges mental illness who must prove the presence of mental illness.*¹³

[22] Dr Porter, a Specialist Psychiatrist assessed Mr L[...] on 9 November 2015 stated that Mr L[...] *'still has severe deficits secondary to the CVA, which would be considered permanent. He has developed a Vascular Dementia as a result and this has a chronic deteriorating course and recovery is unlikely, instead further deterioration is expected, the disorder results in impairment in cognitive and executive functioning. Mr L[...] currently requires supervision of his care as he is unable to carry out his advanced activities of daily living. He is incapable of making decisions. His prognosis is poor and recovery is not likely...'*

[23] In ***Pienaar V Pienaar***¹⁴ it was held that someone who is not mentally ill but subject to curatorship because he or she is incapable of looking after his or her own affairs, for example owing to a disability or chronic illness, is nevertheless competent to conclude a valid marriage without the consent of his or her curator.¹⁵

¹³ Cronje DSP, Heaton J 'South African Family Law' (LexisNexis) Second Ed. page 19.

¹⁴ 1930 OPD 171.

¹⁵ Cronje DSP, Heaton J 'South African Family Law' (LexisNexis) Second Ed. page 19. See fn 22 *'The South African Law Commission's proposed list of grounds on which a marriage should be void or voidable makes no mention of marriages of persons who have been placed under curatorship due to their inability to manage their own affairs...It therefore seems that the Law Commission approves the decision in Pienaar v Pienaar's curator.'*

[24] The question to be answered is whether Mr L[...] understood the nature and consequences of the marriage. The Applicant correctly stated that the legal position in South Africa in respect of capacity to enter into a marriage is *'a person who, owing to mental disease or defect, is incapable of understanding the nature of the marriage contract, or duties and responsibilities which it creates, free from the influence of morbid delusions, cannot contract a valid marriage, nor can his incapacity be cured by the consent of his Curator. The reason is not the mental disease or defect as such, but the absence of a mind capable of understanding,'*¹⁶

[25] The Applicant also referred to the matter of **Hardie v Jansen and Others**¹⁷ wherein references to other authorities were made, stating the legal position *'[t]hat the question is not merely whether the respondent was aware that she was going through the ceremony of marriage, but whether she was capable of understanding the nature of the contract entered into, free from influence of morbid delusions'*¹⁸

[26] The **Hardie v Jansen and Others** matter is distinguishable in that evidence was obtained from the Marriage Officer whereas no information has been obtained surrounding the wedding ceremony itself other than the allegation that the marriage was concluded in a covert manner. According to the Respondent, Mr L[...]’s family has had a very limited role to play in his life and she was the one who attended to all his needs. The Respondent submitted that when she returned in 2008, Mr L[...]’s

¹⁶ Applicant’s Heads of Argument, para 15; Hahla HR *South African Law of Husband and Wife*’ 5th Ed, page 66.

¹⁷ (19339/2014) [2015] ZAWCHC 104 (30 July 2015)

¹⁸ See also *Durham v Durham* (1885) 10 P.D. 80 at 82 *'it is stated that the capacity to enter into a valid contract of marriage is "a capacity to understand the nature of the contract, and the duties and responsibilities which it creates...'*

family did not take him to doctors and therapists. It was she that would accompany him and he would drive to the doctors himself.¹⁹ In this matter the Applicant was aware of the marriage between the Respondent and Mr L[...]. They were living together and the Applicant confirmed that the Respondent appeared to be taking care of Mr L[...]. In my view, the inaction of the Applicant, despite her misgivings suggests her acceptance at the time of the marriage between the Respondent and Mr L[...].

[27] This matter is also further distinguishable from the *Hardie v Jansen and Others* matter in that the assessments of Mr L[...]'s conditions happened approximately eight (8) years after his stroke and approximately three (3) years after his marriage was solemnised, which makes it challenging to establish what the state of mind was at the time of the marriage and at the time of the divorce.

[28] Of seminal importance is the assessment which was conducted by Dr E A Chohan, Clinical Educational Psychologist, who compiled a medico legal report dated 29 September 2015. The purpose of the assessment included whether Mr L[...]:

- (a) Could satisfactorily communicate his intension to marry and then divorce after his stroke;
- (b) Has the mental capacity to make a decision to enter into either of these actions;
- (c) Was able to appreciate his actions and their consequences;
- (d) Has the capacity to instruct his attorney to act on his behalf;
- (e) Is in need of a court appointed curator to administer his affairs.

¹⁹ See Respondent's Opposing Affidavit, paras 12 and 15 pages 90-91 of the Index Bundle.

[29] Dr Cohan obtained collateral information from family members as well as the report of Dr Patty Francis dated 29 April 2015. It is interesting that the information sourced from the Applicant included the following, but is not limited thereto:

'...He is able to use various hand and power tools such as hacksaw, shifting spanner, angle grinder, jig saw and electric drill.

Mr L[...] has adequate self-help skills including the following: bathing, dressing toileting, making coffee, drinking from a cup and frying an egg...

He is able to do simple chores at home, e.g. hanging washed clothes to dry on the wash line and keeping his room neat and tidy...His wife Nosipho resides with him.

He has some sense of time especially when diarised on his calendar...

He tells the days of the week...

He has been driving for the past 40 years...He drives to familiar, nearby places

"...even though he shouldn't be, mostly due to him being very stubborn and being independent all his life. He drives okay but is easily distracted. How he is able to drive is beyond us."

...Prior to 2013 he was unable to talk but is now able to make gestures and often points to objects to indicate his needs. These gestures are often misinterpreted and he then becomes "highly agitated"...'20

[30] Evident from the report is that Mr L[...]’s insight and judgment into his overall functioning could not be assessed directly due to his speech and communication problem. Dr Cohen found that due to Mr L[...]’s risk-taking behaviour, his insight and judgment appeared to be impaired and because of his poor attention and working memory, he is unable to appraise all his options correctly. Mr L[...]’s executive functioning was also found to be impaired. According to Dr Cohen, Mr L[...] lacks judgment and adequate planning, *'and often does not anticipate the consequences of his behaviours...'*²¹ Dr Cohen found that Mr L[...]’s ability to understand, plan a course

²⁰ Medico legal report – pages 4-6.

²¹ Medico – legal report, pages 10-11.

of action, to appreciate the consequences of his actions, to communicate, to think abstractly, to make important decisions are all moderately to severely impaired. Dr Cohen found that Mr L[...] was unable to satisfactorily communicate his decision to marry. He also found that Mr L[...] lacked the intellectual capacity to appreciate his actions and consequences and that given his cognitive deficits, Mr L[...] did not have the capacity to instruct his attorney to act on his behalf.²² Evident too is that the Respondent's attempts to have Mr L[...] examined by a psychiatrist, Dr Colin Levisohn were seemingly refused.²³

[31] It is apposite to mention that Mr L[...] fathered a child, who was born on 13 November 2003. The mother of the child is deceased. It appears that the child was placed in Mr L[...]’s care in terms of the Children’s Act 74 of 1983 since 9 March 2007. Mr L[...] suffered a stroke on 28 May 2007, and notwithstanding, there is a court order dated 11 March 2008, extending the Foster Care placement to 1 March 2009 in terms of Section 16(2) of the Children’s Act 74 of 1983 and on 22 October 2008, a Magistrate signed an order of adoption.²⁴ It follows that Mr L[...] had to be found to be a suitable adoptive parent. The Children’s Act provides stringent conditions for suitability as an adoptive parent.

[32] Section 231 of the Children’s Act 74 of 1983 states:

‘(2) A prospective adoptive parent must be-
(a) fit and proper to be entrusted with full parental responsibilities and rights in respect of the child;

²² Medico – legal report, page 19.

²³ Index bundle, para 10, page 75.

²⁴ See pages 136-140 of the Index bundle.

(b) willing and able to undertake, exercise and maintain those responsibilities and rights ;...'

[33] It therefore follows that notwithstanding the findings in the supporting medical reports obtained, the court found Mr L[...] to be a fit and proper person to be entrusted with full parental responsibilities and rights in respect of the child. Mr L[...] had to have indicated his willingness and ability to undertake; exercise and maintain those responsibilities to the court and / or the adoption Social Worker. In my view, this is the closest independent event to the time of Mr L[...]’s stroke and wedding which is suggestive of the fact that on a balance of probabilities, he was able to make important decisions and communicate such decisions, in this case to the adoption Social Worker, and in respect of the marriage, to the Marriage Officer, but I make no finding in this regard for the purposes of this application.

[34] The Applicant, who bears the onus has not furnished the court with any details surrounding the Respondent’s marriage to Mr L[...] and the averments in this regard is based purely on conjecture in my view. The Applicant suggested that the Respondent contrived the elopement and colluded with the marriage officer to conduct the marriage ceremony in order to unjustly enrich herself. The marriage between Mr L[...] and the Respondent was solemnized in the absence of any of Mr L[...]’s family or friends being present.

[35] The Respondent contended that she had known Mr L[...] since she was at school until she was 33 years old they were already then in an intimate relationship.

[36] The Applicant and Respondent are not *ad idem* in relation to the extent to which the stroke had affected Mr L[...]. There is a clear factual dispute in this regard.

According to the Respondent, Mr L[...] recovered all his faculties after his stroke, except his speech. The Respondent stated that there was nothing wrong with Mr L[...].

[37] The Respondent in her opposing affidavit remarked as follows:

'There is nothing wrong with his mental capacity or his physical ability. He does everything on his own. He buys groceries, cook for himself, cleans, his (sic) drives his car. He fetches and carries Charlize to school and back. He for an example did major alterations to the house at Nqabeni including doing brick laying and the rewiring on the house including installing a distribution box for the house and he even does maintenance around the house. There is no running water at the Nqabeni property. L[...] installed the running water system himself so that there is now water in the house...He also replaced the roof of the three (3) bedroomed supply house with a steel roof.

We drove to Johannesburg and back in 2009 after his stroke...He drove all the way. I cannot drive...He found the destination without any problems. He drives all over the place. He drives to the shopping centre which is about 5 kilometres away to buy food and to pay accounts.

...He could and still write (sic) down the measurements when he does building alterations. When I move back a year after this stroke, he could walk like usual, bath himself, not only could he feed himself but he has cooked for all of us since 2008...He is totally aware of his surroundings since then.²⁵

[38] The Applicant, in her replying affidavit, places all these assertions in dispute with supporting affidavits.²⁶

²⁵Respondent's opposing affidavit, para 9, page 88 of Index bundle.

²⁶ See paras 24-26 of Applicant's replying affidavit at page 126 of the Index Bundle.

[39] It is trite that any factual dispute must be resolved in terms of the rule *in Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*²⁷ where Corbett JA stated as follows:

'...where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.'

[40] Similarly, the case of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions Ltd*²⁸ it was held that:

'...application may be dismissed with costs, particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into the disputed facts not capable of easy ascertainment...what is essentially the subject of an ordinary trial action.'

[41] This was supported in the case of *Lombaard v Droprop CC and Others*²⁹ where Heher JA et Shongwe JA stated:

"...Therefore, if a party has knowledge of a material and *bona fide* dispute, or should reasonably foresee its occurrence and nevertheless proceeds on motion, that party will usually find the application dismissed."

Conclusion

[42] The powers and functions of the Applicant, who was appointed as the *curatrix bonis* is clearly set out in the court order attached to the application. Pellucid from the court order is that it is a peremptory, that the Applicant *inter alia* reports to the

²⁷ 1984 (3) SA 623 (A).

²⁸ 1949 (3) SA 1155 (T) at 1162.

²⁹ 2010 (5) SA 1 (SCA) at page 11.

Master of the High Court and that the powers conferred upon her is to be exercised subject to the approval of the Master of the High Court.³⁰

[43] It is generally accepted that a curator *ad litem* is appointed by the court to conduct proceedings on behalf of another person who lacks the capacity to litigate. It is further evident that JAISHICA GOVIND BHIKH was appointed on 5 April 2016 by the High Court as curator *ad litem* to represent Mr L[...] in the application for the appointment of a curator *bonis* to the estate of Mr L[...] and to report to the Court as to his capacity or incapacity to manage his own affairs as to desirability or otherwise of appointing a curator to his estate and granting certain other relief.

[44] It behoves me to mention the Applicant in her capacity as the curatrix *bonis* was required to attach the approval of the Master of the High Court before launching this application, which consent is absent from this application.³¹ On this basis alone, the application falls to be dismissed. This brings into question whether the Applicant has *locus standi* to institute proceedings without the prior knowledge or approval from the Master of the High Court and / or the curator *ad litem*.

[45] Furthermore, it should be noted that acts that are considered to be too personal in nature cannot be performed by a *curator*. For example, a *curator* has no *locus standi* to institute an action for divorce on behalf of a person declared to be mentally ill.³² Arguably this will and or could, in my view, extend to applications for an

³⁰ Paragraphs 2.2 and 4 of the High Court order, Annexure "KRL1", pages 9-10 of the index bundle.

³¹ Annexure "KRL1", pages 9-10 of Index bundle Court order para 4 'That the powers conferred upon the said curatrix *bonis* in paragraph 3 above shall be exercised subject to the approval of the Master of the High Court.'

³² *Boberg's Law of Persons and the Family* 132 - 133.

annulment of a marriage, which is an aspect best left to the court considering the annulment application.

[46] It is my view, that the curator *ad litem* would be the appropriate court appointed officer who would be able to assist the court in making a determination in the interest of justice, by properly investigating the circumstances of the alleged covert marriage between the Respondent and Mr L[...].³³ For the purposes of these proceedings, the court will have to consider whether the Applicant has successfully proven facts which vitiate the judgment. The prospects of success of the annulment application are in my view, not a consideration as the application comes before me in terms of Rule 49(8) read with Section 36(b). I make no determination in this regard at this stage in light of the conclusion derived at in this application. The court seized with the annulment application will in my view make the appropriate determinations and may issue further appropriate directives.

[47] Central to this application is whether Mr L[...] had the mental capacity to divorce. It is apposite to mention that the Applicant was present and from the record of proceedings assisted Mr L[...] with the interpretation. To this end, it is alleged that Mr L[...]’s stroke rendered his mental and physical capabilities to be severely affected which resulted in him being unable to communicate, whether orally or in writing. His condition seemingly did not improve. The Applicant contended that she gave evidence and not Mr L[...] which stands in stark contradiction to the handwritten recordal by the

³³ *Ex Parte Glendale Sugar Millers (Pty) Ltd* 1973 (2) SA 653 (N) at 659H; *Du Plessis N.O. v Strauss* 1988 (2) SA 105 (A) at 120 A-D.

Presiding Magistrate that the Applicant assisted with the interpretation. Although it was noted that Mr L[...] suffered a stroke, it is apparent that there is nothing on record as to when he had the stroke to possibly alert the court to any possible irregularity.

[48] Additionally, it must be noted that Mr [...] was legally represented when his evidence was led. *Ex facie* the record there appears to be nothing untoward that happened on the day when the marriage between the parties was dissolved. Also *ex facie* the pleadings, Mr L[...] prayed for a decree of divorce stating the reasons for the irretrievable breakdown of the marriage. The judgment granted was clearly in terms of the relief sought. Had there been an irregularity, the Applicant and or the legal representative would not have, in my view, waited so long to challenge the validity of the decree, which delay has presented the impression that Mr L[...] and/or the Applicant have acquiesced.

[49] As previously stated, it was only when the Respondent indicated that she was intent on claiming her half share of the estate that the Applicant pursued the application for her appointment as *curatrix bonis* which was followed by this rescission application with the hopes of applying for the annulment of the marriage in order to prevent the Respondent from accessing her half share of the joint estate. The Applicant, in my view, seeks to challenge the validity of the judgement for this purpose.

[50] In amplification, the Applicant also makes the averment that she informed the attorney at Legal Aid that Mr L[...]’s marriage to the Respondent was *’of an extremely short period, that the “breakdown of the marriage” was as a result of the*

*Defendant's substantial misconduct and that the Defendant had contributed nothing towards the assets of the joint estate. I was of the view that on divorce the Defendant would not be entitled to the joint estate being equally divided but I am advised that that is not the case at all as in the absence of an order to the effect that the Defendant forfeits her share her share in and to the joint estate that division automatically applies.*³⁴

[51] Forfeiture of the benefits of the marriage in community of property was not pleaded in the divorce action. It is overtly clear that the Applicant's objective is to prevent the Respondent from claiming her half share in the immovable property situated at K[...] Avenue, N[...] Durban which is registered in Mr L[...]s name as the sole owner, free from any mortgage bond or other encumbrance.

[52] It should be borne in mind that the Applicant's function primarily is to administer the estate of Mr L[...] with the powers as stated in the court order. Evident from the papers is that the Applicant wants to curtail the Respondent from her entitlement to her share in and to the joint estate. If this is ultimately what the Applicant desires to achieve, then an application for variation of the divorce order could be contemplated in terms of which the proprietary consequences of the marriage can be properly ventilated and considered in the context of the historical factual matrix.

[53] The Applicant, in motivation of this application stated that she was desirous to bring an application for the annulment of the marriage of Mr L[...] and the

³⁴ Applicant's founding affidavit, para 14.

Respondent in the High Court after the order that was granted dissolving the marriage was rescinded. This remedy could have been sought through an appropriate application for variation in the Regional Court.³⁵ Section 28 of the Magistrate's Court act clearly states that:

'(1B) (a) A court for a regional division, in respect of causes of action, shall, subject to section 28(1A), have jurisdiction to hear and determine suits relating to the nullity of a marriage or a civil union and relating to divorce between persons and to decide upon any question arising therefrom, and to hear any matter and grant any order provided for in terms of the Recognition of Customary Marriages Act, 1998 (Act 120 of 1998).'

[54] On the strength the fundamental legal principals enunciated above, the court deciding on the annulment of the marriage will be called upon to decide whether the marriage between the parties is void or voidable.

[55] I have dealt with the proceedings as reflected on the record earlier in my judgment and reiterate that the Applicant, as well as Mr L[...]’s legal representative and the Presiding Magistrate raised no alarm as to whether Mr L[...] understood the proceedings despite it being noted that he suffered a stroke with the Applicant acting as the interpreter. The judgment of the Court thus became final and unalterable the moment of its pronouncement by the Presiding Magistrate. As previously stated there is a presumption that the judgment is correct. The Applicant has, in my view, failed to sufficiently rebut this presumption and efforts by the Respondent to source any

³⁵ **'Nullity of marriage'**. The grounds of nullity are commonly divided into two classes, viz:

(a) those that render the marriage null and void *ab initio*, in which case no marriage ever subsisted at all; and
(b) those that make a marriage voidable only, so that the parties remain validly married unless and until the court grants a decree of nullity.

additional information to assist the court to come to a just determination, did not bear fruit. The Applicant's version as earlier stated is juxtaposed by the record of proceedings, and cannot be reconciled, thus triggering the presumption as earlier mentioned.

[56] If regard is had to the irregularity raised by the Applicant such irregularity could have been taken on review in terms of Section 22(1) of the Superior Courts Act 10 of 2013. The grounds on which a decision may be taken on review includes *inter alia*, gross irregularity in the proceedings, and the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

[57] What the applicant is essentially asking this court to do is to take the decision of the Presiding Magistrate on review, which I cannot do. The Applicant was then supporting Mr L[...] to have his marriage dissolved by way of divorce and judgment was accordingly obtained. Additionally, the issue whether the evidence led was incompetent because the Applicant purported testified is also an aspect that should be taken dealt with through a review application. It is not for this court to decide on whether the court finalising the divorce erred.

[58] The medico legal report suggests that Mr L[...] lacked the capacity. Of seminal importance is that the medical assessment(s) of Mr L[...] were conducted approximately 3 years after the divorce was finalised.

[59] The remaining issues are:

- (a) whether Mr L[...] had the capacity to satisfactorily communicate his intention to divorce after his stroke;
- (b) had the mental capacity to make a decision to divorce;
- (c) was able to appreciate his actions and their consequences and
- (d) Had the capacity to instruct his attorney to act on his behalf.

[60] What Mr L[...]’s state of mind was at the time when he got married cannot be determined with certainty and neither can Mr L[...]’s state of mind at the time of the divorce, be determined with certainty. The ultimate question would therefore be whether Mr L[...] was disorientated at the time of his marriage and at the time of the divorce. Did Mr L[...] have ‘*poor memory, lack of insight and judgment*’ at the time of the marriage and at the time of the divorce. Dr Porter stated that ‘*[h]e is incapable of making decisions...*’, which in my view suggested Mr L[...]’s current state of mind as at the time of assessment and does not necessarily relate to his state of mind at the time of the marriage.

[61] I am mindful of the fact that even if Mr L[...] was mentally ill and had a lucid interval, which is speculative, the marriage would still be valid.³⁶ Conversely, the same would hold true in my view in determining the aforementioned issues. In this

³⁶Cronje DSP, Heaton J ‘*South African Family Law*’ (LexisNexis) Second Ed. page 19. ‘In *Prinsloo’s Curator Bonis v Crafford Prinsloo* 1905 TS 669 a man who had been certified mentally ill concluded a marriage in community of property without obtaining his curator’s consent. The curator failed in his action to have the marriage annulled as the man was able to prove that he was not mentally ill at the time of concluding the marriage and thus had full capacity to act. Solomon J stated at 672: “[*Voet*] is perfectly clear on this point, that where a person has been declared insane, and where curators have been appointed to take charge of his property, if a lucid interval supervenes he thereupon ipso facto [ie, by that mere fact] again acquires the right to dispose of his property and to enter into contract with regards to that property, and that his capacity to do so continues until insanity again supervenes, when the order of curatorship revives, and he once more becomes subject to his curators.”

regard, the report of Dr Patty Francis compiled on 29 April 2015, stated that *'[h]e still remains profoundly compromised cognitively...and inconsistent reasoning...'*(my emphasis). This in my view suggests that Mr L[...] could have had lucid intervals.

[62] Additionally, I am imbued to consider this application on the strength of the papers before me. This is based on the trite legal principle that the an Applicant must stand or fall by his founding papers which principle has been enunciated in ***Director of Hospital Services v Mistry***³⁷ where the Appellate Division held:

"When...proceedings were launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustees v Lahanas 1924 WLD 67 at 68 and has been said in many other cases:

'...an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny'

Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, 'it is not permissible to make out new grounds for the application in the replying affidavit (per Van Winsen J in SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board 1953(3) SA 256 (C) at 260)"

[63] In ***South African Transport and Allied Workers Union and Another v Garvas and Others***³⁸ it was held that:

³⁷ 1979 (1) SA 626 (AD) at 635H-636B.

³⁸ [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (*Garvas*) at para 114.

'Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet.'

[64] In conclusion, I am not satisfied that the Applicant has *locus standi* to bring this application without the approval of the Master; neither am I persuaded that the application was brought at the correct forum, given the nature of the irregularities raised in this application.

[65] Moreover, I am of the view that referring the matter to trial for hearing, so that *viva voce* evidence can be led in order to decide on the issues in dispute is unlikely to disturb what appears on the papers insofar as what transpired on the date of finalisation of the divorce action is concerned. In any event, it is for the Applicant to set out her defence with sufficient particularity so as to enable the court to decide whether or not there is a valid and *bona fide* defence.

[66] As earlier mentioned, I make no pronouncement on whether there is *prima facie* a fair prospect of successfully applying for the annulment of the marriage between the Respondent and Mr L[...] at this stage, as this court is not called upon to do so in applications of this nature. As previously stated, oral evidence on the disputed issues will not take this application for rescission any further, in my view. Therefore, in light of the factual disputes I have made the determination in accordance with the approach set out in ***Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.***³⁹

³⁹ 1984 (3) SA 623 (A), 634E-635C.

[67] This court is not without sympathy to the plight of the Applicant as it is clear that she has Mr L[...]’s best interest at heart. However, cognisance should also be had of the consequences of the order this court is called upon to make. Should the application for rescission of judgment be granted, it will effectively restore the status *quo ante* of the parties; bearing in mind that Mr L[...] and the Respondent have been divorced since 2014.

[68] The court is further mindful that in applications for rescissions, the applicant is required in terms of the rule set out a defence with sufficient particularity so as to enable the court to decide whether or not there is a valid and *bona fide* defence. It is for this reason that I have considered the application holistically and not in a vacuum.

[69] Consequently, after considering the legal principals as well as the case authorities, I am of the view that the Applicant should have taken the proceedings of 5 August 2014 on review alternatively, could have considered launching an application for variation seeking to annul the marriage, or further alternatively sought an order for the forfeiture of the benefits of the marriage in community of property, which remedies are still available to the Applicant, should she obtain the approval of the Master of the High Court.

[70] Consequently, I am not persuaded that the Applicant has:

- (a) *locus standi* to bring the application in the absence of the Master's approval to do so and / or;
- (b) made out a proper case on the papers, viewed cumulatively, that the divorce order granted on 5 August 2014, dissolving the bonds of marriage between the Mr L[...] and the Respondent was void *ab origine*.

Costs

[71] Turning now to the issue of costs. It is an accepted legal principle that costs ordinarily follow the result and a successful party is therefore entitled to his or her costs. The general rule is that costs follow the event, which is a starting point. The guiding principle is that '*...costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation, as the case may be,. Owing to the unnecessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based.*'⁴⁰ It is fundamental legal principal that the issue of costs is in the unfettered discretion of the court.

Orders:

[72] Therefore in the exercise of my judicial discretion, after considering the submissions made by the parties, as well as the papers filed on record, I make the following orders:

⁴⁰ Cilliers AC 'Law of Costs' Butterworths page 1-4; *Agriculture Research Council v SA Stud Book and Animal Improvement Association and Others*; *In re: Anton Piller and Interdict Proceedings* [2016] JOL 34325 (FB) par 1 and 2; *Thusi v Minister of Home Affairs and Another and 71 Other Cases* (2011) (2) SA 561 (KZP) 605-611.

(a) The application is dismissed with costs.

P ANDREWS
Regional Magistrate: Durban