Case No 105/96

IH

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

GREGORY STEWART ROWE — Appellant

and

CATHARINA JACOBA ROWE — Respondent

CORAM : HEFER, VIVIER, NIENABER, OLIVIER JJA and STREICHER AJA

HEARD : 20 MAY 1997

DELIVERED : 27 MAY 1997

J U D G M E N T

HEFER, JA :

It stands to reason, as De Villiers JA observed in Schierhout v Union Governmemt 1927 AD 94 at 98, that a judgment procured by the fraud of one of the parties cannot be allowed to stand. But this does not entail, so Roos J held in upholding an exception in the present case, that the party who procured the judgment is entitled to have it rescinded on the ground that he had been induced to do so by the fraud of the other party.

The parties to the appeal were formerly husband and wife. They were divorced by order of the erstwhile Witwatersrand Local Division in an action in which the appellant (husband) was the plaintiff and the respondent (wife) the defendant. In terms of an agreement of settlement incorporated in the order and recording that three minor children had been born from the marriage, the appellant was awarded custody of Raymond but ordered to pay the medical, tuition and boarding fees and expenses of Marelize and Brendan whose custody was awarded to the respondent.

After the divorce the appellant commenced further proceedings against the respondent in the same court. The pivotal allegations in the particulars of claim in support of his main claim were

(1) that the respondent had induced him to sign the settlement agreement, and to obtain a divorce in terms thereof, by fraudulently representing to him that he had sired Brendan and Raymond;

(2) that the appellant had cancelled the agreement, and

(3) that, by virtue of the respondent's fraud, he was entitled to the rescission of the decree of divorce in the form in which it was issued.

The particulars of claim proceeded with the usual allegations to found a claim for a decree of divorce and concluded, as far as the main claim was concerned, with a prayer for such an order and ancillary relief which did not provide for Brendan and Raymond's custody and maintenance but included a

declaration that they were not the appellant's children.

There was also an alternative claim for payment of R138 000 being the amount by which the respondent had allegedly been enriched at appellant's expense in that he had maintained her children since their birth in the bona fide but mistaken belief, engendered by her fraudulent misrepresentations, that he was obliged to do so.

The respondent excepted to the particulars of claim in the following terms:

"Defendant hereby excepts to the Plaintiffs Particulars of Claim as being bad in law on the following grounds: 1. It discloses no cause of action in that:

(4) in essence, Plaintiffs claims seek to and are dependent upon an Order setting aside the Order of Court set out in Annexures 'A' and 'B' to Plaintiffs Particulars of Claim;

(5) Plaintiff was also the plaintiff in the divorce action between the parties which culminated in the Order;

(6) the Order was made upon the request of Plaintiff;

(7) in the premises, the above Honourable Court has no power to accede the Plaintiff's application to set aside the Order which he himself:

1.4.1 sought; and

1.4.2 obtained;

1.5 alternatively to paragraph 1.4 above, the issues raised in Plaintiffs Particulars of Claim have been finally adjudicated upon by a Court of competent jurisdiction.

Wherefore Defendant prays that Plaintiff's claims be dismissed with costs".

Roos J upheld the exception on the grounds listed in pars 1.1 to 1.4. The appeal which is before us upon leave granted by members of this Court is against his order that

"the exception is thus upheld with costs and the plaintiff's claim is dismissed with costs."

In this Court counsel were agreed that, despite its wording ("the plaintiffs claim is dismissed"), the order must be interpreted as one dismissing the main and the alternative claim as well. This is undoubtedly correct. It will be noticed that the prayer in the exception is for the dismissal of both claims on the premise of the contention in par 1.1 that, in essence, they seek to and are dependent upon the rescission of the order. Roos J expressly accepted this

proposition and proceeded to consider the points made in pars 1.2 to 1.4. He concluded that the order cannot be rescinded despite the respondent's alleged fraud and upheld the exception without distinguishing between the two claims. His intention could only have been to dismiss both. The alternative claim accordingly also requires attention but, because it differs materially from the main claim, 1 will deal with it separately after disposing of the exception to the latter.

In view of the fact that there is no prayer in the main claim for the rescission of the existing order of divorce despite the allegation in the particulars of claim that the appellant is entitled to have it rescinded, there was some debate at the hearing of the appeal about the real purport of the exception. At the commencement of his argument counsel for the respondent intimated that he intended to rely on the absence of such a prayer as a substantive ground of exception. But, save for a faint suggestion that par 1.1 covers it, he was unable

to show us where in the exception the point was taken; and, faced with the wording of pars 1.1 and 1.4 which he had personally drafted, he eventually conceded that he fully understood the main claim to be essentially one for the rescission of the order despite the absence of a specific prayer, and that the exception was taken, argued and disposed of by the Court a quo on that basis. I will follow the same course. It may be that the particulars of claim are defective for lack of a specific prayer for the rescission of the entire order (cf Faulkner v Freeman 1985(3) SA 555 (C) at 558I-559D); but, since the point was not raised in the exception, it does not concern us.

The Court a quo upheld the exception mainly on the authority of the decision in Florence v Florence 1948(3) SA 71 (D). That case, as I intend to show, is distinguishable and a consideration of the validity of the views expressed therein is accordingly not called for. Briefly stated the facts were that the defendant, by feigning a desire to return to him, fraudulently induced the

plaintiff to have an order for the restitution of conjugal rights discharged. Thereafter, when she failed to return, the plaintiff applied for the rescission of the order discharging the restitution order. Broome J found that he had no power to grant the application mainly because (1) an order cannot be set aside on the application of the very party at whose request it was granted and (2) so-called extra-judicial fraud affords no ground for a rescission. Obviously with this in mind Roos J said in his judgment :

> "The question to be answered is whether the court can rescind an order (including an agreement as part of the order), where the plaintiff in the present action has sought and obtained that very order himself. The fraud complained of by the plaintiff was, on his own version, committed extra judicially."

He answered the question by quoting extensively inter alia from the judgment in Florence v Florence.

What is immediately apparent is that the learned judge's slavish adherence to the two limbs on which the judgment in that case rests led him to introduce

into the enquiry what he considered to be the fact that "the fraud complained of by the plaintiff was, on his own version, committed extrajudicially", which is not an element of the exception. On the view that I take of the matter it is not necessary to decide whether he was entitled to do so and I will assume that he was. But this does not avail the respondent because, to my mind, the reliance on Florence v was entirely misplaced. Let me say at the outset that I am by no means convinced that the question which Roos J posed provides the key to the solution of the problem whether the order can be rescinded. The order was granted by consent in terms of an agreement of settlement which the appellant is alleged to have cancelled on account of the respondent's fraud. A party is of course entitled to resile from any agreement on account of the other party's fraud and a more appropriate question would have been whether the fact that the agreement had been made an order of court had a nugatory effect on the right to resile. The answer might have been found in Huddersfield Banking

Company Limited v Henry Lister & Son Limited (1895) 2 Ch 273, Lewak v Sanderson 1925 CPD 267 and the remarks in Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd and Others 1978(1) SA 914 (A) at 922B-F. However, the Court a quo was only called upon to decide the validity of the propositions in pars 1.1 to 1.4 of the exception and the limited grounds on which the respondent has seen fit to attack the particulars of claim preclude us from dealing with what appears to be the real issue.

The fact that the order was granted by consent in terms of an agreement of settlement nevertheless serves to distinguish the present case from Florence v Florence. The agreement was concluded before the commencement of the divorce proceedings. In it the parties recorded that the appellant intended causing summons to be issued for inter alia a decree of divorce, that the respondent agreed that the marriage had irretrievably broken down and that the parties had reached agreement with regard to the custody and control of "the

three minor children born of the marriage, maintenance, the proprietary rights of the parties and costs and wish to record same in writing." In clause 4 the parties agreed that the agreement constituted the full and final settlement of all claims between them and that, upon it being made an order or court, they would have no further claims of whatever nature against each other. Clause 6 provided that, subject to the court's approval, the agreement would be made an order of court. It is evident that both parties were equally interested in and desirous of obtaining an order in the agreed terms. Of course, since the matter was not contested, only one of them would appear in court. That party happened to be the appellant and although his counsel in the event formally moved for the order, the reality of the matter is that the court granted the relief which both parties desired and had agreed upon. In effect it was an order granted at the request of both of them.

Then there is the matter of the respondent's so-called extra-judicial fraud.

Broome J did not explain the term in Florence v Florence; at 74 he merely contrasted it with fraud "committed in the course of the proceedings". Roos J referred to it as "fraud not committed during proceedings". Whether the learned judge only had fraud committed in facie curiae in mind (as a reference elsewhere in the judgment to Childerly Estate Stores v Standard Bank of SA Ltd 1924 OPD 163 at 169 seems to suggest) is not clear. But it does not really matter since it is trite that fraud as a ground for the rescission of an order may take any form and is not limited to perjured evidence (Schierhout v Union Government supra at 98) provided that the party concerned was privy to it (Makings v Makings 1958(1) SA 338 at 342H-345A) and that the facts presented to the court diverged from the truth to such an extent that the court would have given a different judgment had it known the true state of affairs (cf Childerley supra at 169).

It is alleged in the particulars of claim that the respondent's fraudulent

representations induced the appellant to enter into the settlement agreement and to ask for a divorce in terms thereof. It is also alleged that, but for her fraud, the court would not have made the order of divorce in its present form. Annexed to the particulars of claim is the settlement agreement signed by the respondent which recorded the birth of three children from the marriage including Brendan and Raymond who were mentioned by name. The respondent knew, it is further alleged, that this was not the truth; and she knew that the appellant who was not aware of the true state of affairs would present the agreement and thus unwittingly deceive the court. In my view this constituted a fraud perpetrated on the court itself. After all the court does not act as a mere recorder when the parties to divorce proceedings in which minor children are involved, settle their differences; it is in duty bound to satisfy itself that their arrangements will serve the best interests of the children; and this it can only do on truthful information supplied by the parties.

It follows that the exception to the main claim could not succeed on the grounds pleaded in pars 1.1 to 1.4. Quite rightly respondent's counsel did not argue that it can succeed on the ground pleaded in par 1.5.

A few brief remarks will dispose of the alternative claim as well. As mentioned earlier the Court a quo upheld the exception on the grounds listed in pars 1.1 to 1.4. The proposition in par 1.1 (on which the validity of the points made in pars 1.2 to 1.4 is dependent) is perfectly correct in respect of the main claim, hut patently wrong in regard to the alternative claim. The latter is a simple claim for the payment of money; the supporting facts have been pleaded as a discrete cause of action, and it does not seek nor is it dependent upon the rescission of the order. The exception to this claim could accordingly not succeed on the grounds listed in pars 1.1 to 1.4. The point made in par 1.5 is equally invalid: since it does not emerge from the particulars of claim that any of the facts alleged in the alternative claim were adjudicated upon in the divorce

proceedings, the respondent cannot invoke the acception rei judicatae by way of exception.

For these reasons the appeal must succeed. But before I make an order to that effect I must revert to the form of the Court a quo's order. It does not appear from the judgment why the learned judge dismissed the claims instead of making the usual order setting aside the particulars of claim with leave to the appellant to amend if so advised. All 1 wish to add to the remarks in Group Five Building Ltd v Government of the Republic of South Africa Public Works and Land and Land Affairs) 1993(2) SA 593 (A) at 602C-604I is that it is doubtful whether this established practice brooks of any departure and that, in the rare cases in which a departure may perhaps be permissible, one expects to find the reasons in the court's judgment.

The appeal is upheld with costs. The order of the Court a quo is amended to read:

"The exception is dismissed with costs."

JJF HEFER JA

CONCURRED : VIVIER JA
NIENABER JA
OLIVIER JA
STREICHER AJA