

SOUTH AFRICA / JUDGMENT

B.N.K (born P) v M.R.K (CA 297/2019) [2020] ZAECGHC 55 (2 June 2020)

[2020] ZAECGHC 55

COURT

Eastern Cape High Court, Grahamstown

BEFORE

O H Ronaasen, D Van Zyl

CASE / FILE NUMBER

CA 297/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Case No.: CA

297/2019

Court Date: 22 May

2020

Date Delivered: 2 June 2020

In

the matter between:

B[...]

N[...] K[...] (born P[...])

Appellant

and

M[...]

R[...]

K[...] Respondent

JUDGMENT

RONAASEN, AJ:

Introduction

- [1] The parties to this appeal were married to each other on 29 October 2000, in community of property.
- [2] During April 2018, the appellant instituted action against the respondent, out of the Regional Court, Port Elizabeth, in terms of which she sought a decree of divorce and certain proprietary relief (“the action”). The respondent defended the action.
- [3] On 31 May 2019 the Regional Court dissolved the marriage of the parties by way of a decree of divorce and granted certain ancillary, proprietary relief in favour of the respondent (“the order”). In respect of the proprietary relief the order, in summary, directed that the appellant would forfeit the benefit of her undivided half share of an immovable property registered in the name of the parties, in favour of the respondent.
- [4] It is not in dispute that:
- 4.1. the order was granted in the absence of the appellant, by default, pursuant to the respondent’s claim in reconvention in the action;
- 4.2. the appellant was unaware that the action had been set down for hearing on 31 May 2019 in that she had not been given notice of the proceedings by the respondent;
- 4.3. the appellant had not received notice of the respondent’s claim in reconvention in the action, which had been filed of record contemporaneously with the filing of the notice sitting down the action for hearing on 31 May 2019;
- 4.4. the action had been set down for trial prematurely by the respondent as the appellant had not had an opportunity to plead to the claim in reconvention.
- [5] The appellant launched an application to rescind the order in July
2019. On a reading of that application I am satisfied that the applicant made out a good case for the rescission of the order on the basis of the abovementioned undisputed facts.
- [6] The application for rescission was clearly directed at the proprietary relief granted in the order it being common cause that the marriage relationship between the parties had irretrievably broken down and both of them required dissolution of the marriage relationship by way of a decree of divorce.
- [7] In the rescission application the appellant contended that in the light of the abovementioned undisputed facts the respondent should pay the costs of the application for rescission on a punitive scale.

- [8] The respondent, in July 2019, gave notice of his intention to oppose the application for rescission, but thereafter withdrew his opposition to the application before filing any opposing papers. He, nevertheless, instructed counsel to appear on his behalf and argue that the appellant should pay the costs of the rescission application.
- [9] The Magistrate, in handing down judgment in respect of the rescission application on 6 September 2019, quite correctly, did not rescind the decree of divorce, but rescinded all other relief granted in terms of the order. Given the lack of opposition to the rescission application the only question before the Magistrate was the question of the costs of the rescission application.
- [10] The Magistrate ordered the appellant to pay the costs of the rescission application for various reasons with which I shall deal more fully, below. It is against this order that this appeal is directed. Although the appellant sought a punitive order for costs from the Magistrate she now, in terms of her notice of appeal only seeks a variation of the order of the Magistrate to allow for an order for party and party costs in her favour.
- [11] In December 2019, the respondent filed a notice to abide in which he advised that he did not intend opposing the appeal and that he abided the decision of this court. Somewhat contradictorily the respondent has nevertheless filed heads of argument the purpose of which is described as being "... to deal mainly with the costs of the Appeal." In the heads of argument it is contended that should the appeal succeed no order should be made in respect of the costs of the appeal given the respondent's notice to abide the result of the appeal.

Discussion

- [12] The grounds on which the Regional Court ordered the appellant to pay the costs of the application for rescission, in summary, are as follows:

- 12.1. a communication between the appellant and her erstwhile attorney, who had withdrawn from representing her, pointed to her being aware of the procedural step she was required to take to further the action;
- 12.2. her former attorney had advised her to obtain legal aid assistance;
- 12.3. the appellant failed to appear in court on 2 May 2019 after having been advised to do so by her former attorney;
- 12.4. she caused her former attorney to withdraw from representing her by furnishing him with conflicting instructions as a result of which he withdrew from representing her on two occasions;
- 12.5. the appellant through her conduct was delaying the completion of the action;
- 12.6. an exception was upheld against the appellant's particulars of claim; and
- 12.7. generally her conduct of the action made it just for her to the order to pay the costs of the rescission application.

- [13] The first five of the abovementioned factors are all gleaned from a letter directed by the appellant's former attorney to her on 23 April 2019. In relying on this letter, the Magistrate appears to have ignored the fact that it is not disputed that the appellant did not receive this letter. The letter, in any event, addresses events prior to 2 May 2019 whilst the chain of events which led to the granting of the order, commenced with the filing of the claim in reconvention and the notice of set down on 3 May 2019.
- [14] The Magistrate over-emphasised the fact of the exception which had earlier been granted against the appellant's particulars of claim. The granting of the exception was a separate procedural event, which preceded the granting of the order and in respect of which the appellant was ordered to pay the costs. The Magistrate incorrectly found that the order was granted on the basis of the exception. The exception played no role in the granting of the order. The order was granted pursuant to the respondent's claim in reconvention, with no reference to the appellant's particulars of claim.
- [15] The discretion of a court in respect of costs is a discretion in the strict or narrow sense. It is also called a "strong" or a "true" discretion. In such a case the power to interfere on appeal is limited to cases where it is found that the lower court did not exercise the discretion judicially, which can be done by showing that the lower court exercised the power conferred on it capriciously or upon a wrong principle, or did not bring its unbiased judgment to bear on the question or did not act for substantial reasons. A court on appeal would interfere if the lower court that been influenced by wrong principles or a misdirection on the facts or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. (*Naylor and Another v Jansen* 2007 (1) SA 16 (SCA) at [14].)
- [16] The Magistrate wrongly directed the appellant to pay the costs of the rescission application in circumstances where the order for costs made could not reasonably have been made if the Magistrate had properly directed herself to the relevant facts and principles, including the following:
- 16.1. the undisputed facts set out in paragraph [4] above all, of which were occasioned by the conduct of the respondent and which resulted in the respondent seeking and obtaining judgment by default in circumstances where he was not entitled to such judgment;
- 16.2. the respondent's unreasonable refusal, in the light of those undisputed facts, to consent to rescission, thereby obliging the appellant to follow the route contemplated in rule 49(3) of the Rules of the Magistrates' Court, rather than the truncated and less onerous procedure allowed for by rule 49 (5)(a);
- 16.3. the respondent, despite withdrawing his opposition to the rescission application on the day before it was argued, persisting in arguing that the appellant be directed to pay the costs of the application where, as stated, judgment by default was incorrectly granted against the appellant as a result of his conduct. Although the respondent states in his heads of argument that he wished to avoid a punitive order for costs being made against him, he offers no explanation as to why he

sought an order for costs against the appellant instead of simply consenting to the payment by him of costs on a party and party scale.

[17] Thus, an appeal court is entitled to interfere with the costs order made by the Magistrate in this case.

The costs of the appeal

[18] The factors set out in paragraph [16] above also lead me to the conclusion that the respondent should be ordered to pay the costs of the appeal. Although the appellant would have been obliged to bring an application to rescind the order the respondent could have facilitated this process by consenting to rescission at an early stage. Furthermore, he actively pursued an order for costs against the appellant in respect of the rescission application before the Magistrate. His conduct in seeking and obtaining judgment by default in circumstances where he was not entitled thereto set in motion the chain of events which ultimately obliged the appellant to pursue this appeal to remedy the prejudicial situation which caused her to be saddled with a clearly incorrect order for costs.

Conclusion

[19] In the result the following order is made:

19.1. the appeal is upheld, with costs; and

19.2. the order of the Regional Court is replaced with the following order:

"The defendant is to pay the costs of the application for rescission of judgment on the scale as between party and party, such costs to include the costs of counsel allowed at twice the Regional Court scale."

O H RONAASEN

ACTING JUDGE OF THE HIGH COURT

VAN ZYL DJP:

I agree.

D VAN ZYL

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

By Agreement between the parties this appeal was disposed of in terms of Section 19(a) of the Superior Courts Act, 10 of 2013, without oral argument.

Heads of argument for the appellant prepared by Adv L Gagiano instructed by Lizelle Pretorius Inc c/o Netteltons, Grahamstown and Adv A C Barnett for the respondent instructed by Melissa Marais Hoffman Attorneys c/o J Mfundisi Attorneys, Grahamstown.

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Prepared on 14 October 2026 · Esheria