

SOUTH AFRICA / JUDGMENT

# M v M (5710/2010) [2014]

## ZAFSHC 170 (5 September 2014)

[2014] ZAFSHC 170

## COURT

Free State High Court, Bloemfontein

## BEFORE

Motloung

## CASE / FILE NUMBER

5710/2010

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No. : 5710/2010

DATE: 05 SEPTEMBER 2014

In matter between:

SISINYANE ABIGAIL MAJAPHAGE.....Applicant

And

GABOKGANENWE KLAAS MAJAPHAGE.....Respondent

HEARD ON: 04 SEPTEMBER 2014

JUDGMENT BY: MOTLOUNG, AJ

DELIVERED ON: 05 SEPTEMBER 2014

### Introduction

- [1] This is an application for rescission of the divorce order that was granted by this court on the 23 December 2010 in the absence of the applicant.
- [2] On the 23 December 2010 the court granted a divorce order in the following terms, following upon the applicant not entering appearance to defend the action:

2.1 That the bonds of marriage subsisting between plaintiff [responden] and defendant [applicant] be and are hereby dissolved.

2.2 That care and custody of a minor child born of the marriage ....is awarded to the plaintiff....subject to the defendant's right to reasonable contact and access.....

2.3 That the benefits of the marriage in community of property is forfeiture (quoted without amendment).

[3] The applicant subsequently launched an application for the rescission of all orders of the court, together with ancillary relief, and also incorporated an application for condonation regarding the late filing of the said rescission application. In her notice of motion and the founding affidavit, respectively, the applicant phrased her prayer in respect of the divorce order in the following terms:

*"2. That judgment which was granted in this honourable court on the 23rd of December 2010 under case number 5710/2010 be rescinded" (prayer 2 of the notice of motion), [and]*

6. This is an application to rescind the order that was granted by the honourable Justice CB Cillie in the above honourable court under the above case number on the 23rd December 2010" (para 6 of the founding affidavit).

[4] The respondent is opposing both applications for rescission and for condonation.

Facts briefly

[5] The applicant and the respondent were married to each other in community of property on the 20 April 2005 and one minor child by the name of Kabo, a boy aged approximately nine years at the time of divorce (December 2010) was born between them. The respondent caused the divorce summons to be issued against the applicant in November 2010. In his particulars of claim, the respondent alleged that the marriage relationship had broken down irretrievably and that there were no reasonable prospects of reconciliation between them. He then stated his grounds for the divorce, custody of the minor child and an order for forfeiture of benefits arising from the marriage. The summons was duly served on the applicant but no notice of intention to defend the action was filed and the matter was subsequently heard as a judgment by default in the absence of the respondent (who had not entered appearance to defend).

Having heard the matter, the court went on to grant the orders mentioned above – which included an order for custody of the minor child in favour of the respondent, and an order for forfeiture of benefits arising from the marriage against the applicant. It is particularly these two latter orders that are essentially the centre of this litigation, as will appear later in this judgment.

[6] The applicant approaches this court for an order rescinding, in the main, the orders for custody and forfeiture. The heads of argument filed on behalf of the applicant state the following at para 2.5:

*“Argument will be presented on behalf of applicant to the effect that applicant is entitled to rescission of judgment but not to prayer 1 but only prayers 2 and 3 of the divorce order, which will enable the applicant to oppose prayers 2 and 3 of the main action under case number 5710/2010”.*

#### The trajectory of this litigation

[10] The following facts are either common cause or not seriously disputed: The applicant launched this application for rescission of judgment on the 15 February 2011 through the Legal Aid offices called the Bloemfontein Justice Centre, which was served on the respondent on the 18 February 2011. The respondent filed an answering affidavit on the 21 April 2011, after which the applicant filed her replying affidavit on the 1 November 2011.

The facts as regards what transpired thereafter between November 2011 and the set-down of this matter on the 23 July 2014 for the 4 September 2014 are very sketchy and virtually unknown, save for the fact that the court file shows that the applicant applied for a report by the Family Advocate in December 2012 and that there was previously a notice of removal of the matter from the roll of the 15 August 2013, after it had been set down per notice of set-down filed on the 24 July 2013.

#### Some of the applicable legal principles

[11] The application is being brought in terms of Rule 31 of the rules of this court. Subrule 31(2) (b) states that:

*“A defendant may within twenty days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems meet” (my emphasis).*

[12] In discussing the phrase “the court may upon good cause shown”, Erasmus in Superior Court Practice (Service 38,

2012) at B1-201, and with reference to *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476-477 which he states was cited with approval in a number of other decisions in the other divisions mentioned by him (including the SCA in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 9F, states the following:

*“The requirements for an application under the subrule have been stated to be as follows:*

- (a) He (i.e applicant) must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the court should not come to his assistance.
- (b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.

- (c) He must show that he has a bona fide defence to the plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour" (my emphasis).

[13] Erasmus also states at B1-203 with reference to *Galp v Tansley* NO 1966 (4) SA 555 (C) that:

*"In Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) the Appellate Division held that "good cause" includes, but is not limited to, the existence of a substantial defence. It has been held that the requirement of "good cause" cannot be held to be satisfied unless there is evidence not only of the existence of a substantial defence, but in addition, of the bona fide presently held desire on the part of the applicant for relief actually to raise the defence concerned in the event of the judgment being rescinded".*

Erasmus goes on to state further at B1-204, with reference also to *PLJ Van Rensburg en Vennote v Den Dulk* 1971 (1) SA 112 (W), that:

*"The requirement that the applicant for rescission must show the existence of a substantial defence does, however, not mean that he or she must show a probability of success: it suffices if he or she shows a prima facie case, or the existence of an issue which is fit for trial".*

Erasmus further states at B1-204, with reference to other decided cases, that:

*"The applicant need not deal fully with the merits of the case, but the grounds of defence must be set forth with sufficient detail to enable the court to conclude that there is a bona fide defence, and that the application is not made merely for the purpose of harassing the respondent. Where the applicant has provided a poor explanation for default, a good defence may compensate. In circumstances where the strength of the defence on the merits becomes crucial, the applicant must furnish sufficient information to satisfy the court that he or she has a good defence. The court has a wide discretion in evaluating "good cause" in order to ensure that justice is done. For this reason the courts have refrained from attempting to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of an indulgence for any attempt to do so would hamper the exercise of the discretion" (my emphasis).*

[14] In *RGS Properties (Pty) Ltd v Ethekwini Municipality* 2010 (6) SA 572 (KZD) at 575G-576C, the court stated the following:

*"I may add to this principle that judgment by default is inherently contrary to the provisions of s 34 of the Constitution.*

The section provides that everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. Therefore, in my view, in weighing up facts for decision, the court must on the one hand balance the need of an individual who is entitled to have access to court, and to have his or her dispute resolved in a fair public hearing, against those facts which led to the default judgment being granted in the first instance. In its deliberation the court will no doubt be mindful, especially when assessing the

requirement of reasonable cause being shown, that while among others this requirement incorporates showing the existence of a bona fide defence, the court is not seized with the duty to evaluate the merits of such defence. The fact that the court may be in doubt about the prospects of the defence to be advanced, is not a good reason why the application should not be granted. That said however, the nature of the defence advanced must not be such that it prima facie amounts to nothing more than a delaying tactic on the part of the applicant” (my emphasis).

Facts that are relevant to the enquiry

[15] Having due regard to the authorities referred to above, and a myriad of other authorities not specifically referred to in this judgment, the following facts are relevant to this matter and are either common cause or not seriously disputed: The judgment by default was granted two days prior to the Christmas day (23 December 2010) and it came to the knowledge of the applicant on the same day. By the 15 February 2011, the applicant had taken steps, through the Legal Aid offices, to prepare this application for rescission, and the application was served on the respondent by the 18 February 2011 (within three days of preparation). The respondent filed his notice to oppose the application and subsequently filed his answering affidavit on the 21 April 2011, after which the applicant filed her replying affidavit on the 1 November 2011. On the 12 December 2012 the applicant requisitioned a report by the Family Advocate pertaining to the minor child, and the Family Advocate submitted such a report to the applicant on the 26 June 2013, whereafter the matter was placed on the roll for hearing on the 15 August 2013 per notice of set-down filed on the 23 July

2013. On the 14 August 2013 (the eve of the scheduled date of hearing), the matter was removed from the roll by notice to the respondent. The said notice of removal stated, amongst others, that the matter is “removed from the roll as per agreement between the parties”. The matter was finally set down for hearing on the 4 September 2014 (approximately a year after its previous removal per agreement between the parties) per notice of set down filed on the 23 July 2014.

[16] Mrs Oosthuizen from the Legal Aid Board, Bloemfontein Justice Centre, appeared for the applicant and Mr Hadebe, an attorney in private practice, appeared for the respondent. It is worth noting, in my view, that whereas Mr Hadebe represented the respondent at all material times (from the beginning of the divorce proceedings up to today), Mrs Oosthuizen is the third attorney from the Legal Aid to represent the applicant in this matter.

Mrs Oosthuizen indicated during argument that she did not prepare the heads of argument in the matter and that she did not bear intimate knowledge of the history of the matter apart from what she could glean from the file and that two other attorneys from the Legal Aid (her centre) previously dealt with the matter. This information was not challenged during argument, and I thus accept it as correct.

Submissions on behalf of the parties

[17] Mrs Oosthuizen conceded that if the dies non did not suspend the running of the dies, the applicant's application was most probably launched out of time, but submitted that even if the court was to find that the applicant was remiss in respect of prosecuting the application, in that it was filed out of time and there is no reasonable explanation for the delay in prosecuting it subsequent to its launching, the court should exercise its discretion in favour of the applicant as she even referred the matter to the Family Advocate to show that she is serious about defending it, and she has stated facts upon which she relied as constituting the bona fide defence with respect to the custody and forfeiture issues. She submitted that on the merits the applicant was not in wilful default as regards failure to note an appearance to defend and that she has made out a case for a bona fide defence as as she would have shown at trial that it would have been in the best interests of the minor child to have its custody awarded to the her, as the respondent was seldom at home as he worked in Kuruman and often away on business, during which period she stayed with the child in Welkom and took care of the child, who consequently became emotionally attached to her. She also submitted that the applicant would have led evidence to show that she also contributed to the upkeep of the common home, looked after the minor

child on her own and transported the child to and from school every day, and made certain financial sacrifices to the benefit of the common household, without which the joint estate would not have grown to what it was. She concluded by submitting that the respondent would be unduly benefited by an order for forfeiture against her, and in converse, the respondent would unduly benefitted. She also indicated that she did not draft the applicant's heads of argument, and expressed doubt as to whether it was legally feasible for the court to rescind only the orders regarding custody and forfeiture, without necessarily also rescinding the divorce order. She asked the court to grant the relief sought by the applicant.

[18] On the other hand, Mr Hadebe submitted that the dies non only apply to the filing of a notice of intention to defend and not to the application for rescission. He lamented the applicant's delay in failing to launch her application on time – and more especially the inexplicable delay in prosecuting the matter to finality since launching the application in February 2011. He implored the court to find that there was no reasonable explanation for the said delays, notwithstanding that there was an application for condonation, which was hopelessly inadequate, in his view.

He even alluded to the fact that the respondent has been remarried in April 2014 and that a rescission order would have far-reaching and complicating results for the respondent, who was perfectly entitled in law to get remarried, being armed with the judgment by default. He submitted that the applicant had also failed to show that she has a bona fide defence. He also submitted that the applicant should have used the variation application option offered in terms of Rule 42, which the applicant elected not to use, and concluded by asking the court to dismiss both applications – for condonation and rescission.

Application of the legal principles to the facts of this case

[19] I start off by listing those facts that I consider very pertinent to the adjudication of the matter, which are the following:

19.1. Whilst Mr Hadebe is correct in his submission that the dies non only apply to the notice to defend, the delay in launching the application herein was not inordinate. It was a delay enmeshed in the end of the year Christmas and New Year holidays and the concomitant beginning of the new year, when most entities are still closed for the holidays, and I am of the view that I can take judicial notice of the fact that most entities only engage in earnest business from around the middle of January in the new year. The applicant states that she approached the Legai Aid on the 5 January 2011 and was informed there that her intention to challenge the orders of December 2010 would be attended to.

Whether her allegation in this respect is sufficiently founded in her founding affidavit or not – in respect of which I find it unnecessary to make a finding – and thus refrain from doing so, as I am of the view that nothing turns on this point in the light of my other reasons for my judgment – is irrelevant. The fact of the matter is that the extent of the delay is not the one to raise eyebrows, especially if one bears in mind that the true issues at stake here are status matters – very important matters – regarding both the applicant and the minor child.

19.2. The applicant has demonstrated a genuine, bona fide intention on her part to contest her rights regarding the custody of the minor child and her patrimonial rights stemming from being married to the respondent in community of property, in a marriage that lasted approximately five years. Within a reasonable space of time (whether technically out of time or not with regard to the prescribed time frames) she approached the Legal Aid Board for assistance in asserting her rights.

19.3. Even if it could be argued that the Legal Aid was her attorney of choice, I am of the view that the principle that has previously been stated in some previous decisions that a litigant must stand or fall by the conduct of his or her attorney, must be applied with caution as regards an attorney from Legal Aid, as, unlike in a case where one instructs a private attorney at one's own expense, one has no choice of a specific or particular attorney when it comes to the allocation of an attorney to a matter by the Legal Aid.

The facts of this case, where the applicant's matter has travelled through the hands of three different attorneys from the same institution without any explanation therefore, bears acute testimony to this fact – that, strictly speaking, one's choice of an attorney in respect of Legal Aid is more of an illusion or perception than reality. Since the applicant's application was handled at all material times by the Legal Aid office, I will, in the particular circumstances of this case, be less stringent in holding the attorneys' defaults against the applicant. In my view, the applicant was entitled to expect the Legal Aid to prosecute her application to finality, although some level of blame can legitimately be placed at her door too, for failing to spur it on. We must not lose sight of the fact that, by definition, people who approach the Legal Aid for legal assistance and whose applications for assistance are approved (like in the case of the applicant) are indigent members of the community –

who approach the Legal Aid more out of need (and sometimes out of desperation) than as a matter of pure choice.

19.4. The respondent became aware from the very early stages of the post-divorce era (from February 2011) that the applicant sought to assert her rights by seeking a rescission of the divorce order, and by the time he remarried in April 2014 he was fully aware, especially as a practising attorney, that the dispute and the litigation between the parties was live. Amongst others, he should have known, and I find that he did know, that even if the applicant delayed (in his view) in the prosecution of the matter, he was not remediless – he could himself set the matter down for hearing,

in order to attain finality in the matter and also get certainty as regards his future (whether in respect of marital status or rights to custody of the minor child or the patrimonial consequences following on the divorce). Therefore, the respondent's claim of prejudice (actual or potential) from a rescission order is not a legitimate foul cry. He is also partly the author of his misfortune.

19.5. The applicant also approached the office of the Family Advocate for an assessment that would possibly assist her in asserting her custody rights. It suffices for purposes of this judgment to mention that the recommendation made by the Family Advocate's report is that "No recommendation can be made as the respondent refused to cooperate with the family advocate's office". The significance of this conclusion by the Family Advocate also lies in the fact that it shows that around the time of its compilation, in June 2013, before the respondent could remarry, he was acutely aware that the applicant was steadfast in her course to assert her rights through whatever legal means or channels possible.

19.6. As regards the custody and access to the minor child, the divorce order awards the custody to the respondent, and in relation to access simply provides at paragraph 2 that:

*"...reasonable contact and access with the child two weekends per month, long and short school holidays is shared equally".*

On the other hand, the Family Advocate expresses, amongst others, the opinion (in his report) that the respondent's non-cooperation impacts negatively on the best interests of the child, and it is in the child's best interests to have unrestricted contact with the applicant, and it is necessary that the best interests of the child be investigated as there are allegations of abuse in the form of neglect of the child. Therefore, on the facts of this case it cannot be said that the applicant's case is a hopeless one if the matter was to go on trial. In my view, there exists a triable issue in this matter in that the applicant's allegations regarding custody and forfeiture, if proven in a subsequent trial, would constitute a prima facie triable issues.

19.7. The applicant's conduct cannot be termed as one merely meant to delay the matter or harass the respondent. Preliminarily in my view, and without deciding the issues now, which is not for this court to do at this stage, it seems to offend my sense of simple justice between man and man (or man and woman) that the applicant who bore the respondent a child now aged approximately 14 years, who (applicant) spent a period of marriage to the respondent of

approximately 5 years, and in circumstances where the parties had accumulated an immovable property and 3 motor vehicles (as mentioned in the respondent's particulars of claim), should simply be made to walk away empty handed from the divorce – without any share of the joint estate and without the custody of the child,

in circumstances where the best interests of the child were not seriously explored by the court.

19.8. I am also aware of an authority (decided case which in the limited time at my disposal I could not readily locate) which is in support of the proposition that a default judgment in its essence is a matter where the merits of the unopposed matter are irrelevant as the court that grants it is entitled to grant an unopposed litigant the relief he or she seeks, as long as the court is satisfied that the other side was duly served with notice of such litigation, and presumably (where no notice to defend is filed) elected not to oppose the granting of the relief sought. Obviously, this is subject to the high court being the uppermost guardian of children, meaning that even in unopposed divorce proceedings, the court will endeavour to ensure that the minimum best interests of the child are jealously guarded. I use the word “minimum” within this context as the court would obviously be poorer in terms of its capacity to ascertain the best interests of the child without the benefit of inputs or ventilation from both parents and / or the child itself.

[20] I am of the view that the kind of issues at stake in this matter are of such great importance (with ingredients of the constitutionally entrenched right to housing, as the applicant stands to lose the common home, and likely to affect the status of each part involved) not only to the future of the parties, but also the minor child that it would be inappropriate,

especially in the particular circumstances of this matter, to have them finally adjudicated on the basis of some procedural advantage – and without a proper and fair ventilation of the issues on the substantive merits.

[21] There is no question that the parties agree on the irretrievable breakdown of the marriage, and thus there is no need, especially bearing in mind the potential prejudice to the respondent's new spouse (by effectively setting aside the new marriage if the rescission of the divorce order is granted), to interfere with the prayer regarding divorce.

[22] Section 8(1) of the Divorce Act specifically and expressly empowers the court to grant a rescission order, at any time, as regards the custody and access of a child. It provides the following:

*“A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this Act, may at any time be rescinded or varied ...”(my emphasis).*

I am thus satisfied that the applicant has made out a case for rescission of the orders as per paragraphs 2 and 3 only. I also find that the delay in launching the application for rescission must be condoned, not only because of the fact that there was no wilful default on the part of the applicant, but also because I find that she has demonstrated a prima facie triable issue, which shows that she might be successful on trial.

I also find, in passing, that Rule 42 would not be applicable as a remedy (by way of a variation application) as the jurisdictional facts applicable to the said rule are absent on the facts of this case, and thus the suggestion by Mr Hadebe offers cold comfort to the applicant. Consequently, the application for rescission must also succeed. As regards the doubt expressed by Ms Oosthuizen as to whether a court may rescind certain parts of a divorce order without necessarily rescinding the divorce order, I refer again to the provisions of section 8(1) of the Divorce Act and the example of the unreported decision of *M v M* (52110/2007) [2011] ZAGPPHC 155 (27 May 2011), where the court granted a rescission order that left the divorce itself intact.

[23] As regards the costs, a party that applies for rescission is ordinarily seeking an indulgence from the court and must, as a rule, be saddled with the costs of the application. However, this is not a hard and fast rule, the court has a discretion whether to follow it or not, obviously judiciously and not capriciously, after a due consideration of all the relevant factors. From the material before me and submissions made by on behalf of both parties, I am of the view that bearing the heavily skewed financial capacities of the parties – skewed glaringly in favour of the respondent, and the concession made by the respondent's counsel that he would not seriously ask for a costs order against the applicant, no order need be made as regards costs of the application.

[24] Consequently, I hereby make the following order:

24.1. The order granted on the 23 December 2010 is in part set aside, save for the order in paragraph 1 thereof (regarding the order for a decree of divorce).

24.2. The applicant is granted leave to defend the action under case number 5710/2010.

MOTLOUNG, AJ

On behalf of the applicant: Mrs MA Oosthuizen

Instructed by: Bloemfontein Justice Centre

On behalf of the respondent: Mr T Hadebe

Instructed by: T Hadebe Attorneys

Bloemfontein

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