

SOUTH AFRICA / JUDGMENT

N.S v I.S (A276/2018) [2020]

ZAFSHC 5 (23 January 2020)

[2020] ZAFSHC 5

COURT

Free State High Court, Bloemfontein

BEFORE

Reinders, Chesiwe

CASE / FILE NUMBER

A276/2018

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IN THE HIGH COURT

OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Appeal

number: A276/2018

In

the matter between:

N
S
Appellant
(ID
NO [...])
and
I S
Respondent
(ID NO [...])

CORAM:

REINDERS, J et
CHESIWE, J
HEARD
ON: 14
OCTOBER 2019

JUDGMENT

BY: REINDERS, J

DELIVERED ON: 23 JANUARY 2020

- [1] This is an appeal against the whole of the judgment and orders delivered by the Regional Magistrate H.S. van Niekerk in the Regional Court, Bethlehem on 13 September 2018.
- [2] The Appellant is Mrs N S, the Defendant in divorce proceedings under case number FS/BHM/RC/630/2014(D) (“the action”) and Applicant under the same case number (“the application”). The Respondent is Mr I S, Plaintiff in the action and the Respondent in the application. For ease of clarity the parties will be referred to as Mrs and Mr S respectively or the parties collectively.
- [3] On appeal before us Mr MA Maoba appeared for Mrs S. Mr S’s attorneys withdrew after the appeal was noted. Thereafter Mr S was informed numerous times of the date of enrolment of this appeal as is evidenced by correspondence attached to the record. He however chose not to appoint an attorney to oppose the appeal, or file a notice of opposition or appear in person on the date when the appeal was heard. The appeal accordingly proceeded on an unopposed basis.
- [4] A brief history from the record indicates that the parties were married in 2011. Mr S issued a summons for divorce and ancillary

relief during October 2014. Mrs S, through her attorneys, filed a notice of intention to oppose the action on 27 July 2016. Mr S filed a notice in terms of Rule 55A to amend his particulars of claim and amended his papers wherein he prayed for a decree of divorce, forfeiture of the benefits arising from the marriage in community of property, parental rights in respect of minor children and maintenance for the children. No plea was filed prompting Mr S to file a notice of bar on 12 September 2016. No response hereto was forthcoming, resulting in a notice of set down of the action for hearing on 27 October 2016. This notice was served on Mrs S’s attorneys on 12 October 2016. The matter was enrolled before the Regional Magistrate B.B Mahlatsi who heard the matter on an unopposed basis and granted the decree of divorce and ancillary relief on 27 October 2016.

- [5] On 14 May 2018 Mrs S launched an application termed “Application for variation of judgment in terms of Rule 49(8)”, praying for the following relief:

“1. That the Judgment granted by the above Honourable Court under the above case number be varied and corrected in that the said judgment is void ab origine and further that it was obtained by mistake;

2. That the decree of divorce be varied and corrected.
3. That the Respondent pays the costs of this application in the event of him opposing same.”

[6] In the affidavit in support of the sought relief Mrs S stated that she became aware of the “mistake as contained in the divorce order” in January 2018 when she was served with maintenance papers for the “minor children”. She consulted her attorneys who advised her that there were irregularities with the divorce decree. She thus seeks an order to vary same. She explains that there exists two divorce decrees (annexed to her founding papers) and she was originally served with an order which “on a perusal thereof” makes no mention of maintenance. After Mr S’s attorney send a letter to the clerk of the court, an order bearing the same date stamp was served. However, this order required her to pay maintenance in the amount of R 3 000-00 per month “per minor child” from 1 December 2016. She states that in terms of paragraph 2 of both orders there is no indication as to who forfeits the benefits arising from the marriage in community of property. In conclusion she avers that in the event the judgment is not varied, she would be prejudiced in that it would be expected of her to pay maintenance and further that she would have to pay maintenance for more than one minor child although there was only one minor child at the time of judgment by court. In addition she avers that both parties will be prejudiced because of the ambiguity in the forfeiture order. She concludes that the mistakes as alluded to, render “both decrees” void ab origine.

[7] Mr S filed opposing papers and explained that Regional Magistrate Mahlatsi granted the orders sought in the summons, including

maintenance for the minor children mentioned therein and forfeiture of the benefits of the marriage in community of property against Mrs S. He states that upon receipt of the typed copy of the decree of divorce, it was served on Mrs S. It was only hereafter that he noticed that the order did not include the maintenance order. He overlooked that the order failed to include the forfeiture order against Mrs S. This prompted a letter by his attorneys ostensibly to the clerk of the court who then corrected the order as to maintenance. However, the forfeiture order was not corrected. His affidavit concluded by praying for the dismissal of the application with costs, but requesting the court to correct the “typing error or incorrect recordal in the Decree of Divorce dated 278(sic) October 2016” (ostensibly referring to the forfeiture order). Mrs S filed no replying affidavit hereto.

[8] The application was enrolled for 12 July 2018. Having heard argument, Magistrate Van Niekerk reserved judgment. On 13 September 2018 the magistrate intimated that he listened to a recording of the proceedings (when the matter was originally heard on 27 October 2016) and according to him, it was clearly stated that the forfeiture order was in favour of Mr S. The record according to the magistrate confirmed that Magistrate Mahlatsi granted maintenance in the amount of R 3 000 per month per minor child. Magistrate Van Niekerk concluded that “the application must succeed” and made orders that Paragraph 2 of the original written order be varied as follows:

“Forfeiture of the benefits arising from (the) marriage in community of property in favour of plaintiff”,

and that Paragraph 6 of the original order be varied as follows:

“The defendant must pay maintenance of R 3 000 per month in respect of the minor child F S as from 1 December 2016.”

He concluded that each party should pay its own costs.

- [9] It is against this order that Mrs S appeals. In the notice of appeal Mrs S avers that Magistrate Van Niekerk erred in various regards. In particular she blames him for having listened to the original record and making findings on the evidence which were adduced before his predecessor. He was blamed for swopping the parties on the papers. It was argued that in as far as Magistrate Van Niekerk found that the application succeeded, it could only have referred to the application of Mrs S as there were no further applications serving before him. He was not entitled to make or clarify the order as to forfeiture as there was no proper application before him to do so, nor was he entitled to make amendments to the orders by his predecessor. He was blamed for not rescinding and setting aside the orders and not granting Mrs S the opportunity to defend the divorce action.
- [10] Mr Maobe in written heads of argument and before us prayed that we should “grant the rescission and/or variation of the divorce order as prayed for and order that paragraphs 2, 3, 4, 5 and 6 of the divorce order as granted by magistrate B.B. Mahlatsi be reviewed and set aside and further be referred to the court a quo for arguments de novo before any other magistrate other than magistrate H.S. van Niekerk or B.B. Mahlatsi”, or “such relief as the court deems fit.”
- [11] In my view Magistrate Van Niekerk did what the parties should have done in the first instance – he went and listened to the proceedings before Magistrate Mahlatsi to establish which orders were granted. Had the parties done so, the application (and the resulting appeal) would have been totally unnecessary.
- [12] The original transcribed proceedings of 27 October 2016 before Magistrate Mahlatsi was placed before us and the court’s full judgment reads as follows:

“...Having heard the legal representative for the plaintiff, reading documents filed on record, listen to viva voce evidence the Court orders that the bond of marriage between the parties be and are hereby dissolved.

Further that an order of forfeiture of benefits arising from the marriage in community of property is made in favour of the plaintiff.

Further the plaintiff and defendant retains full parental responsibilities and rights over the minor children in terms of the Children’s Act.

The Plaintiff having specific parental rights and responsibilities over the minor child of day-care, maintenance and also permanent residence.

The defendant having specific parental rights and responsibilities over the minor child which includes reasonable contact with the children, such contact rights including her having the children with her on alternate long and short school holidays.

The court further orders that the defendant pay maintenance in the sum of R 3 000-00 per child from the 1st of December 2016.”

- [13] On the papers before Magistrate Van Niekerk there was no application to have the divorce order set aside or rescinded at all. On the contrary, the notice of motion sought that the decree of divorce be varied and corrected based thereon that it was void ab origine and obtained by mistake. There was no evidence that the judgment was in any manner void ab origine or obtained by mistake. At best the complaint was that the clerk of the court issued two different orders bearing the same date stamp. This is a long way from being an order that is void ab origine (from the very beginning) or an order obtained by mistake. It is rather the clerk of the court having allowed incorrect orders to be sent to the parties.
- [14] In my view there was never any case made out based on the alleged grounds, nor was the magistrate requested to set aside the divorce order. The magistrate clearly dismissed Mrs S’s application and in my view correctly so. Mrs S also so understood the order of Magistrate Van Niekerk and hence the appeal. There was no counter application and no need for the magistrate to amend the order by Magistrate Mahlatsi. In the event that the parties (or a party) were of the view that any part of the order was vague or ambiguous, the court could have been approached for clarification thereof. Magistrate Van Niekerk was not requested to clarify any order nor can this court do so mero motu nor is there any reason to do so. The maintenance can only be payable to Mr S with regards to the minor child. It is common cause that there was only one minor child between the parties at the time of the divorce. It would in any event be easy to determine which child/children were minors at the time of the order.
- [15] This court’s concern is whether Magistrate Van Niekerk erred in any way. In my view he was correct in dismissing Mrs S’s application, but he should have refrained from making any further orders. Although I therefore intend to rectify the order of Magistrate Van Niekerk, the appeal cannot succeed or cannot succeed to the extent that the appellant requested.
- [16] In the result it is ordered that:
1. The orders of court dated 13 September 2018 is set aside and replaced with the following:
 - “(a) *The application is dismissed.*
 - (b) Each party to pay its own costs.”
 2. The appeal is otherwise dismissed.
 3. No order as to costs.

C. REINDERS, J

I concur.

S. CHESIWE, J

On behalf of appellant: Mr M.A. Maoba

Instructed by:

Maoba Attorneys

Ficksburg

On behalf of respondent: No appearance

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