

SOUTH AFRICA / JUDGMENT

R L v M L (5462/2008) [2020] ZAFSHC 211 (12 November 2020) [2020] ZAFSHC 211

COURT

Free State High Court, Bloemfontein

BEFORE

Mhlambi

CASE / FILE NUMBER

5462/2008

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 5462/2008

In

the matter between:

R

L Applicant

and

M

L Respondent

JUDGMENT

BY: MHLAMBI J,

HEARD ON: 17

SEPTEMBER 2020

DELIVERED ON: 12

NOVEMBER 2020

MHLAMBI, J

- [1] The issue for determination is whether the respondent, who was the plaintiff in the divorce action, committed fraud when he failed to inform the applicant, the defendant in that action and upon whom the divorce summons was personally served on 19 August 2008, of the date of the hearing of the divorce action.
- [2] The divorce order was granted on 18 September 2008 when the bonds of the marriage subsisting between the parties were dissolved and the care of the minor children was awarded jointly to the plaintiff and the defendant. In the combined summons, the only claims were a decree of divorce and that both the plaintiff and the defendant be awarded joint care of the minor children. The cost of suit was claimed only in the event of opposition.
- [3] In this application, the applicant seeks an order rescinding the divorce order granted on 18 September 2008 and a cost order against the respondent in the event of his opposing same.
- [4] In her founding affidavit, the applicant stated that she was served with a divorce summons on 14 August 2008. It came as a total surprise to her as she was still living together with the respondent as husband and wife. On the very same day, the respondent assured her that he would not persist with the divorce action and that he would instruct his attorney accordingly.
- [5] During July 2018, the couple had a heated argument which emanated from the couple's oldest daughter who had communicated to her mother, the applicant, that she had caught the respondent sleeping with another woman in the communal home. It was during this argument that the respondent informed the applicant that the couple were divorced years ago. The respondent left the common home during the course of October 2018. The daughter, as at the time, was already a major.
- [6] The respondent stated in his opposing affidavit that the marital relationship started to deteriorate during 2007. Around March 2008 he informed the applicant of his intention to divorce her. In April of the same year the parties had an argument following which the applicant left the common home and rented a room in Rocklands location, Bloemfontein. The parties were married to each other on 2 April 2005.

- [7] During July 2008 he instructed his attorneys to institute divorce proceedings against the applicant and the summons was duly served on her on 19 August 2008. On the same day of the service of the summons, the applicant contacted him and informed him of the service of the summons upon her. At the time he was still resident at Rocklands and informed the applicant that he was not changing his mind and would persist with the divorce action.
- [8] A few weeks after the service of the summons on the applicant, the matter was set down for hearing and finalised on 18 September 2008 as no appearance to defend was noted. At the finalisation of the divorce, he was still staying alone at Rocklands, Bloemfontein.
- [9] On receipt of a copy of the court order, he contacted the applicant by telephone and informed her that the divorce was finalised and that she could have the communal house and all the household furniture. He was prepared to start life afresh.
- [10] In both oral argument and the heads of argument, Mr Van Aswegen proposed in the abstract that if the respondent indeed assured the applicant that he would not proceed with the divorce action and then did exactly that without any warning to the applicant, it would constitute fraud. That was the truism because if the court knew that the applicant would have defended the action but for the fact that she was misled by the respondent, it would surely not have granted the order[1].
- [11] He referred me to the judgment of Patience Nondzondelelo Mbusela vs. The Eastern Cape Development Corporation[2] and argued that, as the fact and the parties' versions were diametrically opposed, I should adopt the approach followed in that decision which is stated as follows[3]:
- "In my view the grant of rescission can be likened to the grant of interim relief and the proper approach is to take the facts set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute and to determine whether, on those facts, the applicant is entitled to relief."*
- [12] In support of the assertion that the respondent's version was untenable, the applicant relied on the following three points:
1. The parties purchased a house together in August 2013. In terms of the power of attorney to pass the bond, the parties declared that they were married in community of property and this was reflected in the covering mortgage bond.
 2. Until October 2018 the applicant was listed as a dependent on the respondent's police service medical aid scheme ("POLMED"). It was not in contestation that in terms of POLMED'S rules, the membership of a spouse is terminated on divorce.
 3. The respondent failed to grapple with any of the allegations contained in the supporting affidavit of the applicant's mother, particularly that neither the applicant nor the respondent ever mentioned that they were divorced.

[13] The respondent's counsel, Mr Mazibuko, contended that the Mabusela judgment was not applicable as it referred to an interim

application and furthermore that the bar was set higher in the case of fraud. The applicant attempted in her founding affidavit to create an impression that the marital problems were of a minor nature whereas the respondent demonstrated that the problems were of a serious nature as shown by the respondent's leaving the communal home before the divorce action was instituted; an aspect that was not revealed in the applicant's founding affidavit. It was therefore disingenuous of the applicant to suggest that the respondent had never given the impression that he wanted a divorce before the service of the divorce summons. His vacation of the marital home was an obvious symptom of an imminent divorce.

[14] He submitted that the applicant's admissions were in harmony with the respondent's version of events. The property purchased by the parties together in August 2013, was to secure credit as the respondent, on his own, was ineligible for such credit. The explanation, it was submitted, was plausible as the respondent had acquired immovable property before as an unmarried person, after the parties' divorce.

[15] The respondent left the applicant as a beneficiary on his medical aid scheme as, shortly after the divorce, they started living together again.

[16] The respondent was prepared to leave the applicant with all the property in their joint estate and to start afresh in as far as the parties' joint estate was concerned.

[17] The real thrust of the applicant's case is that she is entitled to have the judgment rescinded on the ground that she was induced not to contest the divorce action by the respondent's fraud. What begs the question is whether the respondent assured her that he would not proceed with the divorce action. A reply to this question entails a consideration of the evidence as a whole. The initial impression given is that the applicant had a happy married life in the years that followed the service of the summons until July 2018, when the heated argument, relating to the respondent's alleged infidelity, took place between the parties.[4]

[18] What is immediately striking on the alleged question of infidelity, is the absence of the daughter's affidavit in support of such infidelity. The daughter was a major as at the time of the heated argument. Despite the telling revelation and the equally shocking news of the divorce, the applicant was unable to tell when precisely this argument took place, but was content to make use of hazy expressions such as "during approximately July 2018". Surely such unusual events must have left a mark on the applicant's life, more especially as they "having come as an absolute shock"[5] and should therefore not have been treated with nonchalance.

- [19] The applicant stated that she wasted no time to instruct the attorney of record who, armed with the divorce order received from the applicant's mother, traced and uplifted the court file, whereafter Advocate Van Aswegen was consulted on 24 October 2018 for an opinion on the prospects of success on an application for the rescission of the order. The opinion was given on 3 December 2018[6]. The court file shows its contents were uplifted by one Leneka Lee Singh on 5 October 2018 from the registrar's office and returned on 8 October 2018.
- [20] After the initial consultation, she sought a further consultation with counsel to discuss a few aspects of his opinion before making a final decision and the attorney was instructed to arrange a further consultation with counsel, which was then held on 23 January 2019. The aspects of the opinion that needed clarification were not disclosed. On 23 January 2019, she decided to proceed with the application, mindful of the legal advice that a number of factual issues needed to be addressed before the application could be drafted. The application papers were settled on 11 March 2019. This version raises some concerns as it is not clear which aspects of the opinion and factual issues had to be addressed before a final decision was made. The cause of the action as pleaded, appeared simple and straight forward enough and should not have presented any complexities.
- [21] Mrs M, the applicant's mother, stated that from time to time she went to the parties' communal home to assist with house work. She would wash and iron their clothes, tidy up their cupboards and so forth. "During approximately the middle of 2018, she could in all honesty not recall the exact date or month," whilst cleaning a cupboard in her grandchild's room, she came across an unmarked white envelope placed under a stack of clothing. The envelope was not sealed, and she opened it to see what was inside so that she could decide what she had to do with it. She was bewildered to discover the contents to a divorce order relating to the applicant and the respondent, neither of whom had mentioned such fact at any stage.
- [22] She took the envelope home with her and she could not get herself to discuss the divorce order with the applicant as she did not want to spark unnecessary controversy and tension. She thought that the applicant had a good reason for not telling her of the divorce. About two months later, the applicant confided and informed her that she had an argument with the respondent during which he told her that they were divorced. At first she, the applicant, did not believe him but he was adamant that there was a divorce order. Mrs M informed the applicant of the divorce order and gave her the envelope which contained the said order.
- [23] It is significant that the mother was very vague about the times of the discovery of the divorce order and when she gave the envelope to the applicant. One can only guess that the middle of 2018 she referred to, could either be in June or July. If it be so, it would mean that the envelope was handed over to the applicant in either August or September 2018. Like the applicant, Mrs M did not make a full disclosure of the events surrounding the discovery of the divorce order nor were the particulars given of the grandchild in whose room the envelope was found. Both the applicant and her mother took time to disclose to each other the shocking and bewildering news pertaining to the divorce. She, Mrs M, consulted with

counsel only on 4 February 2019 when the applicant's "legal representatives also held a consultation with my mother on 4 February 2019 to understand how exactly it came about that she had obtained a copy of the divorce order as I explained above." [7] It would appear as if the applicant's legal representatives had misgivings as to the manner of the discovery of the divorce order.

[24] Two questions spring to mind: firstly, if the respondent was so adamant about the divorce having taken place, why did the applicant,

for a period of three months, not insist and demand that the respondent provide her with a divorce order to ascertain both the

divorce fact and the forum where the divorce was granted? Secondly, why did she and her mother take two months to discuss the divorce? Is it a coincidence that the mother discovered the divorce order by chance in the grandchild's cupboard at the time the parties are alleged to have had a heated argument which led to the respondent's disclosure of the finalised divorce. These questions remain unanswered.

[25] Until July 2019, the applicant stated that she genuinely believed that she was still married to the respondent and that there was no remote suggestion that he had obtained a divorce decree. [8] The fraudulent misrepresentation was based on three factors:

- (a) The purchase of the property during October 2013;
- (b) The medical aid scheme (POLMED) on which she was listed as a member;
- (c) That the respondent failed to canvas the division of the common estate with her. [9]

[26] A lot of criticism can be levelled against the applicant's version. Despite the alleged happy marriage, it is obvious that there were cracks in the parties' marriage long before the divorce. The applicant failed to disclose the respondent's absences from the common home in the founding affidavit and only conceded and disclosed them in her replying affidavit. She conceded that the respondent rented a room at Rocklands location before the divorce. In her replying affidavit, she initially denied that the respondent left the common home during April 2018 and averred that the respondent left the communal home after she had confronted him over the issue of sleeping with another woman as informed by her daughter [10]. However, she admitted that the respondent stayed with his father from April until July 2018 when his father insisted that he should return to the applicant to resolve any issues with her for the sake of the children [11].

[27] It is evident that the respondent did not disclose fully the events in her affidavits and chose to play her cards close to her chest. It is also clear from the perusal of her affidavits that she was evasive, chose not to respond to allegations and gave bare denials when it was expected of her to respond to such allegations. A case in point is her failure to respond to paragraphs 2.19 to 2.22 wherein the respondent stated that he purchased, during 2011 or 2012, a property at Mafora location as an unmarried person, the applicant being fully aware that he

was doing so in that capacity for the future of his children. The applicant had, during the conclusion of that transaction, accompanied him and signed the informal agreement between himself and the seller as a witness. One would have expected that the applicant would have insisted on being a party to such agreement as she alleged to have been married to the respondent in community of property at the time as portrayed in the founding affidavit.[12] Failure by the respondent to address these allegations in the answering affidavit[13], militates against the applicant's attitude that she was married to the respondent at that time.

- [28] The applicant alleged on this point that the parties had stayed together on this property[14] and that it was acquired through the implementation of the provisions of the Conversion of Certain Rights into Leasehold or Ownership Act, following the declaration by the Director-General of the Province. This allegation does not make sense as the sale agreement was between Kenalemang Gladys Phahlo, as the seller, and not the Director-General of the province. The purchase price was the sum of R 30 000.00 and the house was transferred to the respondent as an unmarried person. It is equally strange that the applicant made such allegations in her replying affidavit despite having had sight of the deed of transfer which showed the respondent to be the sole registered owner. The property was purchased and acquired by private treaty and was not, ex facie the documents, subject to the government's subsidy scheme as it then applied.
- [29] The applicant admitted the allegations by the respondent that after this transaction, the relations were getting better between the parties and that they had a good time staying with the children as a family. All these happened with the applicant's full knowledge that they were divorced.[15]
- [30] Both parties referred me to the case of *Rowe v Rowe*[16]. This case is distinguishable from the present one as in that the case (which was defended) the respondent had perpetrated a fraud on the court itself. It was stated that the court was duty bound to satisfy itself that the parties' arrangements would serve the best interests of the minor children and this could only be done on truthful information supplied by the parties. The respondent in that case knew that the appellant was unaware of the state of affairs and unwittingly deceived the court by presenting a settlement agreement which the latter was induced to sign fraudulently representing that he sired the two minor children.
- [31] The closest that the applicant could come in an endeavour to apply the principle set out above, was her description of the respondent's conduct as unpalatable, being the respondent's alleged representation to the court that there was a mutual agreement that he would have the primary care of the minor children in annexure "A" to the divorce summons, whereas there were no such discussions.[17] A perusal of the said annexure (Regulation 2 of the Mediation in Certain Divorce Matters Regulations 1990) indicates the recordal as follows:

"No. Mutual agreement. Plaintiff will be in better position to care for the children because his mother looks after the children if he cannot and the defendant works on Saturdays and Sundays."

The quoted extract was a response to the invitation in the said document that it should be stated whether arrangements were made regarding the minor children. It would therefore seem that the applicant's allegations are not wholly correct as the reading and interpretation of the handwritten response quoted above is ambiguous and prone to a different interpretation as borne out by the contents of the previous paragraphs in the document.

- [32] It is significant that the applicant did not deny in her replying affidavit that the respondent left their home after their argument relating to a loan she obtained from Old Mutual (even though she denied that the sheriff went to their house to execute on that debt). In her replying affidavit, she adapted, tweaked and adjusted her version to correspond to the respondent's version. Even though it was submitted on behalf of both parties that their versions were diametrically opposed or mutually destructive, in my view, the applicant's version, by virtue of its fluidity, corroborated rather than destroyed the respondent's version. Seen as a whole, her version is but unreliable and does not assist her case much.
- [33] The apparent fraudulent misrepresentation based on the three facts[18] relied upon by the applicant, took place after the divorce was granted and not at the time of the divorce. These points underscore the applicant's case as overarching facts to portray the respondent's version as untenable and employed to illustrate that the respondent misled the applicant about the divorce. I have a difficulty with such an approach as the alleged fraud did not take place at the time of the divorce, but after. Similarly, Mr Van Aswegen's argument in the abstract is not of assistance as there is no factual basis whereupon a finding could be made that the respondent deliberately misled the applicant. Indications are that, from the summons stage, the respondent was transparent about the divorce.
- [34] A judgment procured by fraud of one of the parties, whether by forgery, perjury of any other way such as the fraudulent withholding
- of documents, cannot be allowed to stand.[19] At common law, any cause of action that is relied on as a ground for setting aside a final judgment must have existed at the date of the judgment. There must be some causal connection between the circumstances that give rise to the claim for rescission and the judgment.[20]
- [35] Fraud can consist not only in the wilful making of incorrect statements but also in the withholding of material information with fraudulent intent. The mere circumstance that certain material facts were not disclosed does not in itself establish that there was wilful concealment. A fraudulent intent must be affirmatively proved. Charges of fraud should be formulated with the precision and fullness demanded in a criminal case.[21]
- [36] On the consideration of the evidence as a whole it is evident that:
1. The applicant and her witness did not play open cards and the applicant's version was neither consistent nor constant but adapted from time to time;

2. She did not deny some of the crucial aspects in the respondent's version and indeed, her version corroborated his.

3. She filed the application in order to create an opportunity to file a counterclaim for the division of the joint estate, primary care of the two minor children and maintenance;

[37] She conceded that she was not opposed to an order that would, in effect, permit the prevailing status of the parties to continue

whilst simultaneously affording her the opportunity, to which she is entitled, to prosecute the counterclaims as mentioned above.[22] In such circumstances it would be inappropriate to set aside the divorce and to return the parties to a state of matrimony as this

would deny them their rights to dignity and privacy. It follows therefore that the only issue for determination is whether the

applicant has succeeded to prove that the rescission should be granted in respect of the second prayer relating to the joint custody

of the minor children. The order granted during the divorce, did not prejudice the applicant but buttresses the view that this application was launched solely for the purpose of opening the door for a counterclaim. Having considered the factual matrix, I find that it would not be just and equitable to grant an order as per the relief sought on this ground alone.

[38] The applicant failed to give a consistent and plausible explanation why the application was only launched during March 2019. Her explanation that counsel was busy and she could not employ the services of other counsels is without substance as it is evident that despite the counsel's advice given on 3 December 2018 as to whether she had any prospects of success in seeking the rescission of the order, she had further issues to resolve despite subsequent consultations before the papers were settled on 11 March 2019.

[39] In consideration of the above and Mr Van Aswegen's submission based on Mabusela[23], it is clear that the applicant's version is more preferable than the respondent's and the applicant is therefore not entitled to the relief sought. Besides, the applicant failed to disclose sufficient grounds why the court should regard the delay within which the application was launched as reasonable. In this regard I make the following findings:

1. The applicant was not resident at the common home when the divorce decree was granted;
2. The respondent informed the applicant of the finalisation of the divorce on that day (which goes to explain the presence of the divorce order in the communal home) and that the respondent knew during 2008 that she was divorced and acquiesced therein.
3. The applicant failed to show that the respondent misled her and obtained the divorce order by either deceit or fraud.
4. The applicant failed to make a case that the application was filed within a reasonable time.

[40] In the result I make the following order:

Order:

The application is dismissed with costs.

JJ MHLAMBI, J

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- [1] Applicant's heads of argument: paragraph 13
- [2] Case No: CANR 40/2019 Eastern Cape Local Division: Mthatha Unreported
- [3] Paragraph 9 of the said judgment
- [4] Paras 11 and 12 Founding Affidavit
- [5] Paragraph 13 Founding Affidavit
- [6] Paragraph 18 of the Founding Affidavit
- [7] Paragraph 22 of the Founding Affidavit
- [8] Paragraph 28 of the Founding Affidavit
- [9] Paragraphs 30 to 32 of the Founding Affidavit
- [10] Paragraph 47 of the Applicant's Replying Affidavit and paragraph 2.29 of the Respondents Opposing Affidavit
- [11] Paragraph 48 of the Applicant's Replying Affidavit and paragraph 2.30 and 2.31 of the Respondent's Opposing affidavit
- [12] Paragraph 30.1 of the Founding Affidavit
- [13] Paragraph 2.20 and 2.21 of the respondent's Answering Affidavit
- [14] Paragraph 27 of the Replying Affidavit and paragraph 2.19 of the Answering Affidavit

[15] Paragraph 2.22 of the Respondent's Answering Affidavit and paragraph 37 of the Applicants Replying Affidavit

[16]

[1997] ZASCA 54; 1997 (3) All SA 503 (A)

[17] Paragraph 33 of the Founding Affidavit

[18] Paragraph 29 to 32 of the Founding Affidavit

[19] Schierhout vs. Union Government 1927 AD 94 at 98

[20] Swadif (Pty) Ltd vs. Dyke N.O 1978 (1) SA 1928 (A) at 939 E-F

[21] Schierhout supra at 98

[22] Paragraph 48 of the Founding Affidavit

[23] supra

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