IN THE HIGH COURT OF SWAZILAND

JUDGMENT

REPORTABLE
Case No. 4379/05

In the matter between

REUBEN BERNARD RAUTENBACH **Applicant**

and

ROSE RAUTENBACH **Respondent**

Neutral citation: *Rose Rautenbach v Reuben Bernard Rautenbach (4379/05*) [2013] SZHC127 (02 July 2013)

Coram: **Mamba J**

Heard: **05 June, 2013**

Delivered: **02 July, 2013**

[1] Civil Law and Procedure – Application for rescission of judgment in terms of rule 31 (3) (b) of the Rules of Court and Common Law – Applicant required to show good cause for his default and a bona fide defence to the action. Court has judicial discretion to grant or refuse application.

[2] Civil Law and Procedure – Application for rescission of judgment – where applicant was in willful default of appearance, court has no discretion but to refuse application.

[1] This is a rather old rescission application. It was filed with the registrar and served on the respondent's attorneys on 15th March, 2006 and it was set-down to be heard on 31st March, 2006. Since that date, it has been in court and postponed on no less than ten occasions. The reasons for these postponements have themselves been legion and as one would expect, it has practically appeared before all the judges of this court, bar the Chief Justice.

[2] The parties and their respective attorneys have leveled numerous unsavoury or unpalatable accusations or allegations against one another; ranging from unethical and improper behaviour on the part of the attorneys and acts of witchcraft or belief in the occult and utter greed, racism and debauchery between the parties herein. Ever-since the inception of this application, none of these accusers or disputants has recanted and pleaded 'Deus Misereatur.'

[3] I refrain from making any comment on these exchanges amongst the disputants herein because, *inter alia* they are largely irrelevant for a proper determination of this application and because there is indication on the papers before me by Counsel for the respondent that

the issues between them herein were referred to the Law Society of Swaziland and the then Chief Justice of this Court.

[4] By summons issued by the Registrar of this court on 25th November, 2005, the respondent filed an action for divorce against the applicant, to whom she was married under civil rites and in community of property. She also prayed for an order for the custody of their two minor children, their maintenance and that the applicant forfeits all benefits arising from the said marriage. She accused him of adultery with various women, including her niece, one Sthembile Maseko.

[5] The summons was duly served on the applicant on 16th December, 2005 which happened to be the last day of that year's court session. The court went into recess until 16th January, 2006.

[6] As there was no notice of intention to defend the action filed by the respondent, the respondent successfully applied for the relief sought in her summons on 10th February, 2006. This, the court did after hearing evidence from her and obviously being satisfied that there had been proper service of the summons on the applicant and the period

allowed to him to file his notice of intention to defend had expired. It is this default judgment that the applicant now seeks to rescind and or set aside.

[7] I should also note that it is common cause that before obtaining the default judgment aforesaid, the respondent filed an application for maintenance pendente lite against the applicant. This application was duly opposed by the applicant. The relevant notice of intention to oppose was filed and served with the respondent's attorneys on 16th January, 2006. This application was filed under the same case number as the action referred to herein.

[8] The rescission application has been filed in terms of rule 31 (3) (b) of the rules of this court. This sub-rule provides that:

> '(b) A defendant may, within 21 days after he has had 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 and upon the defendant furnishing to the plaintiff security for the payment of the costs of the default judgment and of such application to a maximum of E200.00, set aside the default judgment on such terms as to it seems fit.'

So, other than showing that he has a bona fide defence to the action,

an applicant must show good cause why he was in default; in this case, of filing his notice of intention to defend the action. This is required of him under the above rule and the common law. See *Dlamini, Polo v Nsibande, Martha; In re: Nsibande Martha v Dlamini Polo and others, 2000-2005 (1) SLR 13* and the cases cited therein

[9] The applicant has stated in his founding affidavit that:

9.1 he wished to defend the action herein and duly instructed his attorneys to file his notice of intention to defend, which they did timeously;

9.2 the notice for default judgment was not served on his attorneys and

9.3 he has a bona fide defence to the action inasmuch as he is not guilty of any of the adulteries alleged against him by the respondent. He also states that the respondent failed to give the particulars or details of the alleged adulteries and therefore the court should not have granted the judgment in her favour. Lastly, he alleges that he was not in wilful default.

[10] The respondent and her attorneys denied that they had ever been served with the said notice of intention to defend. No such notice could be found in the court record either. The applicant's attorneys were unable to exhibit a copy of this notice and were also unable to state when such notice was filed with the registrar's office or served on the respondent's attorneys.

[11] In fairness to Counsel for the applicant, despite his dogged insistence in his supporting and confirmatory affidavit, that he had indeed actually executed, filed and served the alleged notice of intention to defend, which had subsequently "fallen out of the court file" he did not seriously pursue this line of argument in his submissions before me. Instead, he urged the court to consider that the applicant had desired to defend the action and had instructed his attorneys to do so but had been seriously and inexplicably let down or been failed by them. Mr Simelane submitted that he could have been confused and misled by the signing and serving of the notice of intention to oppose the application for MPL.

[12] The applicant avers in his affidavit that the forfeiture order is gravely prejudicial to him as he "stands to lose all [his] property that [he] has worked for the whole of [his] life [which] properties run into millions of Emalangeni." He makes reference to the fixed property registered in his name which was purchased using a loan granted to the respondent by the Swaziland Building Society. The property was purchased for E258,000.00 in 2000 and is mortgaged in favour of the Building Society.

[13] When the matter appeared before me on 4th June 2013, I was informed by both Counsel that it had been agreed between them that the final decree of divorce granted by this court on 10th February 2006 was no longer in issue and that the court was only being asked to rescind the forfeiture order or in respect of the properietory issues. I pointed out to Counsel my difficulties about this suggestion, namely that these reliefs were merely ancillary to the divorce decree and could not in law be revisited or re-opened by the same court without the substantive decree of divorce being rescinded. After both Counsel had consulted, the court was informed that the difficulties I had expressed to them were real and the rescission application had to

proceed wholesale – as originally filed.

[14] In her opposition to this application the respondent and her then attorneys of record, have stated that the applicant deliberately refrained from filing his notice of intention to defend the action. They state further that the reason for doing so was because he wanted the divorce to go ahead as unopposed and he had long desired this to be the case. They have both referred to past correspondence between the parties in this direction and the many acrimonious confrontations between the applicant and the respondent. These incidents, they argued, prove that the marriage between the parties had irretrievably broken down and the parties wanted a divorce. The respondent has in effect argued that this application is an afterthought by the applicant who is trying only to get a share of the property forming the joint estate and it is a contrived stratagem by him and an abuse of the court process.

[15] The respondent has further argued that this application is fatally defective inasmuch as the applicant has failed to furnish the required security for her costs but has only made a tender for same.

[16] The applicant has failed in my judgment to show good cause for his default. I do not think that it is necessary or desirable to burden this judgment with the correspondence exchanged between the parties herein before the divorce decree. Suffice to say that it is plain therefrom that both parties were experiencing very tough times in their marriage and had resigned themselves to bring it to an end. This is further evidenced by the suggestion mentioned above that was put to me by counsel relating to the issues in this rescission application. These factors bring me to the conclusion, which is inevitable in the circumstances, that the applicant deliberately refrained from defending the divorce action. This application is merely a belated attempt by him to salvage something from the joint estate. It is too late I think. The respondent has a judgment in her favour lawfully issued by this court. She expects it, like any other judgment creditor, to have it executed. Furthermore, it is not in the interests of justice that cases should be rescinded at the whim or instance of a party who willfully spurned his chances of filing his defence. In this case, the good cause that is required at common law and in terms of rule 31 (3) (b), is wanting or absent and the court has no discretion. It has to dismiss the application. Vide *Maugean t/a Audio Video Agencies v*

Standard Ltd 1994 (1) SA 801.

[17] In reaching the above conclusion, I leave open the question whether or not the applicant and his attorney have perjured themselves in these proceedings.

[18] Even if I were to believe or accept that the applicant in fact did instruct his attorney to defend the action, I would nonetheless hold that his attorneys tardiness or remiss which is unexplained, is inexcusable. The applicant has to bear the consequences of his attorney's actions. (See *Siphamandla Ginindza v Mangaliso Clinton Msibi In re : Siphamandla Ginindza v Mangaliso Clinton Msibi civil appeal case No. 6/2013* (unreported judgment of the Supreme Court delivered on 31st May 2013).

[19] As noted above, the respondent also submitted that the applicant has failed to furnish security for costs as required by the relevant rule. It was argued that a tender for such costs was not compliance with the rule. Whilst an applicant is generally expected to furnish such costs when launching or filing his rescission application, it is normally

accepted as sufficient compliance with the rule if such security for costs is tendered during the course of the application as long as it is before judgment. This was done in this case. See *Adjoodha v Mario Transport, 1976 (3) SA 394 (T).*

[20] For the foregoing reasons, this is not a matter on which this court has to exercise a discretion. The applicant was given the opportunity to defend the action. He, however, exercised his right not to defend it. He made his bed and must now lie on it. The application is dismissed with costs.

[21] This could be a proper case for the court to dismiss the application with costs on a punitive scale, but because of the respondent's initial stance or attitude herein of requiring the court to deal only with the ancillary or proprietary relief in this application, I do not think that the respondent is entitled to costs at this scale. The costs shall be on the ordinary scale and I so order.

MAMBA J

For Applicant : Mr M.P. Simelane

For Respondent : Mr Manyatsi