



**IN THE SUPREME COURT OF SWAZILAND**

**JUDGMENT**

Civil Appeal Case No.38/13

In the matter between:

**ROSE RAUTENBACH**

**Appellant**

**vs**

**RUEBEN BERNARD RAUTENBACH**

**Respondent**

**Neutral citation:** *Rose Rautenbach vs Rueben Rautenbach (38/13) [2013] [SZSC 58] (29 November 2013)*

**Coram:** A.M. Ebrahim J.A.  
M.C.B. Maphalala J.A.  
E.A. Ota J.A.

**Heard:** 07 November 2013

**Delivered:** 29 November 2013

**Summary:** *Civil appeal against the refusal to grant rescission of judgment on the basis that Applicant was in wilful default – Held that the application for rescission should have been granted as it could not be said that the Applicant was in wilful default – The interests of the children were paramount and necessitated the need for a proper hearing on the merits of the dispute between the parties.*

**EBRAHIM J.A.**

[1] The Respondent issued summons against the Appellant for divorce. The parties had been married according to civil rites and the marriage was in community of property. In her summons, the Respondent sought an order for the custody of the children of the marriage, maintenance for the children and that the Appellant should forfeit all benefits from the marriage. Allegations were made in the declaration of adultery on the part of the Appellant (including adultery with the Respondent's niece).

[2] There is some confusion about the date of issue of the summons, as it is dated 25 January 2005, whereas the Registrar's stamp is 28 November 2005. However, the Respondent's attorney claims (page 51 of the record) that the summons was served on the Appellant on 16 December 2005. The court went into recess on that date until 16 January 2006. On that date, the Appellant filed a document entitled "Notice of intention to oppose". What he intended to oppose is not clear. His, and his attorney's attitude is that the notice constituted a Notice of intention to defend the action. The court *a quo* treated it as a Notice of intention to oppose the grant of maintenance *pendent lite*, an application for which had been filed by the Respondent on 13 January, while the court was in recess. In support of this claim, the Respondent filed an affidavit (pp 94 ff of the record). An answering affidavit was filed by the Appellant on 25 January 2006. Against the background of these facts, it is my view, that the Appellant clearly was conducting himself in a manner which

suggests that he was taking issue with the assertions made by the Respondent. In other words he was putting in issue a number of the allegations made by her and this was indicative of his intention to defend the matter brought against him.

- [3] On 14 February 2006, in the absence of any appearance by the Appellant, *Ebersohn J* granted the divorce and ancillary orders sought by the Respondent. It was ordered that the Appellant should forfeit the benefits of the marriage in community of property and it was declared that the Respondent was sole owner of the property forming the matrimonial home. I am concerned with the nature of the order granted by the learned judge. I call into question whether the learned judge gave consideration to the welfare and status “of the children” of the marriage. Particularly as the status of the children was being called into question, see the case of *Williams v Williams, The Gambia Court of Appeal No.34/2007* at page 30 the *Honourable Judge Ota, PCA* (as she then was) made the following observations:

**“As the law has developed over the decade the child’s welfare has effectively become the sole consideration at least in the sense that all other considerations are considered in the light of the child’s welfare. As Lord MC Dermott put in *JVC (1970) AC 668*, ‘These words must mean more than that the child’s welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other**

**circumstances are taken into account and weighed the course to be followed will be that which is most in the interest of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration it rules upon or determines the course to be followed."**

[4] On 10 March of that year, the Appellant signed a Notice of application for rescission of the default judgment. He also sought a stay of execution of the judgment. The application appears to have been lodged on 15 March. In his founding affidavit, he alleged that the Notice seeking default judgment was not served on his attorneys and so he was not in wilful default. In addition, he claimed he had a defence on the merits. He also said that the boy Richard is his son, but the Respondent is not Richard's mother; and that the girl Roxette is the daughter of neither of them, but a child they were considering adopting. It is apparent that there were two children "of the marriage" whose welfare called for careful consideration. It seems to me that it was therefore, ill advised that a more careful approach was not adopted before the granting of a default judgment, particularly as there were facts present which were suggestive of the matter being defended by the Appellant (as is apparent *supra*) and also that the custody of the children was being placed in issue.

[5] The Respondent then, on 30 March 2006, filed a Notice of opposition to the application. In her answering affidavit, she denies many of the allegations made by the Appellant, in particular the allegations about the children. There

is also a copy in the record of an order regarding the adoption of the child Roxette by the Appellant in December 2001.

[6] The record is not clear about the sequence of events thereafter, but it would appear from the judgment of *Mamba J* (against which the present appeal has been brought) that, although the application for rescission was originally set down for hearing on 31 March 2006, it had been in court and postponed no less than ten times. The parties and the attorneys had exchanged a great deal of acrimonious correspondence.

[7] When the matter finally came before *Mamba J*, the parties agreed that the divorce itself was not in issue and that the court was being asked only to rescind the order for forfeiture of the benefits of the marriage in community of property. The learned judge considered that, as the forfeiture order was ancillary to the divorce order, the application should be dealt with as a whole. Having then considered the history of matter, he concluded that the Appellant had deliberately failed to defend the divorce action. He found that the Appellant had failed to show good cause for rescission. He held that if the Appellant had intended to defend the divorce action and that this was thwarted by his attorneys' tardiness or failure to follow correct procedures, this did not help the Appellant: he had to bear the consequences of his attorneys' conduct. Accordingly, he considered that he had no choice but to dismiss the application for rescission. It seems to me that this was an over simplistic approach and the

learned Judge appears not to have taken into account in particular the presence of young children whose welfare needed to be carefully considered.

[8] In the notice of appeal, the Appellant asserts, *inter alia*, that the trial court erred by granting a forfeiture order without making a finding as to whether or not the Appellant was responsible for the breakdown of the marriage.

[9] It seems to me that there was a great deal of confusion about just what was being opposed when the Appellant filed the “Notice of intention to oppose”. He avers that it was always his intention to oppose the main claim, not because he was opposed to the divorce itself, but because of the proprietary consequences of his alleged acts of adultery. I have to say that the record leaves me confused too.

[10] Wilful default occurs when a party, with the full knowledge of the service or set-down of the matter, and of the risks attendant upon default, freely takes a decision to refrain from appearing. The wilfulness of a default is seldom clear-cut. There is almost always an element of negligence, and the question arises whether it was such gross negligence as to amount to wilfulness. The expression relates to that extreme of circumstances where the Applicant knowingly and deliberately refrained from opposing the relief sought. However, even in a case of wilful default, if a satisfactory explanation can be

given for the acquiescence in the judgment, and other circumstances, including the merits of the defence, justify such a conclusion, good and sufficient cause may be established. See *Hutchinson & Anor NNO v Logan 2001(2) ZLR 1 (H)*. It is clear that the Appellant was always vehemently defending himself against the allegations of adultery, those allegations presumably being the basis for making the proprietary order against him. The Appellant's attorney seems to be suggesting that he may have been responsible, at least in part, for the confusion that appears in the record (see pp 20 ff of the record).

[11] I am not convinced, in the circumstances, that the Appellant was in wilful default. The application for rescission should have been granted. There are too many issues of a sensitive nature which call for a proper hearing on the merits. There is of course, nothing precluding the parties from reaching an amicable resolution and coming to an agreement on all the proprietary rights and also as to the status and welfare of the children. Suffice it to say I am of the view that the rescission application should have been granted and it is so ordered.

[12] Accordingly the appeal is allowed with costs.

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A.M. EBRAHIM  
JUSTICE OF APPEAL

I agree

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M.C.B. MAPHALALA  
JUSTICE OF APPEAL

I agree

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E.A. OTA  
JUSTICE OF APPEAL

**For the Appellant :**

**For the Respondent :**