IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO.65/14

IN THE MATTER BETWEEN:

MALEFETSANE LEPELE APPELLANT

AND

MACHAKELA HELENA LEPELE RESPONDENT

CORAM : MOKGORO, AJA
MONAPATHI, JA
MUSONDA, AJA

HEARD ON : 28TH JULY 2015

DELIVERED ON : 7TH AUGUST 2015

Summary

Civil Procedure – Rescission – when can a judge order rescission – a decree of divorce granted in default of defence – Advocate withdrawing defence without instructions from client - client having been desirous to rebut allegation of adultery – when can rescission be ordered – when can appellate court interfere with the trail court exercise discretion and findings of fact.

MUSONDA, AJA Delivered the judgment of the Court

1.0 This s an appeal from the decision of the High Court to rescind a divorce order granted to the appellant herein called the appellant against the respondent. The appellant sought divorce on the ground of adultery. The respondent approached her then counsel Mr Masoabi under LJ Ramakhula Chambers, with instructions to contest the allegations, as the allegations were untrue. The withdrawal to contest the allegations would impact negatively on her integrity.

1.1 On 22nd May 2012, the appellant filed for divorce on the ground of adultery or alternatively an order directing the restoration of conjugal rights, failing compliance therewith an order of divorce on the grounds of malicious/constructive desertions, forfeiture of the benefits arising out of the marriage.

1.2 On 1st June 2012 T. Hlaoli & Co. the defendants attorney wrote to the plaintiffs' attorneys about the intention of the Respondent to defend. On 25 the July 2012, the Respondent filed a plea in which she denied adultery, restorations of conjugal rights, forfeiture of the benefits arising out the marriage, costs and alternative relief the cort would deem fit. She prayed for the dismissal of the action.

1.3 On 11th October T. Hlaoli & Co, the attorneys withdrew defending the Respondent. On 17 the October 2012, divorce was granted to the Appellant on the ground of adultery on 11th October 2012. Conveniently the Appellant's Counsel wrote to Ramakhula Chambers proposing on how the matrimonial property was to be shared and other ancillary relief.

1.4 On 11th February 2013, the current Advocate for the Respondent wrote to the Appellants Advocates that, although divorce would have been granted by consent, it should not have been granted on the allegations of adultery levelled in the summons.

1.5 On 3rd May 2013, a notice of motion to rescind, correct or set-aside the order as having been erroneously granted was filed and a founding affidavit had been filed 11th April 2013 on 15th May 2013, The appellant disputed materially what was contained in Respondent's affidavit.

1.6 On 4th June 2013, Mr Masoabi swore an affidavit concurring with the Respondent's affidavit, that she had at all times been desirous to defend, the allegations contained in the divorce petition. On 12th July 2013 the learned judge the court *a quo* delivered judgment rescinding the decree of divorce.

1.7 The learned Judge found as a fact that:-

(i) That notice to set down was also filed in court on the same date that the alleged notice of withdrawal of the applicant's withdraw of her defence was filed by Adv Ramakhula. There is nowhere where it is indicated by her then attorneys of record Mr Masoabi, that they had since withdrawn the defence. In fact the meaning of the contents of this notice is very ambiguous to the extent that it is not clear whether or not the said attorneys acted on the instructions of the defendant/applicant in having withdrawn her defence.

(ii) This has placed the defendant/applicant in an insidious position particularly because she was never made aware of the intention of her said attorney of withdrawing her defence. She denies having instructed her said attorneys to withdraw her defence. She says that she got to know to the default judgment in question on the day that she had attend the Court annexed mediation. The said mediation was with

regard to ancillary matters since divorce had already been granted against her on the ground of adultery.

(iii) The above fact has not been denied by the Plaintiff/Respondent in the instant application. This therefore remains unchallenged and admitted. Her attendance of the court annexed mediation proceedings is an indication that she wanted to be heard in the main action of divorce, since she did not know of the divorce order.

(iv) Marriage and divorce are very sensitive fragile issues which have to be handled carefully so as to preserve the sanctity of marriage. This calls for a careful analysis of all facts placed before this court before it finally grants a divorce, so as to avoid parties or one of them being left feeling aggrieved and prejudiced. In the premises it is ordered that the default judgment granted on the 17th October 2012 against the defendant/applicant be and is hereby rescinded so that the issue referred to above can be satisfactorily argued as so to allow applicant to be afforded a hearing.

1.8 An application for rescission was instituted in the High Court as according to according to the respondent, she had never instructed counsel to withdrew her defence. It was

heard by the same judge who granted the divorce. The learned judge ordered rescission. It is that order which generated the appeal before us.

2.0 It was submitted on half of the appellant that the notice of withdrawal was the turning point of the divorce proceedings because it was upon its service that the divorce was granted. This was done pursuant to Rule 15 (4) of the High Court Rules 1980.

The Panel of Judges setting as a court of Disputed returns had thus to say about the rule Paragraph 19 and 20 read as follows:

> "under our common law Practice, a person who has instituted proceedings is entitled to withdraw such proceedings without the other party's concurrency and without leave of the court at any time before the matter is set down : The case of Franco Vignazia Enterprises Ltd v Berry[1]. This is based on the trite principles of public policy that it is not the function of the court to force a person to proceed with an action against his will or wishes or to otherwise the reasons for abandoning or wishing to abandon one, Per Kumbleben JA in Levy v Levy[2].

[1] 1983 (2) SA 790 C 295 (H),
[2] 1991 (3) SA 614 at 620 B

2.1 But once the matter has been set down for hearing, it is not competent for the party who has institutioned such proceedings to withdraw them without either the consent of all the parties or the leave of court. The case of Protea Assurance Co v Gamlase[3]. It was emphasised in that case that where such leave or consent has not been obtained, the purported unilateral notice of withdrawal is invalid.

2.2 The notice of withdrawal was served timeously and in terms of the rules. It was therefore a contradiction for the learned judge to hold that the matter was handled unscrupulously by the respondent's legal representative.

2.3 There was correspondence from the Appellant's legal representatives, which indicated that the matter for the divorce proceedings was uncontested.

2.4 This court was asked to distinguish the matter before us with

that of Han v Kun[4]. The appellant in that case has no knowledge that her legal representative had withdrawn her representation in the matter without consulting the client. In the present case the respondent knew at all times the times that the matter was proceeding. Even at page 28 Mr Mariti conceded that the only problem was the issue of the division of property.

[3] 1971 1) SA 460 at 465
[4] CIV/APN/494/99, CV/T/258/99

2.5 In recession application the applicant must prove to court that he have a bona fide defence. The respondent failed to show that she had not committed adultery. She failed to show that in the event of the granting of the recession she will live as husband and wife with the appellant. What has always been apparent is that the marriage had irretrievably broken down and that the outstanding issue between the parties is the division of property.

2.5 The appellant had proved to the court when leading evidence

in the divorce court that the respondent was an adulterer and this had been accepted by the trial court.

3.0 It was argued for the respondent that she had instructed her counsel to contest the proceedings. She was assured that her plea had been filed. She did not authorise her then counsel to withdraw the defence.

3.1 Further, the letter which was authored to that effect was not pursuant to her instructions. The letter of withdrawal was therefore a misrepresentations or fraud.

3.2 The questions is whether a decree of divorce which was obtained on the basis of fraudulent paper can be rescinded

or not. The case of K v K[5] was cited to us, in which Chetty J citing the case of Rome v Rome[6] held that:

> *"a consent order is a divorce may be set aside where it was obtained by fraud. The same relief may follow upon a consent order being granted on the ground of reasonable mistake see Gollach and Gomperts v Universal Mills and Produce Co[7]. On the fact n this matter it is obvious that the deed of settlement s vitiated by the reasonable mistake that at least the appellant (and possibly both Parties) laboured under, namely that there was only one piece of immovable property that formed part of the community of property, whist in fact there were two immovable properties."*

3.3 There was reference by the Respondent to case of Project Authority for Self Reliance Project and Another v Makhahe,[8] which decision cited Tindall JA's statement in Rose and Another v Alpha Secretaries Ltd[9] he said,

> *"in regard to the matter of degree of negligence on the part of the attorney it is in my opinion, unnecessary to decide whether it is correct to say that the greater the degree of such negligence, the greater is the likelihood that such negligence will debar his client from relief. I*

[5] 202, 2009) (2010 LAECHC 4 (11 February 200)
[6] 1997 ZASCA 54 1997 4 SA 160 (SCA)
[7] 1978 1) SA (AD) at 922 (8) (CV/ANN/268/91
[8] CIV/APN/268/91
[9] 1947 (4) SA 511 at p518

am of the opinion that it would be unsound to give a general ruling that where the omission is such that redress attorney liable to his client, the client should have resort to such redress and should not be granted relief under Rule 12. Such a ruling might result in great injustice as, for example, where the attorney is not able to satisfy a judgment for the damages awarded against him. It seems to me undesirable to attempt to frame a comprehensive test as to the effect of an attorney's negligence on his client's prospects of obtaining relief under Rule 12 or to lay down that a certain degree of negligence will debar the client and another degree will not. It is preferable to say that the court will consider all the circumstances of the particular case in deciding whether the applicant has shown something which justifies the court in holding in the exercise of its wide judicial discretion, that sufficient cause for granting relief has been shown"

3.4 The respondent's counsel in arguing whether there was a bona fide defence in the applications for rescission cited to us the cases of J J v K J and Another[10] and Grand v Plumbers (Pty) Ltd[11] where the requirements for an applications for rescissions were stated as follows:

(i) The applicant must give a reasonable explanation

[10] 5035/2912 (2013 SAFSITIC 131 (11 July 2013)
[11] 1949 (2) sa 470 AT 476-7

of his default. It is appears that his default was wilful or that it was due to gross negligence, the court should not come to his assistance.

(ii) The application must be bona fide and not made with the intention of merely delaying plaintiff's claims;

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

(iv) Wilful default may not be an absolute or independent ground for refusal of a rescission application a display or deliberate default in preventing judgment being entered would sorely co-exist with sufficient cause.

4.0 The learned Advocate for the appellant sharply focused on the correspondence from Ramakhula chambers signed by three different people on behalf of T Hlaoli & Co. The correspondence referred to dealt with ancillary relief, as evidence that the respondent had consented to a withdraw

of defence leaving the petition for divorce uncontested. The learned judge's order for rescission amounted to forcing the appellant and respondent to be forcing the appellant and respondent to be married, when the marriage had broken down irretrievably.

The Respondent's view is that the withdrawal was fraudulently procured which was criminal, as the respondent had at all times indicated that she had a defence as demonstrated by the affidavit of Advocate Masoabi who was representing her.

5.0 The issues we have to determine in this appeal are:

(i) Did the respondent consent to the withdrawal of her defence,

(ii) Could her consent be inferred by the correspondence concerning an ancillary relief emanating from the chambers of the legal representative,

(iii) Can an appellate court interfere with the exercise of discretion by the trial court or disturb the trial court's findings of facts, and

(iv) Is this an appropriate matter to grand the order of rescission?

There was correspondence from Ramakhula chambers dated 1st June 2012 to the appellant advocates, intimating the desire to defend. The Respondent's founding affidavit at p33 of the record indicate that she had instructed advocate Masoabi to contest the matter, because of the malicious allegations of adultery. Mr Masoabi corroborated respondent's affidavit, when he said:

> *"I have read and understood the affidavit of Helena Lepele and wish to align myself with the contents therein insofar as they relate to me. I further to say that, I was duly requested to consult and take instructions for and on behalf of L.J. Ramakhula chambers owing to the absence of Mr Ramakhula at the time I wish to state that I have never withdrawn Mrs Lepele's matter and neither have I withdrawn from it, but for when he present counsel was appointed on record. I further aver that the Defendant's plea was not filed with the court because the file was nowhere to be found"*

In the face of this evidence alleging fraud by counsel who filed the withdrawal, his professional integrity on the line, there was no evidence to negate such a serious the allegation.

5.1 Correspondence from a legal representative of the Respondent about ancillary relief cannot logically lead to the conclusion that the Respondent acquiesced to the

withdrawal of the defence. Such an assumption is speculation.

5.2 The appellate court cannot easily interfere with the exercise of discretion by the trial court. The view of the Australian court is instructive. In Minister for Aboriginal Affairs V Peko-Wallsend Ltd[12] and Norbis V Norbis[13] it was said:

> *"The rule government appellate review of a discretionary Judgement are only partly for founded on the opportunity of the judge who first exercised the discretion to assess the evidence at first hand. More fundamentally they are grounded in the view that they would not be right to be overturn a Judicial decision solely on the basis of the appellate court mere preference for a deferent results, when the question is on which reasonable minds may come to a different conclusion, the decision of the Judge first exercising the discretion falls within a reasonable range, and no errors on this past can be shown".*

In 'House v The King[14], it was said that:

> *"It is not enough that the judges composing the appellate court consider that, if they have been in*

[12] 1986-162 LLR 24
[13] 1986 60 ALJR 335 65 65 ALR 12
[14] 1936 55 LLR 499 at PP 504-505

> *a position of the primary judge, they would have a different view. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he makes mistakes of facts. If he does not take into account some material consideration, then his/her determination should be reviewed and the appellate could may exercise its own discretion in substitution for his/her, if it has the material for doing so. It may not appear how the primary judge has reached the result embodied in his/her order, but if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion will be reviewed on the ground that a substantial wrong has occurred"*

We have exercised our minds as to whether the learned judge, in the court a quo wrongly exercised her discretion. We are of the view that the appellant's counsel did not sufficiently canvass how wrong her exercise of discretion to order rescission's could be faulted.

There was uncontroverted evidence which warranted her exercising the discretion to rescind, as the withdrawal of the defence was unauthorised. She had the opportunity to access the evidence which opportunity we do not have and she ably did so.

5.3 There must be some inclination by the Court to reopen the matter, where the defendant complains that he/she had not been allowed to ventilate his/her side of the story on the merits. This is a common law position in Lesotho. The Lesotho common law is in consonance with the English Civil Rules 1998 Rules I, which spells out the overriding objective of civil Procedure as that of:

> "deciding matters on their own merits"

5.4 The learned judge pointed out that rescission will afford the Responded to place all the facts before the court which opportunity will not be denied the appellant. No party will be prejudiced.

The Chancery Division in the United Kingdom in the case of Thorpe v Fasey[15] said:

> *"The essential element of rescission is whether the parties can be put in statu quo"*

[15] 1949 (2) All ER at 393

We are of the view that that is the objective the learned judge's order will achieve.

5.5 For the reasons aforesaid, we dismiss the appeal.

5.6 The following order is made:

(a) The matter is remitted for trial before another judge of the High Court.

(b) The matter should be filed for hearing within 3 months from today.

(c) There will be no order as to costs.

P. MUSONDA

ACTING JUSTICE OF APPEAL

I agree **Y. MOKGORO**

ACTING JUSTICE OF APPEAL

I agree **T. MONAPATHI**

JUSTICE OF APPEAL

For the Appellant : MISS N.G. THABANE

For the Respondent : MR K.A. MORITI