

++IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/276/2012

In the matter between:-

MALEFETSANE LEPELE

PLAINTIFF

AND

‘MACHAKELA HELENA LEPELE

DEFENDANT

JUDGMENT

Coram : Hon. Mahase J.
Date of hearing : Various dates
Date of Judgment : 12th July, 2013

Summary

Civil Procedure – Husband and wife – Divorce – Granted by default – Rescission of final decree of divorce – Essential elements of same – Rule 45 of the High Court Rules.

ANNOTATIONS

CITED CASES:

- **Rabby Ramdairies v. Khadebe Mafaesa CIV/T/56/83**
- **Grant v. Plumbers (PTY) LTD 1949 (2) S.A. 470**
- **Burton v. Thomas Barlow & Sons (Natal) LTD 1978(4) S.A. 794 (T) at 797 to F.**
- **Silver v. Ozen Wholesalers (PTY) LTD 1954 (2) S.A. 345 (A)**
- **Saraiva Construction (PTY) LTD v. Zululand Electrical Engineering Wholesalers (PTY) 1975 (1) S.A. 612 (D) at 625**
- **De Wifts Auto Body Repairs (PTY) LTD v. Fedgen Insurance Co. LTD 1994 (4) S.A. 705 (E) 711 D – H**
- **Raphael Tsotetsi v. Lesotho Highlands Development Authority, CIV/APN/445/1999 at page 4**

- **United Plant Hire (PTY) Limited v. Hills and Others 1976 (1) S.A. 717 (A) at 720 F-G**
- **Helena Lepele v. Malefetsane Lepele – CIV/T/618/2000**
- **Lesotho Housing v. Land Development Corporation CIV/APN/66/2010**
- **Ramainoane v. Sello, CIV/T/19/1997**

STATUTES:

- **High court Rules No. 9 of 1981**

BOOKS:

- **Jones and Buckle, the Civil Practice of the Magistrate in South Africa, 7th Edition Volume**
- **Herbstein and Van Winsen – Authorities 54 and 55**

- [1] This is a divorce matter instituted by the plaintiff/respondent on the 22nd May 2012. A final decree of divorce was granted by default against the defendant/applicant on the 17th October 2012. The reason for having granted default judgment against the defendant was that though having been duly served and having filed a notice of appearance to defend, she failed to file a plea despite having been notified to file same.
- [2] The defendant/applicant has since filed an application for rescission of that default judgment. The bone of her contention being that although she had caused such a plea to be served upon the plaintiff/respondent's attorney, for reasons not of her own doing, that plea was never filed in the court's file. Also that the plaintiff/respondent never disclosed to this court, that such a plea had been served upon his attorney, even if it has not been filed in the court's file.
- [3] It is her argument that had this Court known about the existence of such a plea, it would not have proceeded to finality with the divorce proceedings by

default as it has done. It has therefore been argued that, that final decree of divorce has been granted by error. She has accordingly invoked the provisions of Rule 45 (1) (a) of the Rules of this Court.

- [4] In a nutshell, the applicant/defendant in the main divorce case is blaming her prior counsel of record for his failure to discharge his mandate. Refer to her founding affidavit from paragraphs 4; onward.
- [5] According to applicant, she got to know for the first time and to her greatest dismay, that a final decree of divorce has since been granted against her by default in November 2012 when she attended a court annexed mediation with regard to ancillary matters.
- [6] The final decree of divorce which was granted by default against the defendant/applicant in the application for rescission was so granted on her grounds of adultery.
- [7] However, it has since transpired that in fact, the defendant had at all material times wished to defend the matter but for the alleged non discharge of her mandate of her prior counsel of record.
- [8] In fact, a copy of the said defendant's plea was served and received by the office of the plaintiff/respondent on the 25th July 2012- refer to page 9 of the paginated record, where an officer in the respondent's office has signed as having received it on the above-shown date at 12:01 p.m. It is dated the 15th June 2012.

- [9] The above information was never disclosed to court on the 17th October 2012 when a final decree of divorce was granted against the defendant/applicant. That in itself explains why this Court proceeded as it did with this matter on that day.
- [10] It appears that at all material times, the defendant/applicant had been represented by Adv. L.J. Ramakhula who in turn had been instructed by attorney T. Hlaoli & Company. Refer to notice of appearance to defend and other related documents. Even the defendant's plea was prepared and filed by the said office of Adv. L.J. Ramakhula. This very office also later filed a notice of withdrawal dated and filed on the 11th October 2012. In this notice, the attorneys T. Hlaoli & Co have withdrawn defending the action in this matter. They are not saying that the action is itself withdrawn. My understanding is that the defendant did not herself withdraw her defence. Only her then counsel of record, Adv. L.J. Ramakhula withdrew as counsel of record allegedly on behalf of the defendant/applicant.
- [11] The defendant denies ever having instructed her then attorneys of record to withdraw her defence, particularly she complains that the plaintiff has falsely accused her of having been involved in an adulterous love affair with a certain Rev. Tjokosela. She denies ever having committed adultery and says that it was the plaintiff/respondent who committed adultery with one Nomsa Mzamo with whom he is now staying with in their other matrimonial home in ladybrand in the Republic of South Africa.
- [12] She has sort to have the default judgment granted against her on the grounds of her adultery rescinded and she alleges that the plaintiff's/respondent's

allegations in this regard are unsubstantiated so much so that a final decree of divorce granted against her on such grounds should never have been granted. She prays that she be granted rescission so that she can defend herself. She says this divorce order is prejudicial to her in many respects and that it tarnished her dignity because she has never committed adultery.

[13] Of course she denies that this application is not bona fide, and she says that it has not been filed for dilatory purposes as is alleged by the plaintiff/respondent.

[14] The defendant/applicant has been supported by one Advocate Molefi Masoabi to the effect that he was requested to consult and take instructions for and on behalf of Adv. L.J. Ramakhula. Adv. Masoabi denies ever having withdrawn the defendant's/applicant's defence nor did he withdraw the action. Vide his supporting affidavit, page 29 of the paginated.

[15] It is noted that Adv. L.J. Ramakhula has not filed any affidavit in support of what Adv. Masoabi says.

[16] Be that what it may, Adv. Masoabi says that the reason why the defendant's plea was not filed with the court was because the court file was nowhere to be found. He has, however not been supported by any of the clerks nor by the Registrar of this Court in this regard. However as has been indicated above, such a plea was filed with the office of the plaintiff/respondent earlier than the 17th October 2012.

- [17] The plaintiff /respondent is opposing this application on the grounds that the defendant/applicant is not bona fide because nowhere in the documents filed before this Court does Adv. Masoabi appear as counsel of record on behalf of the applicant. He says that the applicant is in fact abusing court process, because the defence was withdrawn by her then attorney of record. Refer to his answering affidavit.
- [18] It is argued on his behalf that once a withdrawal of her defence was filed, it became irrelevant whether or not the plea was filed; consequently upon such a withdrawal of her defence, the divorce became uncontested hence why evidence was led and a final decree of divorce was granted against her.
- [19] It is argued further that in effect this application has been filed only as a way of the fight over the matrimonial property which property the applicant is about to loose as a result of the final decree of divorce which has since been granted against her. He denies that the divorce was granted erroneously but he says that was granted because the defendant/applicant had not filed a plea and that she has had the defence withdrawn, as such this case proceeded as an uncontested divorce case.
- [20] Very unfortunately, the plaintiff/respondent has not had written submissions filed before this Court. However, even in his opposing affidavit he concedes that the said plea was filed on behalf of the defendant/applicant but says he does not know why this was never filed in the court file. He concedes that such a plea was filed and served upon his legal representatives.

- [21] He does not blame the defendant/applicant for failure to have that plea filed in the court file. The defendant/applicant places the blame for such failure upon her then counsel/attorney of record. She is supported in this regard by her prior counsel Adv. Masoabi.
- [22] Adv. Masoabi has further stated that he had been requested to consult and to take instructions for and or behalf of Adv. L.J. Ramakhula owing to absence of Adv. Ramakhula.
- [23] He does not indicate the time nor the exact period when he was so requested to do so. One does not know if that was before or after the plea was filed but before the defence was allegedly withdrawn.
- [24] Be that as it may, it has been argued on behalf of the respondent that as per all documents filed herein, the applicant's counsel of record has always been Adv. L.J. Ramakhula and that nowhere has Adv. Masoabi been reflected as applicant's attorney.
- [25] Counsel for respondent has referred court to certain correspondence between her office and that of Adv. Ramakhula and says that nowhere was it ever indicated by the applicant's attorney that they knew nothing about such a withdrawal of the applicant's defence.
- [26] I observe that same do not constitute formal pleadings. What is important is the fact that applicant denies ever having instructed Advs. Masoabi & Ramakhula to withdraw her defence and she strongly challenges the allegation that she has ever committed adultery with anybody. She also

denies that she did not file a plea. It has since transpired that indeed, she did file and serve a plea upon the offices of the respondent's counsel. What has also since transpired and this is a matter of common cause, is the fact that this plea could not be filed in the court file because the court file could not be located. Most importantly, and of great concern to this court is the fact that respondent did not disclose to court that such a plea had indeed been served upon him with such service being effected upon his attorneys of record.

[27] The above fact should have been disclosed to court even if the respondent was under the impression that it could proceed with the divorce as uncontested on the basis of the alleged withdrawal of the applicant's defence, which fact is now denied by the applicant. Bona fides are of paramount importance in all matters before court.

[28] There is nothing on the minutes of the court record indicating that Adv. Masoabi ever appeared before this court on any day on behalf of the applicant. In fact the only time that this matter was placed before this court was on the 17th October 2012 when a final decree of divorce was granted against the applicant on the grounds of adultery. Nowhere was this Court informed that the applicant had withdrawn her defence. In fact the only notice of set down of this matter for the 17th October 2012 has not been addressed to the applicant nor to her attorney of record, be it Adv. Masoabi, Ramakhula or Mariti.

[29] That notice of set down was also filed in court on the same date that the alleged notice of withdrawal of the applicant's withdrawal of her defence

was filed by Adv. Ramakhula. There is nowhere where it is indicated by her then attorneys of record 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.

[30] 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 ever having instructed her said attorneys to withdraw her defence of this divorce action. She says that she got to know of the default judgment in question on the day that she had attended the court annexed mediation. The said mediation was with regard to ancillary matters since divorce had already been granted against her.

[31] 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.

[32] From the facts and due regard being had to the circumstances of this case, it becomes clear that, the offices of Adv. Ramakhula may have indeed requested Adv. Masoabi to consult and take instructions for and on its behalf as stated in Adv. Masoabi's supporting affidavit, otherwise there was no way in which the defendant/applicant would have known about Adv. Masoabi. In fact, the fact that none of the two advocates explained in clear terms why the applicant was to be presented by Adv. Masoabi and not by Adv. L.J.

Ramakhula cannot be blamed upon her. Being a lay person, she could not be expected to know what the implications of the private arrangement and a request that Adv. Masoabi handle her case were.

[33] As has been indicated above, there is no court minute indicating that Adv. Masoabi ever appeared before this Court on behalf of the defendant/applicant prior to the 17th October 2012 when a final decree of divorce was granted against her by default on grounds of her adultery. Neither did Adv. Ramakhula did so. At least this is the position in so far as this Court is concerned. This Court is not in a position to say whether or not there is in existence another file in which the said counsel are on record as having represented the defendant/applicant.

[34] In the circumstance, and regard being had to the fact that counsel herein have handled her case unscrupulously and that she was left out and not fully consulted, it is the considered view of this Court that, failure by counsel to observe the Rules of this Court to the letter should not be blamed upon the defendant/applicant. It is fair and just that the defendant/applicant should be heard on the issues pertaining to the alleged withdrawal of her defence as well as on that of adultery which are the basis upon which the final decree of divorce was based.

[35] Marriage and divorce are very sensitive fragile issues which have to be handled very carefully so as to preserve and keep the sanctify of marriage. This calls for a careful analysis of all the 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 issues referred to above can be satisfactorily argued and so as to allow applicant to be afforded a hearing.

[36] I must however warn counsel that they should all strive towards proper compliance with provisions of the Rules of Court so as to avoid unnecessary hardship being occasioned by their clients who have clearly indicated that they each want to move on with their lives.

[37] I make no order as to costs

M. Mahase

Judge

For Defendant/Applicant: Adv. K.A. Mariti

For Plaintiff/Respondent: Adv. N.G. Thabane