JAMES SAMABAWAMEDZA
and
LINDA CHIYANGWA

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 23 November 2011

Opposed Court Application

I E G Musimbe, for the applicant
H Zhou, as amicus curiae

GOWORA J: After hearing this matter I issued an order in terms of the draft. The record was then mislaid resulting in the applicant construction a dummy file so that an order could be issued. The respondent despite having been served with the application and having entered opposition failed to appear at the hearing. In view of the relief being sought I found myself unable to grant an order in the absence of argument on the legality of the order being sought. I therefore sought the assistance of Mr *Zhou* specifically to advise the court whether or not the form of relief being sought in the application was competent. I am profoundly grateful to counsel for having agreed to file heads of argument and appear in support thereof.

The applicant and the respondent were formerly husband and wife. On 2 November 2006, under Case No HC 8631/03 this court granted the respondent a decree of divorce and ancillary relief. The order was granted in default of the applicant herein. On 11 May 2007 the applicant filed this application for an order setting aside the judgment granted under HC 8631/03. The facts surrounding the application are discussed hereunder.

The applicant avers in his founding affidavit that the default judgment should be 'cancelled'. He avers that he has a *bona fide* defence to the claims in the divorce action and further that he had a reasonable explanation as to why the default judgment was entered against him.

The applicant states that he had instructed a firm of legal practitioners to represent him in the divorce action. As a result he was under the impression that those legal practitioners had conduct of his case and he was awaiting a trial date in respect of the same. He was at the time based in South Africa and had appointed one John Nhema to deal with the legal practitioners on his behalf. He was as a result not aware that the firm of legal practitioners had renounced agency. What he was made to understand was that they had informed his agent that the matter would come up for trial in September 2006 and that they therefore needed cover for their fees for the trial.

He stated that his suspicions about the legal practitioners' conduct of his case were raised when an estate agent approached his agent enquiring about the sale of the parties' matrimonial home. He had not given instructions for the house to be sold and was therefore surprised. It then transpired that the house was being sold consequent to an order of this court. Enquiries with the legal practitioners did not yield any result as they professed ignorance over the whole issue. He then requested the legal practitioners in writing to renounce agency. It was only after he received his file from them that he realised that they had renounced agency on 14 February 2005 and that the court order had been issued on 2 November 2006. He discovered that the matter had reached the stage of pre-trial conference but that no papers relating to the pre-trial conference had been served on him or his agent. He contended that if he had been made aware of the renunciation of agency he would have instructed other legal practitioners to handle the divorce on his behalf. He had all along shown an intention to defend the proceedings as evident from the fact that the matter had reached pre-trial conference stage.

As regards his defence to the claim, he stated that he agreed that the marriage had broken down irretrievably. He was of the view that it could not be salvaged. However as regards the distribution of the assets of the parties, his view was that there were two immovable properties. There was a house in Cranborne in respect of which he said he had contributed about 95 percent towards the acquisition of the stand. He had then solely been responsible for paying for the construction of the house built thereon. The respondent had not contributed a single cent thereto. He therefore questioned the respondent's claim to 50 percentum of the value of that property. The second property was a stand in Adore Gold Norton. He stated that he had purchased this stand after the parties had separated and the respondent had not contributed towards its purchase.

He stated that initially the parties had purchased a stand in the same suburb which was repossessed due to non payment but that the one being claimed by the respondent had nothing to do with the parties union as it was acquired after they stopped living together. It was for these reasons that he argued that the court should exercise its discretion in his favour and grant an order rescinding the default judgment against him.

The applicant's appointed agent John Nhema has also deposed to an affidavit. He confirms that the applicant had appointed a firm of legal practitioners and that there was no occasion when he was advised that they had renounced agency. In 2007 he was approached by an estate agent who indicated that the applicant's house was being sold. He then sought clarification from the legal practitioners on the issue who professed ignorance and said they would check with the registrar's office. He was advised by the applicant to collect his file and it was only on perusing it that he noticed that they had renounced agency in February 2005. The notice of renunciation had not been served upon him. He noticed further that the matter had reached pre-trial conference stage but papers to do with the pre-trial conference had not been served upon him.

The respondent had filed papers in opposition of the application but despite being served with a notice of set down she failed to appear. The matter therefore had to be decided in default of her appearance. As the respondent did not appear at the hearing I will not determine the issue of good and sufficient cause as there is no opposition before me on that aspect. I will confine myself to the issue as whether or not a decree of divorce is capable of rescission.

Mr *Musimbe* submitted that in terms of Order 9 r 63 of the High Court Rules this court has the power to set aside a judgment given in default. He argued that a judgment in this context would include an order for divorce given in default. I have not been referred to an authority in this jurisdiction where this court has considered an application for the rescission of a decree of divorce. Mr Musimbe also made reference to the provisions of s 9 of the Matrimonial Causes Act [*Cap 5:13*]. The section reads as follows:

> "Without prejudice to the Maintenance Act [*Cap 5:09*], an appropriate court may, on good cause shown, vary, suspend or rescind an order made in terms of section seven and subs(s) (2), (3), and (4) of that section shall apply *mutatis mutandis*, in respect of any such variation, suspension or rescission."

Section 7 of the Matrimonial Causes Act is the section in terms of which the court is empowered to make orders in relation to the matrimonial assets of the parties as well determining appropriate maintenance in respect of the minor children of the union. Section 7 of the Act is restricted to the division of the assets that form the matrimonial estate of the parties, it does not deal with the dissolution of the union. Section 4 provides for the grounds upon which an appropriate court may grant a decree of divorce. Sections 5 and 6 provide the appropriate court with the legal basis for the dissolution of the unions. When all these provisions are read together it becomes clear that only orders relating to the distribution of the matrimonial assets are susceptible to rescission. I can therefore perceive no impediment to this court entertaining an application for rescission of a judgment in respect of divorce proceedings. Section 9 of the Matrimonial Causes Act [*Cap 5:09*] grants to an appropriate court the power, on good cause shown, the power to vary, suspend or rescind an order issued in terms of s 7 of the Act.

The applicant does not seek the setting aside of the decree of divorce itself. As the proceedings are to all intents unopposed by the respondent it does not seem appropriate that I should embark upon the merits or otherwise of an application to set aside the decree of divorce. Mr *Musimbe* made reference to the case of *Rowe* v *Rowe* 1997 (4) SA 160. In that case the court accepted the principle that a decree of divorce, where it was induced by fraud could be rescinded. In *Ex parte* Kruger 1982 (4) SA 411 the court therein accepted the principle that an order for divorce granted on the premise that the husband had deserted his wife when in fact he was deceased could be set aside.

Mr *Zhou* also accepts the principle that a decree of divorce granted in default, or in certain restricted circumstances by consent, is capable of rescission, variation or suspension. He also accepts that there is no authority in point within this jurisdiction regarding the rescission of a decree of divorce granted in default. He has cited a number of authorities in England and South Africa where courts have granted applications for rescission of decrees for divorce.

In *Gopalakirstan* v *Ambaleegai* 1949 (3) SA 1070 SELKE J found that a judgment for a decree of divorce was a judgment like any other and that in the event a party had been granted such judgment in default there was nothing in the rules precluding the court from rescinding such judgment on the usual grounds. In *Mutebwa* v *Mutebwa & Anor* 2001 (2) SA 193 the court had

granted a divorce in default based on a return from the Deputy Sheriff that the summons had been served on the applicant personally. The applicant had never received the summons. The decree of divorce was rescinded on the ground that it had been erroneously granted. In view of the fact that the issue of the default or reasons behind the default judgment have not been argued it is not necessary that I debate the circumstances under which this jurisdiction may set aside a decree of divorce granted in the absence of the party seeking its rescission. It is only pertinent to note that it is relief that is precluded and may be available.

In *casu*, the applicant accepts that the marriage has broken down irretrievably and therefore the decree of divorce itself need not be interfered with. What is before me therefore is a partial rescission of the order of 2 November 2006. In *Munro* v *Central Mini Cabs* SC 163/95 the Supreme Court upheld the principle of partial rescission of an order of this honourable court.

It is accepted that this court enjoys wide discretionary powers when one considers the ambit of good and sufficient cause. In this case I cannot determine on the merits whether or not the applicant has shown good and sufficient cause for the default judgment to be set aside in the restricted sense. The respondent has chosen not to appear and the application is to all intents and purposes unopposed. The applicant does not wish to have the order in respect of custody and maintenance set aside. My order will therefore be restricted to the proprietary part of the order granted on 2 November 2006. In the premises an order will be issued to the following effect:

IT IS ORDERED AS FOLLOWS:

1. Paragraph 5 of the order of this court under case number HC 8631/03, relating to the division of the immovable properties of the parties herein, be and is hereby set aside.

2. The applicant shall bear the costs of this application.

IEG Musimbe, applicant's legal practitioners
Mbidzo, Muchadehama and Makoni, respondent's legal practitioners