

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 29564/2019

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

06.06.23

In the matter between:

B, I K

PLAINTIFF

And

B, C A

DEFENDANT

Neutral Citation: *B I K v B C A* (Case No. 29564/2019) [2023] ZAGPJHC 636 (6 June 2023)

JUDGMENT

Delivered: This judgment and order was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 6th of June 2023.

Summary: *Divorce - application for postponement – Discretion of the Court – Requirements restated – application dismissed with costs.*

Rule 33(4) of the Uniform Rules of Court – separated issue of cancellation of settlement agreement – plaintiff refusing to participate in the proceedings – plaintiff’s claim dismissed with costs - Counter claim – defendant granted order in terms of the counter claim.

TWALA J

[1] On the 22nd of August 2019 the plaintiff instituted divorce proceedings against the defendant seeking an order, after concluding a settlement agreement, in the following terms:

- 1.1 A decree of divorce on the ground of an irretrievable breakdown of the marriage, incorporating the settlement entered into between the parties on the 20th day of August 2019;
- 1.2 Costs of suit, if defended.

- [2] On the 01st of October 2019, the Court granted the decree of divorce and made the settlement agreement concluded between the parties an order of Court. However, on the 2nd of April 2020 the plaintiff launched an application for rescission of the order granted by the Court on the 1st of October 2019 which application was not opposed by the defendant. On the 6th of August 2020, the plaintiff was granted an order rescinding the order of the 1st of October 2019 together with leave to amend his particulars of claim within twenty (20) days of granting of the order.
- [3] On the 5th of November 2020 the applicant filed the amendment to his particulars which was followed by another amendment to the particulars of claim on the 20th of November 2020. The defendant filed her plea and counter claim in December 2020 and the plaintiff during the same period filed his plea to the defendant's counter claim. In November 2021 the defendant filed an amendment to its plea which necessitated the plaintiff to file a replication and the defendant filed a rejoinder in the same month. In July 2022 the plaintiff requested the matter to be referred to case management by a Judge and Dippenaar J was appointed to case manage the case. On the 30th of August 2022 Dippenaar J granted an order in terms of Rule 33(4) that:
- 3.1 the issue as to whether the defendant is entitled to be granted an order that the agreement of settlement concluded between the plaintiff and the defendant, on or about the 20th day of August 2019 (*"the agreement of settlement issue"*) be separately decided from the issue relating to the plaintiff and the defendant's accrual claims (*"the accrual issue"*).
 - 3.2 the agreement of settlement issue be heard and determined before the accrual issue is heard and determined.

3.3 the accrual issue is to be stayed until the agreement of settlement issue has been disposed of.

- [4] The matter was therefore certified trial ready, and the duration of the trial was estimated to be 4-5 days. The plaintiff was permitted to effect any amendment to the accrual claim issue and not the settlement agreement issue that was now ready for trial. However, in due time the plaintiff filed an amendment to his particulars of claim which were, in essence, amendments to the particulars relating to the settlement agreement. Consequently, the plaintiff prayed for an order of cancellation of the settlement agreement and that a receiver and liquidator be appointed to administer and distribute the parties' accrued estate. The defendant filed a Rule 30 notice objecting to the proposed amendment. In December 2022, the plaintiff withdrew the proposed amendment. On the 24th of January 2023 the defendant's attorneys served a notice that the matter was set down for trial for the 29th of May 2023.
- [5] On the 10th of May 2023 the plaintiff's attorneys wrote to the defendant's attorney informing them that plaintiff's senior counsel has withdrawn from the matter and that their instructions are to apply for postponement of the matter on the 29th of May 2023. The immediate response from the defendant's attorneys was that the thought of postponement of the matter was unacceptable when the hearing was still 20 days away and the plaintiff still has time to can secure the service of another senior counsel. The prejudice to the defendant was stated in that response regarding the undertaking made by the defendant not to dispose of any of her properties until finalisation of the divorce. The plaintiff's response was that they are looking for senior counsel to assist and will revert in due course.

- [6] On the 26th of May 2023 the plaintiff then served the defendant with an application for a postponement. This was on Friday and the matter was set down for hearing on Monday. The defendant filed its opposition to the postponement on Sunday. The application for a postponement is based on two points being the unavailability of senior counsel and that the plaintiff wishes to make an amendment to its particulars of claim.
- [7] It has long been established that an application for a postponement is not there for the taking but the Court has a discretion whether to grant or refuse same. However, the Court must exercise its discretion judicially. The party who seeks the postponement, since he or she seeks an indulgence, must show good cause and reason for the postponement. He must demonstrate his bona fides and that the postponement is not just to delay the other party from obtaining the relief she seeks.
- [8] Mr Londt, attorney for the plaintiff, submitted that he does not have the requisite experience to represent the plaintiff in this matter since the defendant has engaged the services of senior counsel. The plaintiff, so it was contended, would want the playing field to be levelled – hence he requests the opportunity to also engage the services of senior counsel. His senior counsel withdrew from the matter on the 8th of May 2023 and he has been unable to secure another senior counsel to assist him. Although he has consulted another counsel, so the argument went, counsel has advised that he is unavailable to attend to the matter on 29th of May 2023 but suggested that certain amendments should be effected on the plaintiff's particulars of claim.
- [9] The issue of the divorce is common cause between the parties. What is before this Court is the separated issue in terms of Rule 33(4) which is the cancellation of the settlement agreement and division of the accrued estate of

the parties by the liquidator to be appointed. When asked on whether the plaintiff was prepared to make any concessions regarding the undertaking of the defendant not to dispose of any of her properties, Mr Londt submitted that he does not have instructions in that regard.

[10] The difficulty is that plaintiff does not seem to understand that the defendant has a right to deal with her properties as she pleases, and the undertaking was to allow the litigation process to reach its finality. The plaintiff does not seem to be cognizant of prejudice being suffered by the defendant with this matter continuing to be dragged on for almost four years. She has a life to live like any other person rather than to wait for the plaintiff to organise himself who seems to be enjoying good life travelling all over the country and forgetting that he has litigation to attend to.

[11] The parties were divorced in 2019 after reaching a settlement. The plaintiff, for whatever reason, obtained a rescission of the divorce order and an order making the settlement agreement and order of Court in 2020 predicated on the same reason of wishing to amend the particulars of claim. Plaintiff has failed to take this Court into his confidence and disclose what other amendment does he intend to effect to his particulars of claim and why he could not do so for a period of more than three (3) years. The unavoidable conclusion is therefore that the application is not bona fide and is meant to delay the defendant from obtaining the relief she seeks.

[12] Furthermore, I do not agree that plaintiff could not secure the service of senior counsel over a period of three (3) weeks. I do not suggest for one minute that I know how many senior counsels serve in this Division, but my view is that the plaintiff deliberately failed to give this matter the urgency it deserves and thought it better to serve the defendant with the application for

a postponement on the eve of the hearing under the guise of wanting to level the playing field. It is incomprehensible that the plaintiff wants the defendant to keep to her undertaking not to deal with her properties for an extended period because she has not approached him and asked for the release of any of her properties. It is my considered view that the application for a postponement falls to be dismissed with costs.

[13] It is worth noting that the plaintiff was not in Court when the matter was heard. After handing down the order and undertaking that the reasons will be incorporated in this judgment, Mr Londt withdrew as attorneys of record for the plaintiff. However, he was directed by the Court to call the plaintiff and inform him that the matter was proceeding at 14H00 and report to Court at that time as well. Mr Londt came back at 14H00 and informed the Court that the plaintiff has refused to come to Court. Once again, the Court directed Mr Londt to inform his former client, the plaintiff, that he still has an opportunity to attend and address the Court on the 30th of May 2023 at 10H00 and the case was then adjourned to the 30th of May 2023 at 10H00.

[14] On the 30th of May 2023, the plaintiff and Mr Londt approached the Court in chambers where Mr Londt informed the Court that his mandate has been reinstated. The Court directed the plaintiff and Mr Londt to attend Court and place all issues on record but that the Court will not entertain the issue of the postponement since it has already been determined. The reality is that both Mr Londt and the plaintiff did not appear in Court at 10H00 and the matter then proceeded in the absence of the plaintiff and his counsel.

[15] The defendant testified that she was married to the plaintiff on the 17th of May 1996 in Benoni out of community of property with the inclusion of the accrual system and the marriage between them still subsists. There are no

children born of the marriage. The marriage relationship between herself and the plaintiff has broken down irretrievably and reached such a state of disintegration that there are no reasonable prospects of the restoration of a normal marriage relationship, in that:

- 14.1 since 2019 the parties have not been living together as husband and wife;
- 14.2 since his retirement in 2017 the plaintiff has been rarely at home preferring to pursue his own interests;
- 14.3 the plaintiff abused intoxicating liquor and when under the influence of alcohol would be aggressive and abusive towards the defendant;
- 14.4 she has lost all love and respect for the plaintiff and does not wish to continue with the marriage relationship.

[16] The defendant testified further that she prays for the plaintiff's claim to be dismissed with costs and that, in terms of her counter claim, she be granted a decree of divorce incorporating the settlement agreement concluded between the parties on the 20th of August 2019.

[17] It is a principle of our law that for a party to succeed with its claim against another, she or he must establish on a balance of probabilities that her or his version is reliable and can be believed. Put in another way, the plaintiff or the defendant must prove its claim by tendering reliable evidence before the Court. The plaintiff or defendant must tender evidence to the satisfaction of the Court for him or her to obtain the relief that he or she seeks.

[18] As stated in the above paragraphs, the plaintiff absconded from testifying before this Court to prove its claim. The defendant took the stand and exacted her claim against the plaintiff which evidence of the defendant stands uncontroverted. I have no doubt in my mind that the evidence of the

defendant is clear, plain and reliable. I am of the view therefore that the defendant has proved its claim against the plaintiff and is therefore entitled to the relief that she seeks in terms of her counter claim.

[19] In the circumstances, I make the following order:

1. The application for the postponement of this case is dismissed with costs.
2. The plaintiff's claim is dismissed with costs.
3. The decree of divorce incorporating the settlement agreement of the 20th of August 2019 is granted with costs.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing: 29th – 30th of May 2022

Date of Judgment: 6th of June 2023

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