

**IN THE HIGH COURT OF SOUTH AFRICA**  
**[TRANSCVAAL PROVINCIAL DIVISION]**

**CASE NO. 7942/2006**

In the matter between

**PILLAY, ANGELINA** [born NAIDOO]

Applicant/Defendant

and

**PILLAY, DEENASH**

Respondent/Plaintiff

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**JUDGMENT**

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[1] For the purposes of this judgement the parties will be referred to as the applicant and respondent. The applicant seeks an order to rescind the judgement granted by Van Rooyen AJ on 21 April 2006 as well as an order that the Respondent to pay the costs on attorney and own client scale.

[2] The applicant and respondent were married to each other and proceedings were instituted by the respondent in this court under case no 7942/06. The were married in community of property and two minor children were born of the marriage.

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[3] Summons was served on the applicant personally on 17 March 2006. Shortly thereafter the respondent met the applicant in Durban and it appears as if they attempted to reconcile. The applicant averred that she was advised on 20 March 2006 by attorney Gerrit Bouwer of Deneys Reitz that she should obtain a letter from respondent's attorney to the effect that the divorce action had been stopped.

[4] During the period 20 March – 1 April 2006 the applicant endeavoured to obtain a letter from the respondent's attorney that the divorce action would be stopped. On 30 March, 2006 Mr Bouwer telephoned the respondent's attorney's offices in order to establish whether the divorce action had been stopped. No affidavit from him confirming this had been appended to the papers, however the respondent in his answering affidavit deposed to the fact that Mr Bouwer phoned his attorney's offices.

[5] On 3 April 2006 the respondent's attorney of record, Mr Kineil Muthray faxed a letter to the respondent which letter was subsequently handed to the applicant. This letter was dated 3 April 2006 and the content are as follows :

*"We refer to the above matter and confirm our instructions to stop all further action and pend our [sic] as per your request.*

*We trust that the above is satisfactory."*

This was annexed to the founding affidavit as Annexure 'C'.

[6] As a consequence of this letter being handed to the applicant she did not defend the action.

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[7] The respondent proceeded to set the matter down for hearing on the unopposed roll on 4 April 2006, which was to be heard on 21 April 2006 on the unopposed divorce roll.

[8] Without informing the applicant that the matter was set down for hearing on 21 April 2006. On that day the matter proceeded unopposed and Van Rooyen AJ made an order in the following terms :

(i) That the bonds of marriage subsisting between plaintiff and defendant be and are hereby dissolved.

(ii) Division of the joint estate in the following manner :-

That the immovable property situated at no. 52 Hartshorne, Rynfield, Benoni, Johannesburg [sic] together with its contents shall be awarded to the plaintiff and that further bond payments being for the account of the plaintiff.

(iii) That each party shall retain their motor vehicle in their respective names and further that each party shall be liable for their own repayments thereof.

(iv) That each party shall be liable for their own debts incurred during the subsistence of the marriage.

(v) That custody and control of the two minor children be and is hereby awarded to the plaintiff.

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- (vi) That the defendant be granted reasonable right of access to the two minor children.
  - (vii) That the defendant pay the amount of R2 500,00 per child to the plaintiff in respect of the maintenance of the minor children.
  - (viii) That the plaintiff shall place the two minor children on a medical aid of his choice and shall retain them on the medical aid until they become self supporting;
  - (ix) That both parties shall be equally liable for all payments in respect of all primary, secondary and tertiary educational expenses of both the minor children, which shall include but not be limited to the costs of uniforms, stationery, extra mural activities, books, school fees and/or university fees, university books as are reasonably required by the minors, and the costs of both minor children's travelling to and from school and/or university.
  - (x) That the plaintiff be awarded half of the pension including half of the pension in the defendant's fund as from date of marriage to the date of divorce and that same rights accrue to the defendant.
  - (xi) That an endorsement be made on the records of the relevant pension funds.
- [9] It was submitted on behalf of the applicant that the order made by Van Rooyen AJ, *"That the defendant pay the amount of R2 500,00 per child to the plaintiff in respect of the maintenance of the minor children"* stands to
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be corrected as it fails to stipulate whether this amount should be paid weekly, monthly or annually.

- [10] The applicant and respondent were residing in the matrimonial home and on 12 May 2006 the parties had an argument during which the respondent informed the applicant that the house belonged to him. As a consequence of this argument the applicant telephoned the Registrar of this court in order to establish whether the divorce action had been stopped. She was informed by the Registrar that a final decree of divorce granted on 21 April 2006.

#### **LEGAL PRINCIPLES APPLICABLE TO RESCISSION**

- [11] This application is brought in terms of Rule 31 (2)(b) of the Uniform Rules of Court for the rescission of the judgment given on 21 April 2006. In order to succeed in the application the applicant must show good cause for rescinding the judgment and has to give a reasonable explanation for her default.

In addition the application must be *bona fide* and not with the intention to merely delay the respondent's action. See – *Grant v Plumbers [Pty] Ltd* 1949 (2) SA 470 O at 476; *De Witt Auto Bodies Repairs [Pty] Ltd v Fedgen Insurance Company Ltd* 1994 (4) SA 705 (E) at 708 H – 709 D; *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) and *Lazarus and Another v ABSA Bank Ltd* 1999 (2) SA 782 (W)

- [12] It is clear that the applicant sought to obtain a letter from the respondent that he was not proceeding with the divorce, to this end she heeded the
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- advice of Mr Bouwer in obtaining this letter. Notwithstanding the respondent's attorney indicating that the action has been stopped, the respondent proceeded to set the matter down on the unopposed roll on the next day. Counsel for the applicant submitted that the respondent acted in bad faith by proceeding to set the matter down without informing the applicant that they were proceeding with the divorce action.
- [13] I am inclined to agree with the applicant's counsel's submission that this is a case of *mala fides* on the part of the respondent and his attorney in proceeding with the matter without informing the applicant thereof. Furthermore the divorce order having being obtained was not made known to the applicant until she enquired from the Registrar some three week after the order was obtained. The respondent in his answering affidavit stated that he was writing exams at the time and that this was the reason for his failure in informing the applicant that the order was obtained. This explanation on the part of the respondent does not hold any water and the obtaining of the order was done with the intent to deprive the applicant in defending the action.
- [14] The applicant's conduct up to the time of obtaining the letter, annexure 'C' indicates that she intended to defend the action and that she laboured under the impression that the action had been stopped and for that reason she need not enter an appearance to defend. This belief on her part was 4 reasonable belief.
- [15] In addition thereto her failure to defend the action was neither wilful nor negligent as she was informed that the action was stopped and therefore there was no need for her to defend that action.
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[16] For the reasons stated I am of the view that the applicant has made out a case for the rescission of the judgement granted by this court on 21 April 2006.

[17] This brings me to the determination of the cost of this application. On behalf of the applicant it was submitted that a punitive cost order be made in view of the respondent's *mala fides* and persistence in defending this application notwithstanding having given an undertaking that the action was stopped.

[18] The respondent's conduct in withholding information from the applicant under the existing circumstances that he was proceeding with the action after the assurance given is indicative of his *mala fides* and that he manipulated the situation in order to prevent the applicant defending the matter. This conduct on his part calls for an appropriate sanction to be imposed against him. For this reason the cost order sought by the applicant in the circumstances is not without merit.

[19] Accordingly I make the following order –

- (a) The judgement granted on 21 April 2006 is rescinded;
  - (b) The respondent is ordered to pay the costs of this application on an attorney and own client scale;
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Ismail AJ

For the Applicant : Adv S L Ress instructed by M F Martins Costa Attorneys  
Benoni and Hack Stupel & Ross Pretoria.

For the Respondent: Adv N van Niekerk instructed by Kineil Muthray Attorneys

Date of Judgment:

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