REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

CASE NO : **2011/19961**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE YES/NO

(2) OF INTEREST TO OTHER JUDGES YES/NO

(3) REVISED

.....

SIGNATURE

DATE

In the matter between:

E[...] S[...] (born C[...]) Applicant

And

J[...] S[...] Respondent

JUDGMENT

AJ:

[1] In this matter, the Applicant launched an application for rescission of judgment, 12 years after an order for a decree of divorce was granted against her, together with ancillary relief relating to forfeiture of patrimonial benefits.

[2] The Applicant seeks an order in the following terms:

[2.1] Condoning the late filling of her application for rescission.

[2.2] That the order granted by the Divorce Court, on an unopposed basis on the 18th of November 2011 is rescinded and set aside.

[2.3] That the transfer of the Applicant's half share of Erf 23334, Zone 2, M[…] T[…] ("**the property**") to the Respondent is cancelled in terms of Section 6 of the Deeds Registries Act 47 of 1937, as amended.

[2.4] Further and/or alternative relief.

[2.5] Costs of suit only in the event of opposition.

[3] The Applicant and Respondent were married in community of property, 42 years ago on 22 September 1981 at Johannesburg. As at the date of decree of divorce in 2011, they were married for 30 years.

[4] The Applicant remains resident in the property, which is her primary place of residence. According to the site permit attached as Annexure "ES1" to the Applicant's founding affidavit, both parties were indicated as occupants of the property which consists of a *"self-built house"* since 1 November 1988.

[5] Both parties are elderly, and the Applicant is 67 years old.

[6] The Applicant alleges that the Respondent started abusing her physically and emotionally during the 1990s which culminated in a protection order, which was contravened during 2010. The Applicant attached some documentation relating to criminal proceedings that were ongoing during 2010 relating to the contravention of the protection order but it is unclear if a conviction followed. The Respondent denies the allegations of abuse.

[7] The Respondent instituted divorce proceedings against the Applicant in the Central Divorce Court, Johannesburg under case number 5899/10 ("**the Regional**

Court proceedings"), which summons is attached to the Applicant's founding affidavit as Annexure "ES3", dated 5 May 2010. The Respondent was represented by a firm of attorneys, Sarlie & Ismail Inc in the Regional Court Proceedings. In the Respondent's summons, in the Regional Court Proceedings, he prayed for the following relief:

[7.1] A decree of divorce.

[7.2] Division of the joint estate.

[7.3] Costs of suit.

[7.4] Further and/or alternative relief.

[8] The Applicant (as the Defendant in the Regional Court proceedings) opposed the Regional Court proceedings and filed a notice of intention to defend on the 13th of December 2020[1]. She filed a plea in which, the only issue in dispute was the reasons for the breakdown of the marriage.[2] The decree and division of the joint estate were common cause.

[9] The Respondent filed a plea to the Applicant's counterclaim in the Regional Court proceedings on 25 January 2011.[3] The Counterclaim simply amounted to a denial of the reasons for the breakdown of the marriage.

[10] The Applicant who was self-represented in the Regional Court proceedings was served with a notice to attend a pre-trial conference in terms of Rule 28 of the Central Divorce Court rules on the 8th of May 2012. However, prior to the date of the pre-trial conference which was to be held before a regional magistrate, the Respondent's attorneys of record filed a notice of withdrawal of the action against the Applicant on the 18th of April 2012.[4]

[11] The Applicant states that, in April 2012, she was served with both a notice of withdrawal of the Regional Court proceedings and, during the same month, she found a decree of divorce granted in this division, in these proceedings, in her home post box. The decree of divorce granted by this division, was granted on an

unopposed basis on the 18th of November 2011 and the order states as follows:

"IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

CASE NO : 2011/19961

P/H NO. 0

JOHANNESBURG, 18 NOVEMBER 2011

BEFORE THE HONOURABLE JUDGE COPPIN

In the matter between:

J[...] S[...] *Plaintiff*

and

E[...] S[...] (born C[...]) *Defendant*

HAVING read the documents filed of record and having considered the matter:

It is ordered that:

1. The marriage is dissolved.

2. Forfeiture of the benefits arising from the marriage, the property situated on Stand : 23334, Zone 2, Meadowlands, and the Plaintiff's pension funds.

BY THE COURT

_____

REGISTRAR

/lrm"

[12] The crux of the Applicant's application, is that she avers that she was never served with a summons out of this division and that no grounds existed for forfeiture of patrimonial benefits to have been ordered against her. The Applicant avers that, she was completely unaware that the Respondent had instituted an action out of the High Court against her (whilst the Regional Court Proceedings were still ongoing) which relief differed substantially from the relief sought by the Respondent in the

Regional Court proceedings. The Applicant alleges that the above order was fraudulently obtained.

[13] After receiving the above order, the Applicant approached Monama Attorneys and instructed Mr L P Monama (who is deceased) with dealing with the matter. When Monama Attorneys made enquiries from Sarlie & Ismail Inc, they were advised that, the Respondent was represented in the High Court proceedings by *"other attorneys"*.[5]

[14] In a letter dated 19 April 2012, Monama Attorneys requests Sarlie & Ismail Incorporated to provide them with the particulars of the attorneys who assisted the Respondent in the High Court to obtain copies of documentation and to launch an application for rescission *"and proceed with the Central Divorce Court action"*.[6]

[15] A letter was sent from Monama Attorneys on the 8th of May 2012 to *"Bokhumalo Attorneys"* in which letter it is recorded that Monama Attorneys had still not been furnished with the details relating to which attorneys represented the Respondent in the High Court proceedings and the letter records: *"Our belief is against the background that he indicated to his previous attorneys; Sarlie & Ismail Inc, that he has 'misplaced' their details."*[7]

[16] The decree of divorce reproduced hereinabove, does not indicate any appearance on behalf of the Respondent when the order was granted. There are numerous difficulties with the order:

[16.1] The citation of the Court is incorrect. During that time, the citation of the Court would have been described as

"IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)"

[16.2] No pigeon hole number is indicated for the Respondent's attorney.

[16.3] No identity numbers are reflected for either of the parties. This is usually essential, especially where an order relates to the transfer of property.

[16.4] The wording of prayer 2 is confusing and improper. The property is not described with sufficient particularity to enable the Deeds Office to attend to a transfer and it does not specify the Applicant's undivided half share should be transferred to the Respondent. No title deed number is indicated. No detail is provided relating to the pension interests that are declared to be forfeit, nor does the order state that the Applicant's right to share in such benefits are declared forfeit in favour of the Respondent.

[16.5] The Registrar's seal seems to be missing from the order.

[16.6] The order does not refer to counsel (or the Respondent), having been heard in Court, or the evidence that would have been led in open court; it simply states that the order was granted "having read the documents filed" and after considering the matter.

[17] The Applicant avers that Mr Monama indicated that he would seek a rescission of judgment and assured the Applicant that the litigation between her and the Respondent had come to an end.

[18] The Applicant only became aware of the fact that no rescission had been granted or that the proceedings had not been resolved by Mr Monama, in May 2022, when the Respondent applied for the eviction of the Applicant from the property, based on the divorce order.

[19] The Applicant applies for condonation for the late filing of her application for rescission and readily concedes that her application is excessively out of time. The Applicant's explanation for the delay, is that she was advised by her attorney at the time, Mr Monama (now deceased) that the litigation between herself and the Respondent had been concluded and that no further steps had to be taken.

[20] There is no explanation from the Respondent, why he only sought the Applicant's eviction some 11 years after the order was granted, in May 2022.

[21] After service of the application for eviction, the Applicant sought assistance from Soweto Legal Aid. The Soweto Legal Aid office could not assist the Applicant with an application for rescission and for this purpose, she was referred to the Johannesburg Legal Aid office. The Applicant states that she was only able to consult with an attorney at the Johannesburg Legal Aid office on 5 September 2022, after which steps were taken by the Legal Aid office to attempt to find the court file.

[22] On 13 March 2023, the registrar of this division confirmed that the court file could not be located.[8]

[23] The Applicant states that, once the registrar confirmed that the court file was missing, she was left with no option but to launch the application for rescission, as she was not served with the summons and, the Applicant states it would be *"incomprehensible"* that a forfeiture order would have been granted in respect of the property. The Applicant avers that, there were no grounds for forfeiture and that the forfeiture order impacts negatively upon her constitutional rights as stated in Section 25(1) and Section 25(6) of the Constitution of the Republic of South Africa, 1996.

[24] The application for a rescission of judgment was initially served with an unsigned founding affidavit on the 13th of April 2023, pursuant to which the Respondent filed an irregular step notice. The signed founding affidavit by the Applicant was served on the Respondent on 5 May 2023.

[25] The Respondent opposes the Applicant's application for condonation and in a point *in limine* avers, that the Applicant failed to seek condonation for the late filing of her application for a rescission of judgment in terms of an order granted by this division in the eviction proceedings under case number 2021/43466 on the 14th of March 2023.

[26] On the 14th of March 2023, an order was granted in the eviction proceedings, postponing the eviction application, giving both the parties leave to supplement their

papers and an order was *inter alia* made in the following terms:
"The First Respondent to launch rescission proceedings regarding the divorce Court Order granted by Justice Coppin on 18 November 2011 under case number 2011/19961 of this Court, within 30 (thirty) days of granting this order, failing which the Applicant is granted leave to approach this court on the same papers, duly supplemented, for an eviction order;".[9]

[27] According to the Respondent, the *dies* for the filing of the application for a rescission of judgment expired on the 15th of April 2023 and, as the first founding affidavit in support of the application for rescission of judgment served on the 13th of April 2023 was unsigned, same should be considered an irregular step and disregarded.

[28] The Respondent's argument is thus that, apart from the Applicant's general application for condonation for the late filing of her application for rescission, she should also have applied specifically for condonation for the late filing of the rescission application in respect of the period 13 April 2023 to 5 May 2023.

[29] There is no averment, that the unsigned copy of the affidavit differed from the signed copy of the Applicant's founding affidavit.

[30] I am of the view that the order granted in the eviction proceedings, was made with a view to case manage the eviction proceedings and did not have an impact on the rescission of judgment application. To adopt any other approach would either be overly technical or, would mean that, the Respondent would have to accept that another court, had already condoned the late filing of the rescission application, as long as same was launched within 30 days from the granting of the order in the eviction proceedings. This court will not adopt that approach and, the Applicant's application for condonation will be considered as a whole, not in a piece-meal fashion, which period would include the period up to and including service of the signed founding affidavit.

[31] In any event, I am persuaded by the Applicant in her replying affidavit, that the 30 day period referred to in the above order granted in the eviction proceedings referred to court days as opposed to calendar days which means that the 30 day period would have elapsed on the 2nd of May 2023.

[32] Accordingly, the point *in limine* is dismissed. The costs shall be costs in the application.

[33] The Respondent's answering affidavit focuses on his contributions towards the property, his denial of abuse and allegations of adultery (misconduct) against the Applicant.

[34] The Respondent avers that:

[34.1] He became dissatisfied with the services rendered by Sarlie & Ismail Inc. No reasons are stated for his dissatisfaction.

[34.2] He was introduced (by persons unknown) to a certain *"Mr Levin"*.

[34.3] This Mr Levin proceeded to institute High Court divorce proceedings against the Applicant and that at the time the Respondent was under the *bona fide* impression that the regional proceedings were duly withdrawn.

[35] The Respondent failed to provide the court with any details regarding Mr Levin such as a first name, a telephone number or the firm for which Mr Levin worked at the time.

[36] The Respondent states that, the sheriff's return of service relating to the return of service for the summons is apparently too old to have been kept on the sheriff's system. The Respondent however does not attach a copy of the summons itself, which would presumably have reflected the details of his attorney and the grounds upon which he relied for forfeiture of benefits of the in community of property assets.

[37] It is curious, that the Respondent was able to obtain a copy of the return of service in respect of the service of the divorce order on the Applicant dated 19 March 2012 but could not source a return of service in respect of service of the particulars of claim itself.

[38] In status matters, personal service is a requirement. The Respondent does not state when the summons was served, and provides no documentation in respect of a notice of set down or accompanying documentation which would have presented the unopposed divorce court with the relevant dates of service and the date that *dies* would have expired. None of the ancillary documentation required prior to the hearing was provided to this Court.

[39] The Respondent further states that, shortly before the hearing on the 18th of November 2011, Mr Levin informed him that he should appear in person in court to save himself costs. Again, the mysterious Mr Levin is not identified with any particularity, nor is a confirmatory affidavit attached. There is no reason stated by the Respondent why the decree of divorce was only served some 4 months later or, why he waited for a period of 11 years after obtaining the forfeiture order, to evict the Applicant.

[40] The Respondent further states that, unbeknown to him at the time, the Regional Court proceedings were still ongoing as Sarlie & Ismail Inc, failed to file a notice of withdrawal, as they were instructed to do. This version is improbable, if regard is had to the letter addressed to Mr Monama dated 12 April 2012 attached to the Applicant's founding affidavit which states *inter alia "We refer to the above matter and advise that we have now consulted with Mr S[...] in particular regarding your instructions to rescind the divorce order obtained out of the South Gauteng High Court during November 2011. We can now confirm that Mr S[...] was represented in such matter by other attorneys."* No mention is made that their mandate was terminated or that they no longer represent the Respondent.

[41] Over and above the fact that the Respondent admits that he obtained an order for a decree of divorce together with forfeiture of patrimonial benefits against the Applicant in the High Court, whilst the Regional Court proceedings were still pending, the Respondent further states that he was advised by a third attorney at Bogoshi Attorneys in April 2014 to launch his own rescission application of the High Court proceedings.

[42] Inexplicably, the Respondent provides the court only with a copy of a return of service in respect of such a rescission application that he launched in 2014 and he provides the court with a copy of the duplicate court file cover.[10] The Respondent fails to provide the court with a copy of his own rescission application which he launched in 2014 and which, on the Respondent's own version, was simply removed from the roll on 29 August 2014 and not withdrawn.

[43] The only reasonable conclusion to be drawn is that the Respondent has purposefully not provided the court with copies of his own rescission application. In such rescission application, the Respondent would have provided the court with reasons why the unopposed decree of divorce should be rescinded. Presumably that application would have contained details relating to service of the proceedings on the Applicant. These versions under oath, have not been provided to the court and, as a result of the Respondent's selective disclosure of documentation (and as already dealt with hereinabove), I find that the Respondent has not approached this court with clean hands.

[44] The Applicant has accused the Respondent of obtaining the decree of divorce in her absence, on a fraudulent basis. There is not sufficient evidence before this court to come to such a conclusion. The circumstances surrounding the granting of the decree of divorce is, however, suspicious, especially considering the fact that the Respondent has neglected or refused to provide this court with the necessary documentation, that would disprove such averments.

[45] The Respondent avers that, the fact that a decree of divorce was allegedly granted in the divorce court should, without more, be accepted by this court as proof of personal service. With regard to what I have stated hereinabove, I cannot make a finding on the documentation that was presented to the court, when the decree of divorce was granted.

[46] Despite the fact that, on the Respondent's own version, his own application for rescission of judgment is still pending, the next step taken by the Respondent was some 7 years later, when he applied for the eviction of the Applicant from the property on the basis of the disputed decree of divorce. The Respondent's application for rescission was not served on the Applicant personally but, according to the return of service, was affixed to the outer principal door.[11]

[47] The pattern that emerges from the affidavits filed, is that when process or an order is served upon the Applicant personally (as confirmed in returns of service), the Applicant takes action. When the decree of divorce was served on her, she approached Mr Monama. When the eviction proceedings were served upon her, she approached Legal Aid.

[48] There were delays occasioned by Legal Aid, in launching the application for a rescission of judgment. These delays, however, cannot be attributed to the Applicant as an elderly indigent female litigant.

[49] The application for rescission has been launched in terms of the provisions of Uniform Rule 31(2)(b) which states that a defendant may within 20 days of acquiring knowledge of a judgment that was taken by default, apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.

[50] Alternatively, the Applicant relies on the provisions of Uniform Rule 42(1)(a)

which states that the court may, in addition to any other powers it may have, *mero moto* or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby. The Applicant relies on Uniform Rule 42(1)(a) in the alternative, to Uniform Rule 31(2)(b) on the basis that, had the High Court known of the pending Regional Court proceedings, it would not have granted the decree of divorce in default of appearance of the Applicant.

[51] The court, furthermore, has the jurisdiction to rescind a judgment on common law grounds.

[52] The first enquiry relates to whether or not condonation should be granted. The period for the delay, even though it is lengthy, has been properly explained by the Applicant. Further periods of delay since the service of the application of the eviction application have also been explained, as delays occasioned by the Applicant being an indigent, elderly layperson who relied on the advice given to her by Legal Aid as well as the pro bono services the organisation provided to her.

[53] Even though the delay has been lengthy, the Applicant's explanation for the delay is cogent and not inherently improbable.[12]

[54] To grant or refuse condonation is at the discretion of the court, which discretion must be exercised in a judicial manner. The issues of condonation, lack of wilful default as well as reasonable prospects of success, are all inter-related.

[55] In the matter of **Routier v Routier**[13] the Full Bench in this division found that a defendant can seek a rescission of judgment granted in proceedings in the following circumstances:

[55.1] If the litigant commencing proceedings instituted an action and the Defendant failed to defend the action or having been barred, failed to file a plea, then on good cause being shown under Rule 31 and the Defendant could seek a

rescission. Rule 31 applies only to actions.

[55.2] If the litigant commenced proceedings either by way of an action or application and judgment was granted erroneously, the Defendant is only required to establish the procedural error to be entitled to a rescission under Rule 42.

[55.3] A defendant against whom judgment has been granted is entitled to seek a rescission of the judgment at common law.

[55.4] A defendant could conceivably seek relief on the basis of the right of access to courts, clause 34 of the Bill of Rights.

[55.5] Section 173 of the Constitution, 1996, affords the High Court the inherent power to protect and regulate its own process, taking into account the interests of justice. A litigant could seek relief on the basis that a process which should exist, does not.

[56] The court will exercise its discretion on the merits of each individual case and cannot consider the explanation for the Applicant's default in isolation.

[57] In the matter of **De Witts Autobody Repairs (Pty) Limited v Fedgen Insurance Co Limited**[14] the following was found:

"The correct approach was not to look at the adequacy or otherwise of the reasons for the failure to file a plea in isolation. Instead, the explanation, be it good, bad, or indifferent, must be considered in the light of the nature of the defence, which was an all-important consideration, and in the light of all the facts and circumstances of the case as a whole. In this way the magistrate places himself in a position to make a proper evaluation of the Defendant's bona fides, and thereby to decide whether or not, in all the circumstances, it is appropriate to make the client bear the consequences of the fault of its attorneys as in Saloojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A). An application for rescission is never simply an enquiry whether or not to penalise a party for his failure to follow the Rules and procedures laid down for civil proceedings in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable

inference that there is no bona fide defence, hence that the application for rescission is not bona fide. The magistrate's discretion to rescind the judgment of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties, bearing in mind the considerations referred to in Grant v Plumbers (Pty) Ltd (supra) and HDS Construction (Pty) Ltd v Wait (supra) and also any prejudice which might be occasioned by the outcome of the application. He should also do his best to advance the good administration of justice. In the present case this involves weighing the need, on the one hand, to uphold the judgments of the courts which were properly taken in accordance with accepted procedures and, on the other hand, the need to prevent the possible injustice of a judgment being executed where it should never have been taken in the first place, particularly where it is taken in a party's absence without evidence and without his defence having been raised and heard."

[58] A measure of flexibility is required in the exercise of the court's discretion. An apparently good defence may compensate for a poor explanation regarding wilful default, and *vice versa*.[15]

[59] In considering the issue of condonation and wilful default, I have considered the degree of non-compliance, the explanation therefor, the importance of the case, the Applicant's prospects of success, the Respondent's interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.[16]

[60] In the matter of **Harris v ABSA Bank Limited t/a Volkskas**[17], a Full Bench of this division endorsed the approach taken in the **De Witts Autobody Repairs** matter and found :

[60.1] *"Good cause"* and *"sufficient cause"* are synonymous and interchangeable.[18]

[60.2] The test whether sufficient cause has been shown by a party seeking relief is dual in nature, it is conjunctive and not disjunctive.[19]

[60.3] An acceptable explanation of the default must co-exist with evidence of reasonable prospects of success on the merits.[20]

[60.4] Wilful default is characterised by indifference as to what the consequences would be rather than a wilfulness to accept them.[21]

[60.5] Before an applicant in a rescission of judgment application can be said to be in *"wilful default"*, he or she must bear knowledge of the action brought against him/her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his/her actions.[22]

[60.6] A decision freely taken to refrain from filing a notice to defend or a plea or from appearing, ordinarily will weigh heavily against an Applicant required to establish sufficient cause. However, once wilful default is shown, the Applicant is not barred and never entitled to relief by way of a rescission. The court's discretion in deciding whether sufficient cause has been established must not be unduly restricted. The mental element of the default, whatever description it bears, should be one of the several elements which the court must weigh in determining whether sufficient or good cause has been shown to exist.[23]

[60.7] A steady body of judicial authorities has held that a court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or failure in isolation.[24]

[61] In the current matter, Uniform Rule 42 is not applicable, as the judgment was not erroneously sought or granted within the ambit of Uniform Rule 42. The defence of *lis alibi pendens* is a defence that could have been pleaded by the Applicant, had she been aware of the High Court proceedings and such defence would have been dilatory in nature.

[62] The rescission application must therefore be considered, within the scope of Uniform Rule 31(2)(b), alternatively at common law. In terms of Uniform Rule 31, the application should have been launched within 20 court days and at common law, the

application should have been launched within a reasonable period of time.

[63] Even though, the application has been launched many years after judgment was taken against the Applicant by default, I find that it is in the interests of justice for condonation to be granted. On a balance of probabilities, the Applicant was not aware of the High Court proceedings that were instituted against her, alternatively once the existence of the court order came to her attention, she obtained legal advice and was assured by Mr Monama that the matter had been satisfactory dealt with.

[64] The Applicant has shown good cause for the judgment to be rescinded.

[65] The Applicant's default and her defence was considered against the fact that the Respondent did not provide proof of service of the summons in the High Court proceedings, the absence of a copy of the High Court summons, the absence of any explanation regarding why proceedings were instituted in the High Court, the complete change of relief sought by the Respondent in the High Court proceedings including the far-reaching relief of forfeiture of benefits, the Respondent's lack of particularity relating to the particulars of Mr Levin, the lack of disclosure relating to the Respondent's own application for rescission of judgment in 2014 that is still pending before this court and the Respondent's inaction for a period of 11 years before commencing with eviction proceedings against the Applicant.

[66] Furthermore, the Applicant's defence to the Respondent's claim for forfeiture of benefits must be considered and properly ventilated at trial, especially considering that, the Applicant was the co-owner in undivided half shares of an immovable property, that was transferred to the Respondent, without the Applicant's knowledge. If the order is not rescinded, the Applicant who is elderly, may be left destitute.

[67] The Respondent has not stated what evidence the court heard, in default of the Applicant's appearance, in order to grant the orders for forfeiture, not only of the

Applicant's share in the property but also the reasons for declaring the Applicant's claim to half of the Respondent's pension funds forfeit. It is clear from the contents of the affidavits filed in the rescission application, that there are substantial disputes of fact relating to contributions to the property and substantial misconduct, that should be ventilated at trial, in the interests of justice.

[68] As a result of the aforegoing, condonation should be granted as should the Applicant's application for a rescission of judgment.

[69] During argument, the Respondent's counsel stated that the Applicant should have prayed for declaratory relief, relating to the Applicant's averments that the default judgment was obtained fraudulently. These averments relating to declaratory relief are, however, not raised in the answering affidavit and are not applicable in this matter.

[70] The Applicant prayed for costs to be granted against the Respondent, in the event of opposition. Having regard to the lengthy period of time that has elapsed since the order was granted, the Respondent's opposition to the application for rescission was not unreasonable. However, due to the lack of disclosure from the Respondent, and the Respondent's evasive approach to these proceedings, an order for costs cannot be made in his favour either. Accordingly, it would be just and equitable, for costs of this opposed application, to be costs in the action.

[71] I accordingly make an order in the following terms:

1. The late filing of the Applicant's application for rescission is condoned.
2. The order granted by this court on 18 November 2011 is rescinded and set aside.
3. The transfer of the Applicant's half share ownership of Erf 23334, Zone 2, Meadowlands Township, to the Respondent is cancelled in terms of Section 6 of the Deeds Registries Act 47 of 1937, as amended.
4. Costs of this application shall be costs in the action.

FRANCK, A J

Date of hearing : 23 October 2023

Date of judgment : 19 February 2024

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1 Annexure “ES4”, CaseLines 003-8

2 Annexure “ES5”, CaseLines 003-9

3 Annexure “ES6”, CaseLines 003-10

4 Notice of set down of pre-trial conference, Annexure “ES7”, CaseLines 003-11 and notice of withdrawal of action, Annexure “ES8”, CaseLines 003-12

5 Annexure “ES10”, CaseLines 003-15

6 Annexure “ES11”, CaseLines 003-16 to 003-17

7 Annexure “ES12”, CaseLines 003-18

8 Annexure “ES15”, CaseLines 003-26

9 Annexure “JS3”, CaseLines 007-50 to 007-52

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[10] Annexure “JS10”, CaseLines 007-65

[11] Annexure “JS9”, CaseLines 007-64

[12] **Ramalephatso Industries CC and Another v Nyumba Mobile Homes & Offices (Pty) Limited** 2023 JDR 3458 (FB) at [22]

[13] 2019 JDR 2477 (GJ)

[14] 1994 (4) SA 705 (E) at page 711

[15] **Zealand v Milborough** 1991 (4) SA 836 (SE) at 837 H – 838 D

[16] **Federated Employers Fire & General Insurance Co Limited and Another v McKenzie** 1969 (3) SA 360 (A) at page 362

[17] 2006 (4) SA 527 (T)

[18] **Harris v ABSA Bank Limited t/a Volkskas** 2006 (4) SA 527 (T) at paragraph [6]

[19] **Harris v ABSA Bank Limited t/a Volkskas** 2006 (4) SA 527 (T) at paragraph [5]

[20] **Harris v ABSA Bank Limited t/a Volkskas** 2006 (4) SA 527 (T) at paragraph [5] and **Chetty v Law Society, Transvaal** 1985 (2) SA 756 (A)

[21] **Harris v ABSA Bank Limited t/a Volkskas** 2006 (4) SA 527 (T) at paragraph [5]

[22] **Harris v ABSA Bank Limited t/a Volkskas** 2006 (4) SA 527 (T) at paragraph [8]

[23] **Harris v ABSA Bank Limited t/a Volkskas** 2006 (4) SA 527 (T) at paragraph [9]

[24] **Harris v ABSA Bank Limited t/a Volkskas** 2006 (4) SA 527 (T) at paragraph [10]