REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 1572/2016

In the matter between:

R N I **APPLICANT**

and

J P I **RESPONDENT**

Neutral citation: *R N I v J P I* (I 1572/2016) [2019] NAHCMD 468 (1 November 2019)

Coram: ANGULA DJP
Heard: **18 October 2019**
Delivered: **1 November 2019**

Flynote: Applications and motions – Application for rescission of final order of divorce – Requirements for rescission applications – Reasonable and acceptable explanation for failure to defend the action– *Bona fide* defence with some prospects of success – Grounds for rescission – That respondent by failing to disclose his adultery to the applicant and the court – Committed fraud and or fraudulent misrepresentation – No reasonable and acceptable reason for applicant's failure to defend the action – Applicant does not have a *bona fide* defence with prospects of success – Tests applied for the determination of the factual disputes and the

adequacy of the explanation – Both the *Plascon-Evans* rule and the probabilities test applied as per *SOS Kinderdorf* matter – Applicant has not made out *a prima facie* case nor do the probabilities favour her in this application.

Civil Procedure – Non-joinder – Adulterous third party was not a party to the divorce proceedings – Has no interst in the rescission of the final order of divorce obtained by agreement between applicant and respondent.

Civil Procedure – Undue delay – Explanation for delay accepted and condoned.

Summary: The applicant applied for the rescission of a final divorce order in terms of common law on grounds that the final order of divorce was obtained by fraud and or fraudulent misrepresentation perpetrated by the respondent – The order was obtained by consent based on a settlement agreement entered into between the parties and which was incorporated as part of final order of divorce – The applicant alleged subsequent to the granting of the final order of divorce she discovered that at the time when the parties concluded the settlement agreement her husband did not disclose to her that he had committed adultery and that had she known, she would not have entered into settlement agreement instead she would have claimed forfeiture of the benefits arising from the marriage in community of property.

Held; the explanation tendered by the applicant for not defending the divorce action, was not acceptable.

Held; the applicant was not *bona fides*, and as such the application amounted to an abuse of court process and resources.

Held; applicant has failed to make out a *prima facie* case that she had a bona fide defence as well as a counter-claim which enjoyed a reasonable prospect of success.

ORDER

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1. The first point *in limine* of non-joinder is dismissed.

2. The second point *in limine* of undue delay is dismissed.

3. The applicant's delay in bringing this application is condoned.

4. The application for rescission of the final order divorce granted on 5 September 2016, is dismissed.

5. The applicant is ordered to pay the costs of the respondent such cost not to be limited to the threshold stipulated by rule 32(11).

6. The matter is removed from the roll and regarded finalized.

JUDGMENT

ANGULA DJP:

Introduction:

[1] This is an application for rescission of a final order of divorce, in terms of the common law. The order was obtained by consent of the parties based on the settlement agreement entered into between the parties and which was incorporated into a final divorce order. The applicant now alleges that, subsequent to the granting of the final order, she discovered that at the time when the parties concluded the settlement agreement her husband did not disclose to her that he had committed adultery and that had she known of that fact, she would not have entered into a settlement agreement, and would instead, have claimed forfeiture of the benefits arising from the marriage in community of property. The applicant thus contended that the order was obtained by fraud or fraudulent misrepresentation and for that reason it should be rescinded.

The parties

[2] The applicant is a lecturer employed as such by the University of Namibia. She holds a Masters degree and was at the time of the cause of action which gave rise to the present proceeding studying for a Ph.D degree. The respondent is also employed by the University of Namibia as assistant director: occupational health and safety. He has fathered two children out of wed-lock.

Background

[3] The applicant and the respondent ('the parties') were married to each other on 26 August 2009, in community of property. It is a matter of dispute between the parties whether the marriage was a happy one or not. According to the applicant the marriage was a harmonious one. The respondent for his part paints a picture of discontent and fault lines in the marriage. No child was born from the marriage relationship. During May 2016 the respondent instituted divorce proceedings against the applicant. The applicant did not oppose the action. A final order of divorce was granted on 5 September 2016.

The applicant's case

[4] The applicant points out that when the respondent instituted the divorce action he only alleged that she constructively deserted him by emotionally abusing him; showing no love and affection; that she spent nights and weekends away from the common home without an explanation; and that she moved to Germany after indicating her intention to no longer continue with the marriage relationship.

[5] The applicant alleges that after the divorce order was granted, she discovered that the respondent had committed adultery during the subsistence of the marriage and that a child was born on 13 June 2016. In this regard the applicant points out that the respondent did not inform her and the court that he had committed adultery during the subsistence of the marriage and did not seek condonation for the adultery from the court when he moved for the divorce order. In this connection she states that after the final order of divorce was granted, she was advised that the

respondent's conduct constitutes a material misrepresentation to her and the court and in fact constituted a fraud on the court.

[6] The applicant deposes further that due to the applicant's material misrepresentation, she entered into the settlement agreement to her detriment. She states further that she has been advised that had the respondent admitted adultery, she would have been entitled to an order for the forfeiture of the benefits arising from the marriage in community of property.

[7] The applicant continues to say that the respondent had only informed her of the adultery in respect of the first child and at the time that child was already three years old. After that revelation the parties attended counselling sessions.

[8] Finally the respondent states that once the final order of divorce has been rescinded, she intends to institute divorce proceedings against the respondent by way of a counter-claim in terms of which she will seek a divorce order and an order incorporating an order for the forfeiture of the benefit arising from the marriage in community of property.

Opposition by the respondent

First point in limine – non-joinder

[9] The first point in limine is one of non-joinder. It relates to the alleged non-joinder of the third party with whom the respondent had committed adultery and from which relationship a second child was born. The respondent alleges that such third party has a direct and substantial interest in the outcome of the present proceedings. The respondent therefore urged upon the court to order that present proceedings be stayed pending the joinder of the third party.

Second point in limine – undue delay

[10] In respect of this point in limine the respondent alleges that the applicant did unreasonably and unduly delayed in bringing the present application. The respondent points out that the applicant had known of her grievance since

September 2016 when the final order of divorce was granted, about two and half years ago. The applicant states further that, and, in the meantime, he has moved on with his life and as such he was about to get married and that he would be married by the time this application is heard.

[11] The respondent then proceeded to catalogue the steps taken by the applicant to demonstrate the alleged unreasonable and undue delay committed by the applicant in bringing this application and the reasons why the application should not be entertained by this Court. In the view, I take on this point it is unnecessary to set out all the respondent's allegations with regard to the alleged delay.

Opposition to the merits

[12] It is the respondent's case that the applicant informed him during December 2015 that she had consulted a legal practitioner with the purpose to institute divorce proceedings. Thereafter they, on his suggestion, consulted a marriage counsellor whereafter they agreed to maintain the marriage relationship. It so happened that her father passed away in April 2017. After the funeral, she again requested him that they should attend at the lawyer's office as she wanted to obtain a divorce. At the consultation it was agreed that he would institute divorce proceedings as the applicant was returning to Germany for her studies. At that consultation the parties further agreed on the grounds of divorce to be advanced in the particulars of claim and the terms of the settlement agreement were also agreed and drafted. Neither of the parties informed the lawyer about his adulterous relationship as that matter was according to him 'water under the bridge' by then.

[13] The respondent deposes further that the settlement agreement was e-mailed to the applicant in Germany which she signed on 29 June 2016. He signed it on 30 June 2016. The applicant then deposed to an affidavit which stated that she 'had the settled intention to leave the Republic of Namibia for an indefinite period' and that the restitution of conjugal rights (RCR) order may be served upon her via email.

[14] Thereafter the respondent moved for the RCR order on 27 June 2016 which was served via email on the applicant. After receipt of the RCR order she sent an

email to the parties' legal practitioner confirming receipt of the order and further confirming that 'I understand the contents of the RCR order'.

[15] Lastly, the respondent confirms that when he testified in court to obtain the RCR order, he did not mention the adultery because by that time the applicant had already condoned such adultery. The respondent points out that the applicant is a highly educated person with a Masters Degree and was at the time studying towards a Ph.D. degree. In this connection the respondent asserts that the applicant had entered into the settlement agreement which knowledge of his adultery which the applicant had condoned. Much about the parties' positions. I now proceed to consider the respondent's *points in limine* and thereafter the merits, if necessary.

First point in limine of non-joinder considered

[16] In the court's view, this point in limine is not well founded and can be dismissed on the simple ground that the third party has no interest in the present proceedings. It concerns the final order of divorce agreed to between the parties and to which the third party was not a party. She might have an interest in the subsequent proceedings if the final order of divorce in question, is rescinded. The applicant states that she intends to join the third party to the proceedings. As a matter of fact, the mentioning of the name of the third party in this proceeding violated a long-time honoured rule 87(4) of the rules of this court, that the name of a third party must not be revealed in the proceedings unless and until such third party has been joined to the proceedings. For those reasons the point in limine stands to be dismissed.

Second point in limine of undue delay considered

[17] Central for consideration regarding this point in limine, is the question whether the steps taken by the applicant since she became aware of her cause of action, were taken with the required haste and promptness. The facts are generally common cause.

[18] It is common cause that after the final order of divorce was granted on 5 September 2016, the applicant instituted action proceedings wherein she sought to have the settlement agreement set aside on the basis of fraudulent misrepresentation. The respondent defended that action, but could not participate in the proceedings after his condonation and upliftment of bar application for the late filing of his plea was dismissed. The action was dismissed by the court on 29 September 2017. The applicant then noted an appeal to the Supreme Court on 31 October 2017. On 25 January 2019, the Registrar of the Supreme Court set the matter down for hearing on 8 July 2019. On 6 February 2019, applicant withdrew her appeal to the Supreme Court and instituted the present proceedings. During this time the applicant was legally represented and had in addition obtained the services of an instructed counsel. In fact, her legal team consulted senior counsel and it is those consultations that led to the withdrawal of the appeal and institution of the present application proceedings.

[19] The court accepts that there was a delay of about two years from the date the final order of divorce was granted and the date when this application was launched. However, it is clear from the facts set out in the preceding paragraph that during the intervening period, the applicant did not sit around and did nothing. It would appear that even her legal advisors held different views about the correct approach to have the final order of divorce, set aside – whether by way of appeal to the Supreme Court or by way of a rescission application before this court. As mentioned in the preceding paragraph, she was advised to lodge an appeal which she instructed her legal representatives to proceed with, but the appeal was later withdrawn on the advice of senior counsel and after a long wait to be allocated a date for hearing.

[20] Taking into account the novelty attended upon the matter, the court is of the view that the steps taken by the applicant since she was advised of her right and the time taken to bring this application have been fully and satisfactorily explained. In accepting the applicant’s explanation, the court takes into account that the applicant was highly dependent on the advices of her legal representatives which advices turned out to be divergent and conflicting and as a result she had to change horses, so to speak, in the middle of the battle. For those reasons the second point in limine is liable to be dismissed.

[21] I now turn to consider whether the applicant has made out a case for the relief sought.

Parties' principal submissions

[22] Mr Narib who appeared on behalf the applicant, argues in his written submissions that when the respondent instituted the divorce proceedings, he was duty bound not only to make explicit allegations of his adultery, but also of the circumstances under which he alleged his adultery had been condoned. The respondent's failure to do so, so the argument continues, resulted in a judgment being granted in his favour. In failing to disclose his adultery the respondent had deprived the court the opportunity to exercise its power and discretion whether or not to condone such adultery. Furthermore, his failure to do so amounted to a fraud on the Court.

[23] Mr Tjombe, who appeared on behalf of the respondent submits in his heads of argument that it is clear from the respondent's answering affidavit, that it was never his intention to commit fraud. Counsel points out that the applicant knew of the adultery and she had condoned it. Furthermore, if the respondent was wrong in his understanding in this regard, it does not follow as a matter of course that his conduct amounted to a misrepresentation or fraud. Lastly, the argument continues, the applicant has failed to set out facts which if established at the trial, would entitle her to a forfeiture order being granted in her favour.

Rescission: applicable law

[24] Under the common law, the court has the power to rescind an order obtained on default of appearance, provided the applicant establishes sufficient cause (or good cause) for the rescission[1]. In *De Villiers v Axiz Namibia (Pty) Ltd*[2] Hinrichsen AJ quoting with the approval from Herbstein & Van Winsen (supra) set out the two

[1] Herbstein and Van Winsen *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 4 edition at 691.
[2] 2009 (1) NR (1)40 HC at para 25.

requirements that need to be satisfied in an application for rescission order obtained by default. These are:

(a) The applicant must provide a reasonable and acceptable explanation for his or her default;

(b) that the applicant must show that he or she has a *bona fide* defence, which *prima facie* has some prospects of success at the trial – that is, if his or her defence is established at court, she would be entitled to the relief claimed.

[25] In order to succeed in the relief sought the applicant must establish both requirements as stated above. I proceed to consider whether the applicant has established these requirements.

Has the applicant furnished a reasonable explanation for her failure to defend the respondent's action for divorce?

[26] There is no explanation made by the applicant for her failure to defend the divorce action. The reason for not doing so is obvious: that is because she had agreed in the settlement agreement that the respondent 'shall proceed with his claim unopposed by the Defendant'. She had made a conscious decision not to defend the divorce action. This was so even in the face of the 2012 adultery which may have resulted in her obtaining a final order of divorce and possibly a forfeiture order.

[27] It is common cause that the parties jointly consulted one legal practitioner and agreed as to the terms upon which they would obtain a final divorce order. After the said consultation, the said legal practitioner drafted the particulars of claim based on the parties' instructions. The particulars of claim were emailed to both parties. The legal practitioner pointed out to them in his email, that the allegations which constituted the grounds of divorce were necessary to sustain the granting of an order for the dissolution of the marriage. In other words, to establish fault on the part of the applicant. The applicant accepted that she was blamed for the breakdown of the marriage. In other words, she was the so-called 'guilty party'.

[28] Having regard to the foregoing, I am of the view that the applicant's complaint that the respondent did not mention his adultery was a misrepresentation and fraud to her and the court rings hollow. The applicant is not *bona fide*. In my judgment, if there was a misrepresentation made to the court at all, the applicant was a willing and active accomplice. She knew that the grounds advanced to the court for the parties to obtain a divorce order, were a sham.

[29] On her own version, she was not the cause of the breakdown; it was the respondent whom she had always suspected of being involved in extra-marital affairs and from one of those affairs the first child was born. As it will appear later in this judgment, she contradicts herself whether she did condone the first adultery or not. Whatever the true position might be, she allowed the court to be presented with grounds of divorce which she knew were false. In reality the court granted the order at the request of both parties.

[30] In my judgment, taking into account the foregoing facts, the applicant has failed to furnish a reasonable and acceptable reason for her to defend the action. To the contrary, she had agreed that she was not defending the action. For that reason, the applicant's default was wilful.

Is the applicant bona fide

[31] It is my considered view that the applicant is not *bona fide*. I arrived at this conclusion taking into consideration the following facts.

In her para 9 of her founding affidavit the applicant states as follows:

> 'The respondent did not allege that during the subsistence of the marriage he committed adultery.'

[32] In response to the respondent's statement that the parties did not inform their joint lawyer about the adultery committed by the respondent in October 2015, the applicant in her replying affidavit states as follows:

'I definitely informed the legal practitioner that the reason why I wanted a divorce was as a result of the respondent's adultery. This related to the adultery which he committed around 2012 as a result of which a child had been born. At that stage I still did not have definite proof of the adultery of which I found out only after the divorce proceedings, that is, the adultery which committed during or about October 2015'.

[33] In my opinion, the applicant's above statement is not credible and thus points to the applicant's lack of *bona fides*. This opinion is borne out by a number of the following undisputed facts: It is common ground that the lawyer e-mailed the draft particulars of claims to the parties. Upon receipt of the particulars of claim she did not object thereto or point out to the lawyer that she wanted to obtain a divorce based on the respondent's adultery committed in 2012.

[34] If the applicant's contention is accepted that she intended to divorce based on the adultery committed in 2012, it would mean, in my considered view, that she then did not condone the adultery of 2012 as she claims on the one hand. Furthermore, if it is accepted that she had not condoned 2012 adultery, she failed to explain why she agree that the respondent should proceed to obtain a divorce order based on her alleged desertion and not on the respondent's adultery. I question this for the following reason: the applicant knew of the 2012 adultery and instructed the lawyer that she wanted to get a divorce based on the 2012 adultery, yet she approved the particulars of claims which were not based on the 2012 adultery and furthermore she still entered into a settlement agreement and did not insist on the divorce being based on the 2012 adultery. Only one of the contradictory versions can be true. Both cannot be true. The conclusion to be drawn from these versions is that the applicant is not being truthful to the court.

[35] A further fact which indicates the applicant's lack of *bona fides* is this: It is common cause that after the RCR order was served on the applicant she sent an email to their joint lawyer stating that:

'I hereby acknowledge and confirm receipt of the email and that I understand the contents of the email and the contents of the RCR order attached.'

[36] Notwithstanding her 'understanding of the RCR' the applicant did not protest or show cause that the final divorce order should not be granted because it was not based on adultery or that it did not state that the respondent's adultery had been condoned. It is for those reasons that I hold the view that the applicant is not *bona fide,* and her version is not credible and therefor liable to be rejected.

Has the applicant shown that she has a bona fide defence or cause of action?

[37] The applicant contends that had she known of the respondent's second adultery from which a second child was born, she would not have entered into the settlement agreement; that she would have defended the action and would have instituted a counter-claim for the forfeiture of benefits arising from a marriage in community of property. It is her contention that, the respondent's failure to inform her of the second adultery and the child born therefrom, constitute fraudulent misrepresentation, which caused her to enter into the settlement agreement. The applicant's allegation must be considered against the background of the legal principles applicable to the issue at hand.

[38] According to the learned author *Kerr*[3], there are three classes of misrepresentations namely fraudulent misrepresentation, negligent misrepresentation and simple misrepresentation. As regards fraudulent representation the learned author states that the party alleging that a misrepresentation is fraudulent has to prove the absence of honest belief. This he or she may do by showing that a false (i.e an incorrect) representation has been made (i) knowingly or (ii) without belief in its truth or (iii) recklessly, carelessly whether it be true or not.

[39] I will first consider whether the applicant has proved the alleged misrepresentation by the respondent, keeping in mind the requirements as set out by *Kerr*. The alleged misrepresentation has two components: misrepresentation by the respondent to the applicant; and misrepresentation by the respondent to the court. I first consider the alleged misrepresentation to the applicant and thereafter to the court.

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[3] Kerr: *The Law of Contract*, 6th edition at 280.

[40] In order to succeed in both instances, the applicant is required to make out a case that the respondent made a false representation ‘knowingly or without belief in its truth or recklessly, carelessly whether it be true or not’. The applicant only says the respondent failed to disclose to her and the court his adultery. Failure to do something (where there was a duty to act), ordinarily in law points to negligent conduct. In my view, the respondent’s alleged failure to disclose to the applicant his adultery amounts to a non-disclosure which have its own different legal requirements. Representation is made by words or conduct or by both words or conduct. On the applicant’s own case, the court is unable to make a finding that the respondent made a flase representation due to lack of evidence.

[41] If regard is had to the contradictory evidence tendered by the applicant with regard to adultery committed by the respondent during 2012, it is not possible for this court to make a finding that the applicant has shown that the respondent had fraudulently misrepresented to her with regard to the said adultery. This is because, on the one hand, the applicant concedes that respondent had informed her of the first adultery from which a girl child was born, and that child was already three years old by the time she was informed. She asserts that she came to the knowledge of the first adultery only in 2015 and that they thereafter attended counselling. Yet on the other hand, as shown earlier in this judgment, the applicant contends that she wanted to obtain a divorce order based on the respondent’s adultery committed by the respondent during 2012. Given the conflicting evidence tendered by the applicant on this point the court is not in position to accept either of the conflicting versions tendered by the applicant on this point. The applicant bears the onus to make out a *prima facie* case for the relief she seeks. In my judgment the applicant has failed to make out a prima facie case of the alleged misrepresentation by the respondent.

[42] As regards the alleged misrepresentation by the respondent to the court by respondent, the high mark of the applicant’s case is that the respondent did not disclose to the court his adultery. It is common cause that the respondent did not say anything to the court regarding his adultery. It would appear to me that the applicant conflated the concept of ‘misrepresentation’ with the concept of ‘non-disclosure’. Non-disclosure entails a situation where the ‘circumstances are such that a frank

disclosure [is] clearly called for – or as it has frequently been said when there was [is] a duty to disclose[4]'. In view of the fact that it is not the applicant's case that the respondent failed to disclose to the court his adultery, I feel that it is not necessary to go into detail with the legal requirements of non-disclosure.

[43] In my judgment for the respondent to be held to have committed misrepresentation to the court it would require that had conveyed something to the court which he knew to be false. It is common cause that the respondent did not say anything to the court regarding his adultery. The law requires that for misrepresentation to be found to have been committed, the representor must have said something to the represented, something which he knows to be incorrect or downright false. To demonstrate the point, the learned author *Kerr* refers to the case of *Comer's Motor Spares (Pty) Ltd v Albanis*[5] where the seller of a car represented to the buyer that the car had done no more that 50 000 miles and that the car had never been involved in an accident. It later turned out that the car had in fact done 150 000 miles and had been involved in two accidents. No doubt the court found in favour of the plaintiff.

[44] In any event, in my judgment, the respondent gave a plausible explanation that when he testified in court to obtain the RCR order, he did not mention the adultery because by that time the applicant had already condoned such adultery. Furthermore, he had accepted that there was no hope left to save the marriage and all attempts to save the marriage had failed. I deal further with that aspect later in the judgment.

[45] In respect of the adultery relating to the second child, there are disputes of fact. The applicant denies that she condoned that second adultery. The respondent on his part alleges that he had informed her of the adultery; namely that a woman was pregnant with his child.

[46] In this connection Mr Narib alerted the court to the fact that the question as to the cogency of evidence for the applicant to succeed in an application of this nature is a vexed one in this jurisdiction following the decision of the full bench in *SOS*

[4] *Kerr* at page 301.
[5] 1979 (2) SA 623.

Kinderdorf International v Effie Lentin Architects[6] which suggests that the well-known Plascon-Evans rule does not apply to interlocutory applications such as an application for the rescission of judgment where a final is not sought. The court simple stated:

'The Steeleville type of case relates to applications where the applicant is asking for a final relief. In an application to set aside a default judgment, should the application be successful, the matter is not finally decided.'

[47] Smuts J (as then was) in the *Katzao*[7] matter had occasion to consider the import of *SOS Kinderdorf* above statement and was of the view that the 'fundamental basis would appear to have been rejected in the more closely reasoned approach of the Supreme Court' in *Rally for Democracy and Progress and Others v Electoral Commission of Namibia*[8]. The Court further reasoned that the sufficiency of an explanation or its adequacy is finally determined one way or another in a rescission application although the matter itself is not finally determined if the rescission application were to be granted. The Court in *Katzao* then proceeded to apply the approach as propounded in the SOS Kinderdorf matter and the *Plasco-Evans* rule and arrived at the same conclusion.

[48] Mr Tjombe did not deal with the vexed question but simply urged the court to apply the *Plascon-Evans* rule.

[49] I am inclined to adopt the approach by the court in *Katzao* matter by applying both tests for the reason that the *SOS Kinderdorf* judgment being a full bench judgment is binding on this court. I must however with respect express my reservation about the correctness of the reasoning of the Court in the *SOS Kinderdorf*. I should however add my voice to call upon the Supreme Court, when an occasion arises to pronounce itself in clear terms on the import and effect of the *SOS Kinderdorf* judgment.

[50] The *Plascon-Evans* stipulates that the dispute is to be resolved on the admitted facts and the facts deposed to by the respondent unless the court

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[6] 1992 NR 390.
[7] *Katzao v Trustco Group International (Pty) Ltd and Another* 2015 (2) NR 402 (HC).
[8] 2013 (3) NR 664 para [33].

considers them to be so far-fetched or clearly untenable that the court can safely reject them on the papers[9]. Applying the principle to the facts of the present matter, the dispute, is in my view to be resolved, in favour of the respondent. There is nothing to show that the respondent's version is far-fetched or untenable. The applicant also did not contend that the respondent version is untenable neither did counsel for the applicant submit so. This conclusion is fortified taking into account the applicant's contradictory and less than credible statements as found earlier in this judgment.

[51] Even on the approach to the dispute of facts as propounded in the *SOS Kinderdorf* matter, the probabilities, in my view favour the respondent's version with regard to the fact that the applicant knew about the adultery whether the first or the second and that she had condoned it. In my view, if the applicant's version is to be accepted namely that she had condoned the first adultery, is to be accepted (forgetting the contradictions for a moment) it is probable that the applicant would have condoned the second adultery as well.

[52] In my judgment, taking into account all the foregoing, the applicant has failed to make out a *prima facie* case regarding the alleged fraudulent misrepresentation committed by the respondent. I now turn to consider whether the applicant has made out a *prima facie* case that the respondent had committed fraud.

[53] As regards the alleged, fraud has been defined in the following terms:

> 'Fraud can consist not only in the wilful making of incorrect statements, but also in the withholding of material information with fraudulent intent. The mere fact that certain material facts were not disclosed does not in itself establish that there has been wilful concealment. A fraudulent intent must be affirmatively proved[10].'

[54] The authorities tell us that 'a party seeking to set aside a judgment [or order] on the ground of fraudulent evidence must prove three items namely:

1. that the evidence was in fact incorrect;

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[9] *Rally for Democracy* (supra).
[10] *Herbstein and Van Winsen*, p 940.

2. that it was made with fraudulently and with intent to mislead; and

3. that it diverged to such an extent from the true facts that the Court would, if the true facts had been placed before it, have given a judgment other than what it was induced by incorrect evidence given[11].

[55] In an attempt to satisfy the above requirement, the applicant simply makes a bald allegation that the mere fact that the respondent did not seek condonation from the court for his adultery, such failure or neglect amounts to fraud on the court. I have already found that applicant has failed to make out a prima facie case of misrepresentation. In my judgment, the bar to make out a prima facie case for fraud is higher. Fraud requires proof of wilful concealment by the respondent as opposed to the proof for misrepresentation, which only requires a statement to have been made in the absence of 'honest belief'.

[56] Mr Narib referred the court to a number of judgments in his written submission and submitted that the respondent, by concealing that he had committed adultery and by further failing to seek condonation for that adultery had perpetrated a fraud on the court and on the applicant. I have had regard to the cases cited by counsel for the proposition. Some of the relevant principles emanating from those cases are: adultery on the part of the plaintiff is a bar to any relief being granted in divorce proceedings[12]; that condonation must contemplate the restoration of the offending spouse to his or her previous position and must result in reconciliation between the parties[13]; and in one of the cases, the court found that a misrepresentation had been made by the wife whereby she claimed that the plaintiff had sired children with her which turned out not to be true. They had agreed, that the applicant would pay maintenance for the children. The court held that the wifes conduct was a fraud on the court itself and on that basis the maintenance order was set aside[14]. It should be mentioned, the further reason why the court found in favour of the applicant it also felt that as an Upper Guardian of the minor children, fraud was committed upon it by the respondent.

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[11] *Herbstein and Van Winsen* page 470.
[12] *Mackaiser v Mackaiser* 1923 CPD 174.
[13] *Curram v Curram* 1946 SR 114.
[14] *Rowe v Rowe* [1997] 3 All SA 503 (A).

[57] I have no doubt that the thread of the legal principles arising from those cases cited by counsel constitute good law. The challenge at hand is the applicability of those principles to the facts of the present matter.

[58] I am not persuaded that the applicant has made out a *prima facie* case that the respondent wilfully concealed the issue of adultery. The applicant was bound to make out specific allegations why she alleges that the respondent wilfully concealed his adultery. She did not. I say this for the reason that even the respondent's 2012 first adultery of which the applicant was aware, was never mentioned to their joint lawyer or stated in their particulars of claim. It would appear to me that the respondent had accepted, and he says so, that the marriage was already at its tail-end and there was no need to disclose his adultery to the court. It does also not appear nor does the applicant allege, that the respondent knew that he had to disclose the adultery to the court or that he was advised that that he had an obligation to make such disclosure to the court. In this regard my finding is that the applicant has equally failed to establish that the respondent had wilfully concealed his adultery to the court. The applicant has therefore failed to satisfy the requirements for setting aside the order on the grounds of fraudulent misrepresentation set out earlier in this judgment. I proceed to consider whether the applicant has shown a sufficient cause.

Whether the applicant has shown sufficient cause?

[59] The applicant simply states in her affidavit that should the final order of divorce be rescinded; she intends to file a counter-claim in which she will seek an order of divorce and an order for the forfeiture of the benefits arisings from the marriage in community of property. The applicant is required to make out a *prima facie* case that her intended counter-claim enjoys some prospects of success.

[60] Mr Narib submits that if the applicant is able to prove by evidence at the trial, that the respondent had committed adultery which she had not condoned, she will succeed in her action. Mr Tjombe for the respondent on his part submits in his written submissions with reference to case law[15] that, at the very least the applicant was required to set out the value of the joint estate and the contributions each party

[15] *Hoeseb v Hoeseb* (I 3140/ 2009) [2013] NAHCMD 116 (30 April 2013).

had made to the joint estate, in order for this court to determine whether the exercise of seeking a rescission of the divorce order is justified or is it a mere academic exercise.

[61] As regards Mr Narib's submission, the converse is equally possible that the respondent might succeed at the trial to prove that applicant had condoned his adultery in which event a specific forfeiture order would not be made.

[62] In any event I agree with Mr Tjombe, that the applicant should have set out the value of the joint estate and the parties' respective contributions. In this connection it has been held that, for the requirement of good cause to be satisfied, there should be evidence of a substantial defence (or cause of action in respect of the intended counter-claim) and a bona fide defence of the presently held desire by the applicant to raise the defence if the application is granted[16]. The applicant should have set out with some degree of particularity, how she will be in a better position than the current final order which stipulates that the joint estate is to be divided in terms of the settlement agreement. The applicant was required to put before this court facts which *prima facie* show that, if established at the trial, would enjoy reasonable prospect of success. In my judgment, the applicant has failed to do so.

[63] The applicant might have established the requisite 'sufficient cause', had she demonstrated even on a provisional basis, the excess of the of joint estate which the respondent should not be allowed to share in, in the event she succeeds to obtain a forfeiture order coupled with her intended counter-claim. In the absence of any indication of such excess in the joint estate, even an indicative or provisional number calculated based on the value of the joint estate, this court is driven to the inevitable conclusion that the applicant has failed to establish reasonable prospects of success.

[64] Before I conclude, I should mention that, I felt troubled by the applicant's approach to this rescission application: she sought to have the whole final order of divorce set aside and thereafter to apply for the same order except for the forfeiture part. It rather troubled my mind why the applicant did not only apply for the setting aside of part of the order which deals with the division of the joint estate. This

[16] *Galp v Tansely* 1966 (4) SA p 555.

approach was not raised with counsel during the hearing. However during the preparation of this judgment I thought to myself that it cannot be correct in law , for a party to seek the setting aside of the entire final order of divorce including the settlement agreement, only to come back and seek the same final order of divorce *albeit* on her own terms maybe excluding the settlement agreement. In this connection the Court in *SOS Kinderdorf* express the view that there was no reason why where the plaintiff who has obtained a default judgment in respect of more than one but separate claims, and the claims are divisible from each other , he or she cannot be granted judgment which the defendant cannot defend. In my view, the final order of divorce *per se* is divisible from the parties' proprietary claims. In the present matter the applicant is not opposed to the fact that a final order of divorce has been granted, but only to the consequence of the order with regard to the proprietary claim. I cannot see the reason why the order of divorce should *per se* be rescinded?

[65] Quite apart from the obiter view expressed in the preceding paragraph, this court is of the firm view that the applicant's approach to the proceedings in this matter, no doubt amounts to an abuse of the court's proceedings and a waste of the court's time and resources. She approached this court on the basis of being 'holier-than – thou' whereas her motive is so transparently clear for everybody to see, that she wants to gain or secure a proprietary benefit or interest out of this proceeding. Such conduct shall not be countenanced by this Court.

Costs

[66] Mr Tjombe asked in his written submissions that in the event the application is dismissed the costs should not be limited to such costs as prescribed by rule 32(11), namely to N$20 000. By doing so, so the submission goes, the court will demonstrate its disapproval of the applicant abusive conduct of the court proceedings. In this connection counsel submits that this application is an abuse of the court's process and unreasonable. I have already expressed my view about the applicant in respect of what I perceive to be her motive and about her conduct in this proceeding, in the preceding paragraph. I agree with the submission by counsel for the respondent and will therefore for those reasons not limit the costs which the respondent is entitled to recover, to the amount stipulated by rule 32(11). I also take

into account that the parties litigated at full throttle and the issues are rather complex.

[67] In the result:

1. The first point *in limine* of non-joinder is dismissed.

2. The second point *in limine* of undue delay is dismissed.

3. The applicant's delay in bringing this application is condoned.

4. The application for rescission of the final order divorce granted on 5 September 2016, is dismissed.

5. The applicant is ordered to pay the costs of the respondent such cost not to be limited to the threshold stipulated by rule 32(11).

6. The matter is removed from the roll and regarded finalized.

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H Angula

Deputy-Judge President

APPEARANCES:

APPLICANT:	G Narib Instructed by Shikale & Associates, Windhoek
RESPONDENT:	N Tjombe Of Tjombe-Elago Legal Practitioners, Windhoek