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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA

CASE NUMBER: 2579/2010

DATE: 20 NOVEMBER 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

D[...] V[...] L[...]

APPLICANT

and

N[...] B[...] M[...] (BORN L[...])

FIRST RESPONDENT

DEPARTMENT OF HOME AFFAIRS

SECOND RESPONDENT

JUDGMENT

MODIBA AJ:

[1] This is an opposed application for the rescission of a judgment granted on 14 November 2011 by Makgoka J declaring the civil marriage between the applicant, D[...] V[...] L[...] (D[...]) and M[...] H[...] L[...] (the deceased) null and void.

[2] D[...] also seeks an order declaring that the civil marriage entered between her and the deceased on 14 December 1970 is valid. The application is only opposed by the first respondent N[...] B[...] M[...] (N[...]).

[3] When the order declaring her marriage void *ab initio* was granted, not only had D[...] filed an answering affidavit opposing the application, she was legally represented. Therefore the order was not granted in default. For that reason, the rescission application fails outside the ambit of rules 31 (2) (b), 31 (5) (d) or 42 (1) of the Uniform Rules of Court. It can only be considered under common law.

APPLICABLE LEGAL PRINCIPLES

[9] The circumstances under which a judgment granted on the merits may be rescinded under common law are explained in Harms, Civil Procedure in the Superior Courts at B42.10 as follows:

‘A final and definitive judgment, on the merits of the dispute (if it is not a legal issue, after evidence was led) may be rescinded at common law on very limited grounds namely that the judgment was obtained by fraud (including forgery and perjury) or, exceptionally, as a result of a *iustus error*. The fraud or error must be of such a nature as to entitle the party to *restitutio in integrum*. The facts relied on must have existed at the time of the final judgment.’

[10] Such an application must also be brought within reasonable time.

THE QUESTION TO BE DECIDED

[11] Two questions ought to be decided: (1) whether the rescission application was brought within a reasonable time and (2) whether an order declaring the applicant’s marriage to the deceased null and void was granted as a result of fraud or *iustus error*.

BACKGROUND

[12] N[...] was the applicant in the application that resulted in the order sought to be rescinded by D[...]. She brought that application as an interested party in the deceased estate. She is a nominated beneficiary in the deceased’s will. She alleged that her late mother M[...] I[...] M[...] (I[...]) entered into a customary marriage with the deceased in 1967. She and S[...] J[...] M[...] (J[...]) were born from that marriage. J[...] is also a nominated beneficiary in the deceased’s will.

[13] D[...] filed the rescission application in June 2012, approximately 6 months after the order she seeks rescinded was granted. She has applied for condonation for the late filing of the rescission application. Her explanation for the delay in bringing the rescission application is that she had to gather evidence in respect of the facts she wanted to put before court. N[...] Is not opposing the condonation application. The application Is therefore granted.

[14] The ground D[...] puts forward in support for the rescission application is that her attorney and counsel

failed to put before the court certain pertinent facts. The fact in question is that in 1964, the deceased married her by customary law. She is advised and on the basis of that advice submits that by virtue of her 1964 marriage to the deceased, the deceased was competent to enter into a civil marriage with her. Therefore the civil marriage concluded between her and the deceased in 1970 is valid.

[15] On the 18th of January 2010, N[...] filed an application declaring D[...]’s civil marriage to the deceased invalid. On the 18th of February 2010, D[...] filed a notice of intention to oppose. At that time, she was represented by M.B. Moloto Attorneys. She alleges that she had difficulties reaching them for the purpose of preparing her answering affidavit. For that reason, in April 2010 she terminated their mandate and appointed her current attorneys of record. However M.B. Moloto attorneys failed to file a notice of withdrawal as attorneys of record. As a result, she filed an affidavit on 7 April 2010, confirming that she has terminated their mandate and appointed her current attorneys of record. On 9 April 2014, her current attorneys filed an answering affidavit on her behalf. In that affidavit, the customary marriage that she allegedly entered into with the deceased in 1964 is not mentioned. She alleges that Mr M[...] is now in a vegetative state and is unable to depose to an affidavit why he omitted to bring this information to the attention of the court.

ANALYSIS

[16] First of all, in application proceedings evidence is placed before the court by way of affidavit exchanged between the parties prior to the application being heard. Evidence is never accepted from the bar by counsel. D[...] deposed to her answering affidavit in April 2010. Her answering affidavit is a response to N[...]’s founding affidavit where N[...] avers facts relating to the customary marriage between I[...] and the deceased concluded in 1967. She mentions in her answering affidavit that the reason why she was able to enter into a civil marriage with the deceased is that to her knowledge the deceased was not party to any valid customary marriage with Idah. I find it absurd that D[...] omitted to mention in her answering affidavit that prior to entering into a civil marriage with the deceased in 1970, they entered into a customary marriage in 1964. That should have been her first response to D[...]’s application.

[17] In support of the rescission application. D[...] fails to mention whether she was aware of the contents of her answering affidavit or not. It is after all her affidavit. She deposed to it and confirmed the truthfulness of its contents and her personal knowledge of the facts contained in it. The omitted facts had to be set out in that affidavit. She also failed to mention whether she disclosed these facts to her erstwhile attorney Mr Mlangeni when he prepared her answering affidavit. Consequently, it is unclear whether Mr Mlangeni negligently omitted to include these facts. It was not Mr Mlangeni’s duty or that of her counsel to disclose these facts to the court. The facts had to be set out in her affidavit. If she disclosed the facts to Mr Mlangeni and he omitted to include them in the affidavit, she ought to have seen that before she signed the affidavit. In the

circumstances, I do not see how the incapacitated Mr Mlangeni should be blamed for the omission. She did not obtain a supplementary affidavit from counsel who argued the application on her behalf explaining this omission.

[18] Very interestingly, after the order declaring her civil marriage to the deceased null and void is granted, it takes her six months to bring a rescission application. The reason she proffers for the delay is that she had to gather evidence relating to her 1964 customary marriage to the deceased. If she did not have this evidence on hand when she deposed to her answering affidavit and at the latest when the application was heard, it begs the question why Mr Mlangeni and her counsel should be blamed for not putting the evidence before court.

[19] In my view, even if Mr Mlangeni negligently failed to include the facts in question in her affidavit, there is no basis for D[...] to escape the consequences of such an omission. See *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* 2003 (2) All SA 113 (SCA) at para 12 where the Court held as follows:

"While the courts are slow to penalize a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of negligence of his attorney. ..."

Worse so, the omission is also not a valid ground for rescinding the order granted by Makgoka J. For the order to be rescinded, D[...] has to show on a preponderance of probabilities that N[...] fraudulently suppressed or withheld this evidence or that there was an *iustus error*. The non-disclosure of the facts in question is not attributed to D[...] or to an error on the part of the court.

[20] D[...] has failed to make a proper case for the granting of the order prayed for in the notice of motion. Therefore the application for the rescission of the order granted by Makgoka J on 14 November 2011 stands to fail.

[21] I therefore grant the following order:

ORDER

1. The application for condonation for the late filing of the rescission application is granted.
2. The application for the rescission of judgment granted by Makgoka J on 14 November 2011 is dismissed with costs.
3. The application for an order declaring that the marriage between D[...] V[...] L[...] and M[...] H[...] L[...] is valid is dismissed with costs.

LT MODIBA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Counsel for the Applicant: Mr E.C. Siwela

Instructed by: Mlangeni Gasela Magagula Inc Counsel for the

First Respondent: Maphosa Lufuno

Instructed by: Maphosa (Lufuno) Attorneys

Date of hearing: 29 July 2014

Date of judgment: 18 November 2014