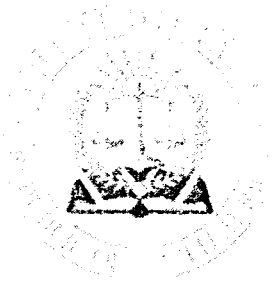

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 29059/14
DATE: ~~01 JUNE 2016~~ 26/7/2016

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: ~~YES~~/NO	
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO	
(3) REVISED	
.....	.....
DATE	SIGNATURE

In the matter between:

MATEPE MILDRED TOGO	Applicant
and	
PALADI PIET MOLABE	First Respondent
ESKOM PENSION PROVIDENT FUND	Second Respondent

JUDGMENT

WENTZEL AJ:

1. This is an application for rescission of a divorce action. The applicant avers that the respondent proceeded to obtain a decree of divorce and other ancillary relief concerning maintenance and the division of the parties' assets on an unopposed basis full knowing that she intended to oppose the action and had e-mailed a notice of intention to oppose to the respondent and filed same at the Court. The respondent avers that as service of the notice of intention to oppose via e-mail is not proper service in terms of the Rules of Court, he was entitled to ignore it. He did not believe that he had any duty to draw this fact to the attention of the Court.

2. It is significant that at the time that the respondent instituted action for divorce, neither of the parties were represented. However, both were represented by counsel in the current application for rescission. Counsel for the applicant made the bold assertion that the notice of intention to oppose must have been clandestinely removed from the Court file so that the respondent could obtain the relief sought by him on an unopposed basis on the basis that had the notice of intention to oppose been in the Court file, the Order would not have been granted by default. I do not believe that this follows axiomatically and experience in these Courts reveals that it is not unusual for documents served at the registrar's office not to find their way to the Court file.

3. What is clear, however, is that the judge granting the Order believed that the matter was unopposed. I believe that had the learned judge been aware that the notice of intention to oppose had been e-mailed to the

respondent, albeit defective, the Order would not have been granted on an unopposed basis. This is particularly so where the parties were not represented.

4. Moreover, the respondent was not entitled to simply ignore the defectively served notice of intention to oppose and should properly have brought an application to set it aside as an irregular proceeding under Rule 30 or Rule 30 A before proceeding with the matter on an unopposed basis. (DR Harms, Civil Practice in the Superior Courts, Service Issue 52, October 2014, B-196).However, I accept that as a lay person the respondent may well not have known this.

5. But there were other defective procedures followed which should also have caused the Court to refuse to grant a divorce by default. Although there is a notice of set down in the file, there is no proof that it was served on the applicant. On the assumption that a notice of intention to oppose was served, the applicant was not entitled to proceed on an unopposed basis without first having served a notice of Bar and it must be accepted that had it been served on the applicant, she would have attended to the service of her plea.

6. The Order granted has severely curtailed the applicant's rights to spousal maintenance and division of the joint estate to which she was entitled by virtue of their marriage in community of property. In terms of the Order, there was only provision for maintenance for the minor children and there

was no provision for spousal maintenance or division of the joint estate; instead it was simply ordered that each party will retain their own assets. The applicant also avers that the order for maintenance for the minor children is hopelessly insufficient.

7. It is trite that if spousal maintenance is not claimed at the time of the divorce, it is forever forfeited and cannot be claimed at a later stage, even in changed circumstances. The major assets of the parties in dispute are the matrimonial home which is registered in the applicant's name and the pension benefits of each of the parties. My sense is that it is the applicant's entitlement to her half share of the respondent's pension that is the major bone of contention between the parties and that the respondent's pension is substantially more valuable than that of the applicant. The respondent insists that the applicant's entitlement to a share of his pension is subject to his previous wife's rights pursuant to their divorce which has not been finalized.

8. Although I am not seized upon to resolve this impasse, I had hoped to persuade the parties to negotiate a way forward as untangling the decree of divorce at this stage which would affect their status is not desirable. It would also have disastrous consequences for the respondent who has since remarried. His new wife, who would clearly have a substantial interest in the proceedings, has not been joined. Whilst the respondent's third marriage would have been validly entered into as the decree of divorce stands until set aside (***Oudekraal Estates (Pty) Ltd v The City of***

Cape Town and others *2010 (1) SA 333 SCA)*, what then of the validity of the marriage concluded before the application for rescission was brought were an order to be granted setting aside the decree of divorce? A party may not have two valid civil marriages and the inevitable result would be to void the respondent's marriage to his new wife. This is a result which should if possible be avoided and is relief that I would not be empowered to grant without the joinder of the respondent's current wife.

9. Counsel for the applicant has referred me to an unreported judgment of my learned sister, Mngqibisa-Thusi J in this Court in the matter *of* ***MvM*** *(52110/2007) [2011] ZAGPPHC 155 (27 May 2011)* who took an imminently sensible approach in leaving the status of the parties unchanged and only rescinding the proprietary consequences of the decree of divorce accepting that the marriage between the parties had irretrievably broken down and that they both wished to remain divorced.

10. In that matter the learned judge stated:

> *"What the respondent fails to appreciate is that these proceedings are highly contested particularly in view that both parties had originally sought forfeiture of benefits orders against each other. There is a need for evidence to be led. What is not in dispute is that both parties are in agreement that their marriage has irretrievably broken down and a decree of divorce should be granted.*

Taking into consideration the facts and the circumstances of the case, I am of the view that the applicant is entitled with regard to the respondent's prayer that she forfeits the benefits of the marriage in community of property. Like any other citizen she is entitled to have her dispute resolved in public. Judgment depriving her, rightly or wrongly, of her rights should not have been taken in her absence, particularly as she was sick and unable to come to court and had taken steps to inform the court of her inability to be in court. A postponement coupled with a cost order would have been fair. Further, the fact that her legal representative had withdrawn during the trial mitigates towards good cause being shown.

In the premises, I am of the view that the order and ancillary relief granted on the 21 May 2010 in the absence of the applicant was erroneously granted. However, in view of the fact that the parties are in agreement that their marriage should be dissolved, I do not think it is necessary to rescind that part of the order. Secondly, I am also of the view that, in the light of the alternative prayer in the applicant's notice of motion, the orders relating to that the parties' parental rights and responsibilities; rights of contact and access and the primary residence of the minor child should remain as they are".

11. I warned the applicant that should I adopt such an approach in this matter should I find that the requirements for rescission have been met, this may have the result that she will continue to forfeit her entitlement to spousal

maintenance as this must be claimed at the time of the divorce. The applicant's counsel has assured me that this has been explained to the applicant and that both her and her attorney's instructions are to consent to such relief should I be inclined to grant rescission of the contended aspects of the Order granted but not interfere with the decree of divorce itself. The applicant is herself permanently employed as a scheduler at Eskom, is the registered owner of immovable property and would in all likelihood not be entitled to spousal maintenance.

12. The applicant prepared a draft Order should I be inclined to grant rescission of the proprietary aspects of the divorce Order granted tendering to keep paragraphs 1, 2, 3 and 4 intact.

13. The net effect of this will be that the Order regarding the provision for maintenance for the minor children and that each party retains their own assets in paragraphs 5 and 6 be set aside.

14. It was not disputed that the respondent has since the divorce paid maintenance for the three minor children at R 500 per month per child and has in fact also been paying for their schooling. However, the applicant states that she believes this to still be insufficient and she is entitled to have this issue ventilated but must bear in mind that she is also employed and would, herself, too have an obligation to contribute to the maintenance of the children. This is an aspect that can be varied in the maintenance Court.

15. I might also mention that should I rescind this aspect of the Order, the applicant, and axiomatically, the minor children, may be prejudiced in the sense that there would, until the matter is resolved, be no Order in place for maintenance for the children although I have no cause to suspect that should the Order for maintenance be rescinded, the respondent would cease to pay maintenance ; on the contrary he has voluntarily increased his obligations to pay maintenance over and above that Ordered by additionally paying for the children's schooling. I am thus satisfied that the maintenance Order also be rescinded and that this issue also be ventilated in the action between the parties.

16. That brings me to the merits of the application for rescission. I have already indicated that I believe that the divorce order was erroneously granted in the face of a clear intent by the applicant to oppose the action and her assertion that she did indeed file a notice of intention to oppose at Court. There is authority that this would entitle the applicant to relief under Rule 42 without having to establish good cause (***Tshabalala and another v Peer*** *1979 4 SA 27T;* ***Topol and Others v LS Group Management Services*** *1988 1 SA 639 W).*

17. However, as there no clear evidence of this, as the notice of intention to oppose did not make its way into the Court file, it is necessary for me to consider whether a proper case for rescission has been made out at common law and/or under Rule 31. Both require that the applicant establish good cause involving her establishing a *prima facie* defence and

a reasonable explanation both for her default in failing to file a plea and for her delay in bringing her application for rescission.

18. As I have said that the applicant is entitled to division of the joint estate by operation of law as she was married to the respondent in community of property, I am satisfied that she has established a *prima facie* defence to the relief sought by the respondent and in particular to that sought by him in paragraph 6 of his particulars of claim that each party retain their own assets.

19. I am also satisfied that the applicant has provided a reasonable explanation for her default in filing a plea and her delay in bringing this application. With regard to the former, there is some considerable dispute of fact. The applicant states that after serving his summons for divorce, the parties tried to reconcile their marriage and she was led to believe by the respondent that he would withdraw his action for divorce. This is denied by the respondent who says that after being ejected from the matrimonial home by the applicant, he instituted action for divorce and made no attempt to reconcile the marriage nor state that he would withdraw his action for divorce. Whilst I am reluctant to decide this issue on the papers, I see little purpose in referring this aspect to oral evidence and am prepared to accept for these purposes that the applicant believed that the respondent did not intend to proceed with the action and thus did not file a plea.

20. The applicant states that on 29 July 2014 she telephoned the Court to determine if the matter had been withdrawn only to find out, after inspection of the file, that an Order for divorce had been granted on the terms sought by the respondent. She noted that there was an unsigned notice of set down in the file that had not been served on her. She also noted that her notice of intention to oppose was also not in the file, nor was there any notice of bar served.

21. The applicant states that after attempting to sort the matter out herself she ultimately obtained the services of an attorney who she instructed to seek a variation of the Order. Having launched that application on 18 August 2014,the applicant later received advice that the appropriate method of challenging the Order was to seek rescission thereof and accordingly withdrew her application for variation and launched the current application. I am satisfied with that explanation and that there was an absence of willfulness , that the application is *bona fide* made and is not made with the intention to delay the respondent's action as required in terms of Rule 31 (2) (b).

22. Dealing then with the issue of costs, although I am mindful that the applicant is seeking an indulgence in seeking to rescind the Order granted, I must also pay due regard to the fact that the respondent did not draw the Court's attention to the fact that the respondent intended to oppose the matter and proceeded with the matter on an unopposed basis. Had he done so it is unlikely that the Order would have been granted on

an unopposed basis and thus there would not have been any need for the bringing of this application for rescission. It is on this basis that I believe that the applicant would, had the application been brought expeditiously, have been entitled to costs. On the other hand, I do believe that the respondent reasonably opposed the application which was brought after he had already remarried. In the circumstances I believe that justice would be served were each party to pay their own costs.

23. There is a last aspect with which I need to deal which was not addressed in argument and that is the joinder of the second respondent to the proceedings and the prayer sought that it update its records to reflect the rescission order. The application was served on the second respondent and it did not oppose the application. Although it was not a party to the proceedings sought to be rescinded, as there is no Order for division of the assets of the joint estate, the applicant's entitlement to a share in the respondent's pension would not have been endorsed in their records. However, until such an Order for division of the joint estate is made, there is no basis upon which the applicant can insist that the second respondent update its records. A similar endorsement would have to be made in the second respondent's records regarding her own pension. The effect of the Order of rescission that I propose to make is that this is an issue which will remain pending by the Court and can be addressed by the Court in resolving the proprietary consequences of the divorce between the parties.

24. In the circumstances I am satisfied that there are grounds for rescission and grant an Order in the following terms:

24.1. Condonation for the late filing of the application is granted.

24.2. That the order granted on 20 June 2014 in the North Gauteng High Court, Pretoria by the Honourable Mr Justice Delport AJ under case number 29059/2014 is in part set aside save for the orders in paragraphs 1, 2, 3 and 4 thereof.

24.3. That the Applicant is ordered to file a plea in the main action within 15 days of the granting of this Order.

24.4. I make no order as to costs.

Signed and dated on this 29th day of June 2016.

For the Applicants: VB Tshabalala Attoneys
Tel no: 011 333 1977
For the Respondents: Makinta Attorneys
Tel no: 012 703 3815

S.M WENTZEL
Acting Judge of the High Court of South Africa Gauteng Division, Pretoria