IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

15/01/2016.

CASE NUMBER 39223/2011

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

15 / 01 2016
DATE

SIGNATURE

In the matter between:

ACHESON PHIRI — APPLICANT

And

MMONE VIOLET PHIRI — 1ST RESPONDENT

THE DIRECTOR GENERAL — 2ND RESPONDENT

DEPARTMENT OF HOME AFFAIRS

JUDGMENT

MAVUNDLA. J,

[1] On the 5 October 2015 this Court dismissed the applicant's application for rescission with costs, to be taxed on opposed basis including costs of counsel on party and party scale. The reasons for this order are set herein below.

[2] The application for rescission was in respect of a divorce order granted by Van Der Byl AJ on the 14 October 2011. The application for recession was sought in terms of Rule 42(1) of the Uniform Curt rules, which provides as follow:

"The Court may, in addition to any other powers it may have, *mero motu* or upon 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."

[3] This Court was not satisfied, *inter alia*, that the order sought to be rescinded was erroneously sought or erroneously granted, as it will become more lucid herein below.

[4] The Court has a wide discretion to grant or refuse the relief sought under rule 42(1). In this regard the court will have regard to the explanation proffered by the applicant why the order was granted in his absence, the fairness to both parties and the need to have finality to the litigation between the parties, vide ***Sheriff Pretoria-East v Flink and another ALL SA September (1) 2005 SA*** 492.

[5] *In casu*, the summons was served personally on the applicant on the 15 July 2011. It would seem that the applicant served and filed a notice of intention to defend on the 22 June 2011. However, on the 8 August 2011 the applicant set the matter down for hearing on the unopposed roll on the 14 June 2011, on which day a divorce order was granted in the absence of the applicant.

[6] The notice of intention to defend provided the following case number:

"39223/4" which is not the correct case number reflected in the pleadings herein above. Therefore, the notice of intention to defend was defective. By virtue of the incorrect case number, the notice of intention to defend certainly could not have found its way to the correct file.

[7] Where a litigant files a defective notice of intention to defend, the other party is not obliged to draw the defect to his opponent but will be within his right to merely ignore such defective notice of intention to defend, which would seem to have been the case *in casu*.

[8] In the absence of a notice of intention to defend in the court file, it cannot be said that the court erroneously granted the order of divorce on the 14 August 2011. Neither can it be said that the first respondent erroneously sought the order granted. In the circumstances, in my view, the order granted was not erroneously sought nor erroneously granted.

[9] Shortly after the divorce decree was granted, the first respondent's attorneys remitted a copy of the divorce decree to Legal Nexus per letter dated the 22 November 2011. In response per letter dated 29 November 2011, Lexus Nexus placed on record that they held instructions to bring an application for rescission. Indeed this fact is confirmed by the applicant himself in his affidavit in support of the application for rescission stating that at all relevant times he thought that Legal Nexus were attending to the application for rescission application. It can therefore be safely accepted that as far back as in November 2011 the applicant was aware of the divorce decree.

[10] According to the applicant in June 2014 he became aware of the fact that Nexus Lexus did not bring the application for rescission. The applicant brought the application for rescission on the 26 November 2014. The reason for the delay between June 2014 and November 2014 was due to lack of funds. However, there is no explanation proffered for the delay between November 2011 and June 2014.

[11] In my view, there was an inordinate delay of at least three years in bring the application for rescission, which delay is not explained. The applicant merely contented himself in instructing Legal Nexus to bring the application for rescission, without bothering himself to make a follow up to inquire of the progress by Legal Nexus in executing his instructions. In certain circumstances, the Court will condone any remissness of an applicant's attorney. *In casu*, the remissness is not only on the part of Legal Nexus, but also on the part of the applicant in failing to take appropriate steps to ensure that his instructions are promptly and properly executed[1].

[12] It is trite that a litigant, such as the first respondent *in casu*, is entitled to have finality to litigation. The matter relates to marital status, which was terminated four years ago. It is, in my view, in the interest of justice that

[1] *Vide Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A).

finality of the litigation *in casu* be reached without further delay[2]. I deem it not necessary to traverse all the other aspects raised by the applicant.

[13] Having regard to the above facts, and the authorities in matters of this nature, in the exercise of my discretion[3], I decline to exercise it in favour of the applicant but conclude that there was an inordinate delay[4] coupled with remissness on the part of the applicant.

[14] It is for the aforesaid reasons that on the 5 October 2015 this Curt granted the following order:

That, the application for rescission is dismissed with costs, which shall be taxed on opposed basis including costs of counsel on ordinary party and party scale.

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[2] *Vide eThekwini Municipality v Ingonyama Trust* 2014 (3) (SA) 240 (CC) paragraphs [24] et [28].

[3] *Vide Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC) at 477A-B. Immelman v Loubser 1974 (3) SA 816 at 824B-C.*

[4] *Vide Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (AD).

N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE : 05 /10/ 15

DATE OF JUDGMENT : 15 / 01/2016

APPLICANT`S ATT : TSWAGO INC. ATTORNEYS

APPICANT`S ADV : MR. K. H. TSWAGO

1ST RESPONDANT`S ATT :. SEKELE ATTORNEYS

DEFENDANT`S ADV : ADV. W. N. MOTHIBE