

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

10/02/2017

CASE NO: 3584/2013

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

In the matter between:

T M

APPLICANT

and

G M

RESPONDENT

JUDGMENT

MAKHOB A J

INTRODUCTION

[1] This matter came before me as an application for a rescission of judgement granted by **Hiemstra AJ** on the 19th June 2013 between the applicant and the respondent. The decree of divorce was coupled with orders that:

- a) Both parties retain parental responsibilities and rights with regard to care and residence of the minor children.
- b) Primary care residence of the minor children awarded to the respondent.
- c) Applicant awarded right to reasonable contact in respect of the minor children.
- d) Respondent to pay R500.00 per month per child.
- e) Respondent to keep the Mazda motor vehicle with the registration number

[...]GP.

BACKGROUND

[2] The parties were married in community of property on the 29th August 2008 at Moretele and two minor children were born out of this marriage namely R M born on [...] August 1998 he is currently 19 years old and O M born on [...] April 2005 and she is currently 12 years old.

[3] Application for the late condonation in filling this application was not opposed by respondent. Thus therefore the court grants the application for condonation.

[4] on the 15th January 2014 the applicant discovered that she was divorced to the respondent she then on her own made inquiries about the divorce order she was not aware about such an order. She found out that the return of service of the summons as well as the *dies induciae* were forged and confirmed by the sheriff who filed an affidavit confirming this. The affidavit of the sheriff is not in dispute by the respondent.

[5] In this matter it is common cause that the marriage between applicant and the respondent has irretrievably broken down. Applicant left the common home on the 9th June 2013 and left the children in the care of the respondent. It is not in dispute that the return of service and the *dies induciae* were forged.

[6] In addressing the court counsel for the respondent asked the court not to rescind the divorce order as well as the order to divide the estate. In support of this request, counsel relied on unreported decision of my sister **Mngqibisa Thusi, J** in the matter between **M: Rand M: N case no 52110/2007** delivered on the 21st May 2011. In this matter **Mngqibisa Thusi J** did not rescind the divorce order since the marriage had irretrievably broken down, however some of the orders of the court *aqou* were set aside.

[7] In this matter before me, I am satisfied that the divorce order granted by my brother HIEMSTRA AJ was obtained by fraudulent means.

[8] This application can only be entertained in terms of Rule 42(1) (a) of the Rules of the court or in terms of the common law. Rule 42(1) (a) provides for the rescission of a final order of judgement granted in the absence of a party who has an interest in it. ***In Grant v Plumbers (pty) LTD 1949 (2) SA 40 (O)*** the court held that applicant must give a reasonable explanation of his default and the application must be *bona fide*. Thirdly the applicant must show that he has

a *bona fide* defence to plaintiffs claim.

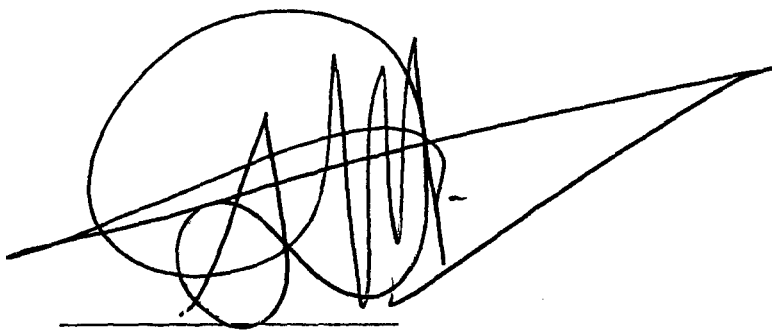
[9] I am of the view that the application by the applicant is *bona fide*; applicant gave a reasonable explanation for her default.

[10] However both the applicant and the respondent agrees that the marriage between them has irretrievably broken down and a decree of divorce should not be set aside.

[11] The court is therefore of the view that it is not necessary to set aside the whole order made by the court on the 19th June 2013.

Accordingly the following order is made:

1. Paragraph one (1) of the order granted on the 19 June 2013 remains the same in other words it is not set aside.
2. The orders in paragraphs 2-7 are set aside
3. The applicant is directed to take the necessary steps to set the matter down by no later than 30th March 2017
4. The office of the registrar is directed to give preference to this matter in setting it down on an appropriate date.
5. Respondent to pay the costs of this application

A handwritten signature in black ink, consisting of a large circle followed by several vertical strokes and a long horizontal line extending to the right.

MAKHOBAD

(ACTING JUDGE OF THE HIGH COURT)