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**IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)**

CASE NUMBER: 3307/04

DATE: 14 November 2013

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

J..... M..... Z....

APPLICANT

//

M..... M..... Z....

RESPONDENT

JUDGMENT

MABUSE J:

1.This is an application firstly, for rescission of a judgment which was granted by this Court on 10 March 2005 in the absence of the applicant and secondly, for condonation for the late filing of the aforementioned application This application is brought by the applicant, an adult female, who at the time of launching this application in 2008 resided at House No. 348 Leboneng, Themba, against the respondent who at the time was employed by Telkom as a technician. The aforementioned judgment was granted in the absence of the applicant after service of a copy of the summons on her had taken place by way of edictal citation after it had been applied for and granted by the Court on 9 November 2004. Following the said order service of a copy of the summons upon the defendant took place by way of application in the Silverton Newspaper.

2.In the said judgment the Court granted the following orders:

“(1) THAT the bonds of marriage subsisting between the plaintiff and the defendant be and are hereby dissolved.

(2) Defendant to forfeit all the benefits arising from the marriage.

3. The purpose of this application is firstly, to seek that the status of dissolution of the marriage bonds between the applicant and the respondent remain unchanged, secondly, that the division of the joint estate of the applicant and the respondent be done in equal shares.

4.The applicant and the respondent were married to each other in community of property on 10 August 1993. During 1997 they had marital problems and the applicant, as a result of such problems, left the common home and moved back to her parental home in Leboneng. On three occasions the applicant instituted divorce actions against the defendant, firstly, on 17 March 2005 in the North-

Eastern Divorce Court under Case no. 1800/05 and, secondly, on 24 July 2006 still in the North-Eastern Divorce Court under Case no. 50222/06 and thirdly and lastly, on 21 February 2008 in the Central Divorce Court under Case no. 2360/08. She was, however, unsuccessful in her attempts to serve the summons for the divorce action on the respondent during March 2005 and July 2006 by reason of the fact that she was unable to locate the respondent's whereabouts. It was only during the applicant's last attempt in 2008 and more specifically on 19 July 2008 that she became aware of the fact that a decree of divorce at the instance of the respondent had already been granted in her absence and without her knowledge or any notice to her. The source of her knowledge was a special plea that the respondent, then as the defendant in the same matter, had delivered on her. In the said plea the respondent had contended that the marriage bonds between them had already been dissolved by this Court and furthermore that Court had ordered that she should forfeit the benefits arising from the said marriage wholly in favour of the respondent

5. The respondent contended that he himself attempted proper service of a copy of the divorce summons on the applicant by means of accompanying the sheriff to the applicant's place of residence at the time but the sheriff was unable to serve it by reason of the fact that the applicant had refused to accept service of a copy of the summons. According to a copy of the return of service that constitutes part of this papers on 9 February 2004 at 11 h 13 the sheriff could not serve a copy of the combined summons on the applicant, then the defendant, because she refused to accept service the document and furthermore failed to go and collect it from the sheriff's office after she promised him that she would come and collect it at from his office. In her founding affidavit the applicant admitted that indeed she refused to accept service of a copy of the respondent's divorce summons on her. Her reason for refusing to accept service of the summons was that she was completely unaware of the fact that the person who had accompanied the respondent was the sheriff of this Court and that his intention was to serve the papers as he completely failed to identify himself to her. Instead the person just told her that they had to sell the immovable property and that for that purpose she needed to sign some documents whereupon she refused. On this basis the applicant contended that she was not in wilful default as she was unaware that the respondent had instituted a divorce action against her.

6. With regard to the requirements of a bona fide defence the applicant contended that she and the respondent were married to each other in community of property. The respondent quite simply failed to lay a substantial basis warranting forfeiture of her half share of the joint estate before this Court other than that the applicant vacated the home. The applicant had no intention of forfeiting her half share of the joint estate. She went as far as to enter the common home to try and seize some of the assets. In his summons the respondent contended that the applicant did not contribute anything to the communal home. However it is apparent from annexure "G" attached to this application that the applicant bought a substantial amount of movable goods which are still in the possession of the respondent. The applicant contended that the respondent was partly to blame for the breakdown of their marriage. On the other hand the respondent contended that the applicant was aware of the divorce action and that she decided to adopt a supine attitude towards it.
7. Counsel for the applicant submitted that although this application was brought in terms of the provisions of Rule 42(1) read with Rule 31(2) (b) this Court could use its discretion and consider it on the common law grounds. In order to succeed with an application for rescission of a default judgment on the basis of common law the applicant must show sufficient cause. In terms of common law the applicant must:
 - 1) give a reasonable explanation of his default;
 - 2) show that his application is made bona fide, and;
 - 3) furthermore show that on the merits he has a bona fide defence which prima facie creates some prospects of success.

It must be noted, however, that a Court should entertain some measure of

discretion which it may exercise after proper consideration of all the relevant factors or the circumstances. In terms of common law a judgment by default can be set aside only on the following grounds:

- 1) fraud;
- 2) justus error,

8. It is not the applicant's case that the judgment that the respondent obtained was so fraudulently obtained nor was her case the, in granting the judgement the court erred and that the error was just. On the grounds of common law the application must fail.

9. According to the founding affidavit the applicant brought this application for rescission in terms of Rules 31(2)(b) and 42(1) of the Rules of this Court. It needs to be mentioned that the applicant must stand or fall by her application. It never was the case that in seeking a rescission of judgment she placed any reliance on the common law grounds. In the premises I will deal with this matter only on the basis as set out in the founding affidavit, that this application is brought in terms of Rules 31 (2)(b) and Rule 42(1) of the Rules of this Court

10. Rule 31 (2)(b) provides that:

“A defendant may within 20 days after he or she has knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as to it seems met. ”

There is no doubt that the judgment granted on 10 March 2005 by this Court was granted in the absence of the applicant and that for that reason it is a default judgment. In terms of Rule 31 (2)(b) the application to rescind the said judgment should have been brought within 20 days after the applicant had become aware of it. The applicant became aware of the judgment on 19 July 2008 after the respondent had delivered a special plea in case no 2360/08 of the Central Divorce Court. Despite the fact that she became aware on 19 July 2008 that the respondent had obtained a decree of divorce, the applicant only signed her

founding affidavit on 4 October 2008, even though a notice of motion was dated 13 August 2008.

11. The applicant therefore launched her application out of time. In the result she was compelled to launch an application for condonation in which she had to furnish reasons why she did not launch her application for rescission within 20 days of 19 July 2008. The applicant has done so. Under a small heading “**AD CONDONATION**” she has furnished reasons why she only signed the founding affidavit on 4 October 2008. She stated that on 8 August 2008, her attorneys told her that the papers were ready to be signed by her. Her employers refused to grant her leave to attend to the offices of the attorneys in order to sign the documents as she had just been recently employed and was still on probation. For that reason her attorneys, who did not work over weekends, made special arrangements with her to sign the papers on Saturday 4 October 2008.
12. It is not clear why the applicant did not, as she did for 4 October 2008 arrange with her attorneys to sign the papers on a Saturday. No explanation is furnished in this regard nor is it explained why she did not send someone to go and collect the papers from her attorneys so that she could sign them and sent them back with the same person. It is not her case that she had nobody to ask in order to do this errand. In my view, the applicant did not do enough to make sure that the papers were signed so that her attorneys could launch the application. She did not attribute any fault on her attorneys. A party must show more desire to attend to her urgent matters than just rely on the fact that she was unable, due to work pressure, to attend to her matters. In my view, the applicant merely adopted a supine attitude to her matters.
13. After she signed her affidavit on 4 October 2008, a copy of the application was served on the respondent on 23 October 2008. In the notice of motion, the respondent was required within 5 days after service of a copy of the application for rescission, to notify the applicant of his intention to oppose the application and, having given the applicant notice of his intention to oppose, to file an opposing affidavit within 15 days thereof.

14. The respondent's attorneys duly delivered their notice to oppose on 31 October 2008. They only delivered the respondent's opposing affidavit on 8 April 2010. The applicant does not explain in her founding affidavit what happened between 31 August 2008 and 8 April 2010. She explained this in a supplementary affidavit dated 11 January 2003. She attributed the delay in attending to a matter to her attorneys or candidate attorneys.
15. According to her testimony, one Khunoana, who had been handling her matter, left the Law Clinic either at the end of the year 2010 or the beginning 2011. The applicant is clearly unable to remember the precise date, an indication that she was not checking on progress of the matter with her attorneys. After the departure of the said Khunoana, her file exchanged hands between two other candidate attorneys who also have left the Law Clinic. This is a bald statement. No attempt was made to obtain their verifying affidavits. No explanation has been furnished why such affidavits could not be obtained. Their names have not been mentioned. Certainly the file would have assisted her to establish the names of the candidate attorneys who handled the file.
16. She then approached a Aphané of the Law Clinic for assistance. The dates on which she approached the said Aphané who promised to locate the file have not been furnished. The applicant has not furnished any explanation as to the date on which Aphané located her file and date or dates on which she consulted with him. At the beginning of 2012 she lost her cell phone as a consequence of which Aphané could not get hold of her. Again she had gotten new employment which needed her at all times. No verifying affidavit by Aphané has been filed. There is no explanation why the applicant has not filed such affidavit. There is also no explanation as to why the matter did not proceed immediately after 8 April 2010. In the words of the **Court in McCallum and Another vs Beacon Sweets and Chocholates (Pty) Ltd 2004JDR 0116(N)** at page 5, the applicant had adopted an unsatisfactorily supine approach to the plight in which she found herself by simply giving the attorneys instructions and not taking any steps to ensure that they were carried out. The fact that she did nothing to promote progress in the matter is borne out by the fact that her attorneys did not even know her whereabouts. In his heads of argument Mr Motloba referred me to the authority of **First**

National Bank of Southern Africa Ltd v. Van Rensburg NO And Others: In Re First National Bank of Southern Africa Ltd v. Jurgens And Others 1994(4) SA 677 (TPD) at 681E-F. In this authority the appellant had brought an application to rescind a default judgment three years after it had been granted. In refusing to grant the order the court stated that:

“It is in the interests of justice that there should be relative certainty and finality as soon as possible concerning the scope and effect of orders of Court. Persons affected by such orders should be entitled to know within after thereof that the last word has been spoken on the subject”

See also **Firestone South Africa (Pty) Ltd v. Genticuro AG 1977 (4) SA 298 (A) at 306H.** In my view, by reason of the inordinate lapse of time and furthermore by reason of the applicant's laxity to make sure that the matter was attended to properly, this application must fail.

17. Although in her notice of motion the applicant seeks *“an order rescinding the judgment granted against the applicant on 10 March 2005”*, it is as clear as crystal that the target of the applicant's application for rescission is not so much the order that dissolves their marriage as it is the order that *“defendant to forfeit all the benefits arising from marriage*. This constitute the primary reason why the applicant launched this application. It was argued on behalf of the applicant that it was not legally possible for her to apply for a variation of the said order.

18. In her founding affidavit, the applicant stated that her attorney of record sent a letter to the respondent's attorney requesting a division of the joint estate in equal shares between her and the respondent. She continued furthermore to state that the attorney has not received any response from the respondent's attorneys. In his answering affidavit, the respondent stated that the applicant, without any agreement between the parties and without further having so authorised by the Court, removed the parties' furniture in 2004. The applicant has not disputed this fact.

19. The order that the respondent seeks is inconsequential and. in my view,

academic. The practical effect of an order of forfeiture of the benefits arising from the marriage where a party such as the respondent in the present matter has not proved a benefit has been fully set out in the authority of **Smith v Smith 1937 WLD 126 at pages 127 to 128** In this authority the Court stated as follows:

“What a defendant forfeit is not his share of the common property but only the pecuniary benefits that he would otherwise have derived from the marriage. It is not uncommon to refer to division and forfeiture as alternative remedies upon the plaintiff. On this view forfeiture means that each party keeps what he or she brought into the marriage. An alternative division of an order of forfeiture is that it is really an order for division of estate plus an order that the defendant is not to share in any excess that the plaintiff may have contributed over the contributions of the defendant”

The history of the principle enunciated this principle in *supra* can be traced back to **Celliers v Celliers 1904 WLD 926 at page 928** where the Court states that:

“There can be no question that the usual order which is made in these cases is that the guilty party shall forfeit all the benefits which may have accrued to him or her by virtue of community of property, whether those benefits have accrued by virtue of marriage in community of property or antenuptual contract or by virtue of a gift, which may have been made by one party to the other.”

In the same authority Curlewis J stated as follows at page 936:

“I therefore come to the conclusion that the abundance of authority is that, whatever may have been the Roman Law on the subject, and however far that law may have been adopted in earlier times, it has certainly fallen into disuse; and if we consider the practice in South Africa it is very dear that except for this decision in the case of Mulder v Mulder decided by the majority of the late High Court, the practice in South Africa has not been to declare forfeiture of a share of the community but only to declare forfeiture of any benefits which the guilty spouse may have derived from the marriage.”

For these reasons the application for rescission of the judgment granted by this Court on 10 March 2005 is hereby dismissed.

P .M. MABUSE JUDGE OF
THE HIGH COURT

Appearances:

<i>Counsel for the applicant:</i>	<i>Adv. RG Bowles</i>
<i>Instructed by:</i>	<i>UP Law Clinic Hammanskraal</i>
<i>Counsel for the respondents:</i>	<i>Adv. BW Motloba</i>
<i>Instructed by:</i>	<i>Motloba A ttorneys</i>
<i>Date Heard:</i>	<i>11 No vember 2013</i>
<i>Date of Judgment:</i>	<i>14 No vember 2013</i>

