NOT REPORTABLE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case No.: 52110/2007

DATE:27/05/2011

In the matter between:

M: R Applicant

and

M: M Respondent

JUDGMENT

MNGQIBISA-THUSI J

[1] The applicant is seeking the rescission of the divorce decree plus ancillary relief granted on 21 May 2010 by default, alternatively, the varying of the orders granted.

[2] On 21 May 2010 Judge Webster granted a decree of divorce in favour of the respondent in the absence of the applicant. The decree was coupled with orders that the applicant forfeits the benefits of the marriage in community of property, that the applicant should vacate the common home by 30th June 2010; and that applicant be granted custody of the minor child subject to the respondent being allowed access to the minor child.

[3] The applicant and the respondent were married for approximately four years. The marriage was in community of property. In May 2007 the respondent instituted divorce proceedings, culminating inn the order granted on 21 May 2010.

[4] The divorce hearing, in which the applicant had also instituted a counterclaim was scheduled for hearing on 20 May 2010. In her counterclaim the applicant was seeking a forfeiture of the benefits of the marriage in community of property However, during the hearing the applicant and her legal representatives had problems, leading to the legal representatives (counsel and the instructing attorney) withdrawing as counsel and applicant's attorney of record. The judge allowed the matter to stand down until after lunch to enable the applicant to secure legal representation. After lunch the applicant was not in court leading to the matter being stood down until the following morning. On 21 May 2010 the applicant made no appearance. However, a medical certificate from the applicant was handed to the judge who then proceeded with the trial in the absence of the applicant and/or her legal representative. The court proceeded to grant a divorce decree together with ancillary orders by default.

[5] This application can only be entertained in terms of Rule 42(l)(a) of the Rules of Court or in terms of the common law. Rule 42(l)(a) provides for the rescision of a final order or judgment granted in the absence of a party who has an interest in it. The applicant is not required to show good cause. Under the common law an applicant for rescission of an order or a judgment the applicant also needs to establish good cause which is a reasonable and acceptable explanation for the default and that on the merits, he has a bona fide defence which, prima facie, carries some prospect of success. Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O).

[6] It is common cause that:

6.1 on 20 May 2011 there was a fall-out between the applicant and her counsel leading to the withdrawal of counsel;

6.2 the applicant did not return to court after the matter stood down to allow her to seek alternative legal representation;

6.3 on 21 May 2010, when the matter resumed the applicant was not in court;

6.4 a medical certificate from Dr Janina Maydell was handed to the court. The medical certificate indicates that the applicant had attended the offices of Dr Maydell and had been diagnosed with severe migraine.

6.5 the applicant was informed via sms message that the trial action would be proceeding at l0h00 on 21 May 2010.

[7] It was submitted on behalf of the applicant that the order was erroneously granted in her absence in that the court was aware that she could not attend court as a result of the migraine she was suffering from. Further that the applicant had done everything within her powers to notify the court of her inability to attend court and was therefore not in wilful default. With regard to the applicant's absence from court on the afternoon of the 20th May she gives an explanation in her founding papers that after her legal representatives had withdrawn, she was traumatised, ending in her seeking medical attention. That she did go to a doctor is not in dispute.

[8] The respondent submitted that this application by the applicant is an attempt to further delay the finalisation of the divorce proceedings in view of the fact that summons was issued sometime during 2007.

[9] 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.

[10] 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 respondents parayer that she forfeit 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.

[11] 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 (paragraphs 8-10 of the order) should remain as they are.

[12] Accordingly the following order is made:

1. That the order granted on 21 May 2010 is in part set aside save for the orders in paragraphs 1 and 8-10 of the order.

2. That the applicant is directed to take the necessary steps to set the matter down by no later than the 30 June 2011.

3. That the office of the Registrar is directed to give prefenrence to this matter in setting it down on an appropriate date.

NP MNGQIBISA-THUSI

Judge of the North Gauteng High Court