



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Number: 1580/2020

In the matter of:

NEO KHUMO DISEKO

APPLICANT

and

ANTHONY BERLOWITZ ATTORNEYS

1st RESPONDENT

**VOLTEX(PTY) LTD t/a LIGHTING STRUCTURES
AND ATLAS GROUP**

2nd RESPONDENT

ABSA BANK

3rd RESPONDENT

THERESA VAN DER MERWE

4th RESPONDENT

JUDGMENT BY: MOLITSOANE, J

HEARD ON: 25 NOVEMBER 2022

DELIVERED ON: This judgement was handed down electronically by circulation to the parties' representatives by email and released to SAFLII on 10 January 2023. The date and time for hand-down is deemed to be on 10 January 2023 at 11H00.

[1] The applicant is the unsuccessful party in an application for rescission of two costs orders granted against her. She seeks leave to appeal the dismissal of her application to rescind the said orders

[2] Section 17(1) of the Superior Courts Act 10 of 2013 states:

“Leave to appeal

17. (1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—

- (a) (i) the appeal would have a reasonable prospect of success; or*
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and*
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”*

The test to be applied in order to determine whether to grant an application for leave to appeal is now higher than what it used to be. It is no longer whether another court **may** come to a different decision than what the trial court arrived at. It is now whether another court, sitting as court of appeal, **would** come to a different decision. The use of the word ‘*would*’ connotes a measure of

certainty that another court will differ from the judgment sought to be appealed against.

- [3] In essence the attack on the judgment of this court is three fold:
1. That this court erred in failing to recognize and apply the principle that Rule 42(1)(a) caters for mistakes in the proceedings, which may either be one which appears on the record which appears on the record of the proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgment;(my emphasis)
 2. That this court failed to recognise and distinguish between the claim for rescission of the costs order in the business rescue application and the claim for rescission of the costs order in the application for leave to appeal;
 3. That this court erred in finding that the costs orders were not granted in the applicant's absence.

- [4] It is apt to refer to *Lodhi 2 Properties v Bondev*¹ in which the court said:

“...a judgment to which a party is procedurally entitled cannot be considered to been granted erroneously by reason of facts of which the judge who granted the judgment, as he was entitled to do was unaware...” See also *Freedom Stationary & Others v Hassam & Others*²

- [5] It is undisputed that the Applicant was cited as a party in the business rescue application as well as an application for leave to appeal the order dismissing the business rescue application. She filed a confirmatory affidavit as a party in the business rescue

¹ [2007] SCA 85 (RSA) para [25].

² (921/ 2017) [2018] ZASCA 170 (30 November 2018) at para [18].

application. In my view she participated fully in the business rescue application. She was legally represented. I agree with Counsel for the First Respondent that the outcome of the adverse cost orders is actually the reason for bringing the ill-fated application. That the Fourth Respondent was indemnified against costs subsequent to the institution of business rescue application, may also be the reason for the application by the Applicant. I agree that it would seem unfair that the Fourth Respondent was indemnified against the costs but this court is not seized with determining the circumstances under which such indemnification was granted. In any case this court is further not called upon to decide whether it was fair or unfair to have granted the indemnification. It cannot be argued that the judge in the business rescue and the leave to appeal was not entitled to exercise his discretion and grant the cost orders. It is most disconcerting that after the adverse cost orders were made, Applicant would contend that she had not mandated the First Respondent to represent her. It is undisputed that she was a party to the proceedings in which cost orders were made against her.

- [6] This court dealt fully with the question of the alleged absence of the applicant in the applications sought to be rescinded. I dealt with this issue in the court a quo as follows:

“ [14] *The contention that the order was granted in the absence of the applicant is disingenuous. The proceedings in both the business rescue and leave to appeal applications were so called motion proceedings. It is common knowledge that such proceedings are essentially adjudicated on affidavits and supporting documents. Parties do not generally attend court. It cannot be said that once the court grants an order, such an order*

was granted in the absence of the parties. The parties were in my view 'present' because their documents were properly before court. During the applications their Counsel moved their applications on their behalf. Even in circumstances where the legal representatives of the parties are not before court, once their papers are properly before court, such papers cannot be ignored..."

- [6] The applicant participated fully in the business rescue proceedings. She filed affidavits as an affected applicant. The application for leave to appeal was a sequel to the dismissal. The orders she seeks to rescind were not granted in her absence. In further amplification I refer to *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*³ where the Constitutional Court said the following::
- " [60] Accordingly, this Court found that the irregularity committed by the High Court, insofar as it prevented the parties' participation in the proceedings, satisfied the requirements of an error in rule 42(1)(a), rendering the order rescindable. Whilst that matter correctly emphasises the importance of a party's presence, the extent to which it emphasises actual presence must not be mischaracterised. As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed. I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, *ipso facto* (by that same act), plead the " absent victim". If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, merely electing *absentia*(absence).

³ (CCT 52/21) [2021] ZACC 28; 2021(110 BCLR 1263(CC).

[7] In my view the Applicant has failed to establish that another court would grant a different order to the one granted. I accordingly make this order:

ORDER

1. The application for leave to appeal is dismissed with costs.



HP P.E. MOLITSOANE, J

On Behalf of the Applicant:
Instructed by:

Adv Van der Merwe
VAN WYK ATTORNEYS
BLOEMFONTEIN

On Behalf of the First Respondent: Adv L Acker

Instructed by:

Blair Attorneys