

(1) REPORTABLE :YES / NO

(2) OF INTEREST TO THE JUDGES :YES / NO

(3) REVISED

10/01/2022

DATE

SIGNATURE



**IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)**

CASE NO.: HCA 17/2021

In the matter between:

WOOLWORTHS TZANEEN

FIRST APPELLANT

STEPHANIE VAN DER MERWE

SECOND APPELLANT

and

MOKGALE DAVID RAPATSA

RESPONDENT

JUDGMENT

TSHIDADA, AJ

- 1 This is an unopposed appeal against the whole judgment and order pronounced on 11 March 2021 by the Magistrate Court at Tzaneen, dismissing a rescission application launched by the appellants against a

default judgment granted in favour of the respondent herein in the main action between the parties.

- 2 The current appeal was timeously noted and prosecuted in terms of the Uniform Rules of the High Court. The appellant filed a notice of security in terms of Rule 51(4) of the rules of the court¹.
- 3 The respondent failed to file heads of argument and was in default of attendance of the current proceedings. As already alluded, the respondent lack of appearance and non-compliance with filing of its heads of argument compelled the hearing to continue on uncontested basis.

THE FACTS:

- 4 The present appeal is borne from the following factual background. That the respondent instituted an action against the appellants for damages allegedly suffered by him, as a result of alleged unlawful arrest and detention at the behest of the second respondent, whilst he the respondent was busy shopping at the first appellant's store².
- 5 When the appellants failed to defend the main action, default judgment was subsequently granted by the *court a quo* on the 2nd March 2021 in the amount of R60 000 (sixty thousand rands) against the appellants jointly and severally together with interest and costs³.

¹ Record: pp.5 – 8, pp. 98 – 100

² Record: POC, pp. 12 - 13

³ Record: pp. 35

- 6 The appellants aver to have only became aware of the default judgment when the respondent proceeded with a warrant of execution about three months post the default judgment⁴.
- 7 The appellants immediately launched a rescission application of the said judgment of which the respondent opposed⁵.
- 8 In opposition of the rescission application, the respondent raised a *point in limine* that the deponent to the founding affidavit one Jan Lucas Lombard ("Lombard") lacked the requisite *locus standi* to depose to the appellants' rescission application founding papers on the basis that Lombard has no mandate or authority neither was he in possession of the company (first appellant)'s resolution to confirm his *locus standi* to act on its behalf.
- 9 It was this *point in limine* that became the bone of contention between the parties when the rescission application was argued before the *court a quo* on 11 March 2021, whereupon the *point in limine* was upheld with costs even against Lombard, albeit him not having been cited as a party in those proceedings.
- 10 This court finds that the merits of the rescission application were not dealt with by the court below.
- 11 The appellants requested reasons of the court's ruling and the subsequent orders within the prescribed period after delivery of judgment in terms of

⁴ Record: pp. 52 - 53

⁵ Record: pp. 40 - 51

Rule 51(1) of the Rules Regulating the Conduct of Proceedings of the Magistrates Court of South Africa⁶.

- 12 This court noted from the record that the reply to the request for reasons from the presiding officer *a quo* regrettably was simply that, and I quote "*I will stand by my reasons*"⁷. This is impermissible as the reasons for the court's decision were required.
- 13 With dismay, this court however could not establish any reasons for the ruling and/or order allegedly so furnished by the presiding officer from the attached record of the proceedings of the *court a quo*, an issue that begs a question as to which reasons did the presiding officer stand by, in terms of her response. This was a misdirection.
- 14 The court proposes to deal with the necessity and significance of the presiding officer providing requested reasons of its findings, rulings and/or judgment later in this judgment.
- 15 Despite the foregoing, the appellants launched the present appeal on the following grounds, that:

The *court a quo* erred in upholding the respondent's *point in limine* relating to the alleged lack of *locus standi*/authority on the part of Lombard, whereas the application for rescission was instituted and prosecuted by a firm of attorneys whose authority to act on behalf of the appellants was never challenged by the respondent in terms of Rule 52(2) of the Magistrate's

⁶ Record: pp. 95 - 96

⁷ Record: pp. 97

Court rules”, for which there would be no need for Lombard to have additional authorisation from the first respondent, (“my emphasis”).

15.1 The court erred in not finding that the objection to the lack of *locus standi*/authority on the part of Lombard was raised in an impermissible manner and against the provisions of Rule 52(2) of the Rules Regulating the Conduct of Proceedings of Magistrates Court. (“the rules”)

15.2 As a result and in the alternative, the court erred by failing to adjourn and postpone the application in order to enable Lombard to rectify the defect and comply with the provisions of Rule 52(2)(b) of the Rules.

I pause to mention even at the stage that the above attempt by the appellants to remedy the defect would not have been necessary as it shall be demonstrated hereunder.

15.3 The *court a quo* further erred by failing to dismiss the respondent’s point *in limine* on the part of Lombard with costs.

15.4 Furthermore, that the court erred by ordering Lombard to pay the costs of the application in his personal capacity, whereas such costs order was not warranted or permissible by the facts and/or by law.

THE ISSUE ON APPEAL:

16 The main and one issue that remains to be determined by this court and as it were with the *court a quo*, is whether Lombard required authorisation by

the first appellant to depose to a founding affidavit in support of the appellant's rescission application or not.

- 17 It is common cause that the appellants were throughout these proceedings legally represented by a firm of attorneys who duly acted on their behalf with authority. Lombard deposed to the founding affidavit in the rescission application on appeal in his capacity as an authorised director of Lombard Retail (Pty) Ltd, which company traded as the first appellant.
- 18 Rule 54(4) of the Magistrate's Court Rules allows for a company to sue or be sued in a firm's name.
- 19 It was stated in **Durbach v Fairway Hotel Ltd**⁸ that "a denial of authority must be clearly pleaded".
- 20 In this instance, there was no clear denial or notice filed in terms of the rules on the denial of Lombard's authority by the respondent. The enquiry into his authority should have ended there and that the improperly raised *point in limine* should have been dismissed.
- 21 Rule 52(2) of the Magistrate's Court Rules provides as follows:
- " (a) it shall not be necessary for any person to file a power of attorney to act, but the authority of any person acting for a party may be challenged on notice by the other party within 10 days of such party becoming aware that such person is so acting or with leave of the court on good cause shown at any time before judgment.*

⁸ 1949 (3) SA 1081 (SR)

(b) if a person's authority to act for a party is challenged, he or she may not, without leave of the court, so act further until the court is satisfied that her or she has authority so to act, and the court may adjourn the hearing of the proceedings to enable him or her to do so."

- 22 However, the dispute with regards to the authority to act of a person who is legally represented in motion proceedings which have already been instituted by his/her legal representatives whose power of attorney has never been challenged, was settled by the Supreme Court of Appeal in a matter of **Ganes and Another v Telecom Namibia Ltd**⁹ at 616 G – I where the court held thus:

"in determining the question whether a person has been authorised to institute and prosecute motion proceedings, is it irrelevant whether such person was authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof that must be authorised. Thus, where, as in the present case, the motion proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the applicant and in an affidavit filed with the notice of motion."

See also the matter of **Masako v Masako & Another (Case No.: 724/20) [2021] ZASCA 168 (3 December 2021)**

- 23 It is therefore no brainer that Lombard required no authorisation, nor was he required or expected to prove that he had the requisite authority to depose

⁹

2004 (3) SA 615 (SCA)

to the rescission application founding papers in support of the appellant's rescission application before the *court a quo*.

24 It is clear from the record that the *court a quo* was adamant that authorisation on the part of Lombard was required and necessary, despite reference by the respondent's counsel at the hearing to the **Ganes** case referred *supra*.

25 Regardless, it is apparent that the respondent's counsel did not understand the principle regarding the need for authorisation to depose to an affidavit on behalf of a legally represented entity, as enunciated in the referred authority, inspite quoting and referring the court to the stated case law¹⁰.

26 It is unsurmountable to imagine that the *court a quo* does not seem to have had any regard to consider the relevant authority as referred to by the respondent's counsel. Undoubtedly, if it was considered and understood on principle, clearly the *point in limine* raised would have been dealt with differently.

27 Instead, without proper consideration of the matter, the *court a quo* was inappropriately convinced that the *point in limine* was valid, and that there was no authority deposed to in the affidavit by Lombard, lastly, that Lombard was not in possession of a resolution to prosecute the matter,

¹⁰

Record: pg. 85, Line 20, pp. 86

when in actual fact and in law it was not necessary for Lombard to have the sought authorisation¹¹.

- 28 It is on this point that when viewed alone, this court finds that the *court a quo* misdirected itself and erred in upholding the point raised by the respondent without proper reasons or basis for its finding.
- 29 Under those circumstances, the respondent's *points in limine* ought to fail.
- 30 By no stretch of imagination, if in the first place the *point in limine* was erroneously upheld by the *court a quo*, the costs order against Lombard on a wrong finding is also bound to fail and therefore set aside.
- 31 The *court a quo* accordingly erred in ordering Lombard to pay costs in his personal capacity when he was not even a party to the application. It failed to even afford Lombard an opportunity in terms of the *audi alteram partem* rule to present reasons as to why costs should not be ordered against him, under circumstances where such costs order was not warranted or permitted by facts and/or law.
- 32 I now turn to deal with the importance and necessity of a presiding officer / court to furnish reasons for its findings and/or judgments.
- 33 Goldstone J had the following to say in a Constitutional Court matter of **Vincent Maredi Mphahlele v The First National Bank of South Africa**¹², thus;

¹¹ Record: pg. 92, Line 15 - 20

“The rule of law undoubtedly requires judges/courts not to act arbitrary and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek to appeal. It assists the appeal court to decide whether or not the order of the lower court is correct.”

- 34 I find it disconcerting that there are courts which still neglects and fail to promote and uphold the rule of law by accounting for their decisions. It is undesirable, unacceptable situation and unbecoming conduct least expected of a judicial officer.
- 35 Sanctity and integrity of the judicial processes is what defines our country's judicial justice system.
- 36 This court is displeased and finds it absurd to discover and observe that no clear reasons for the presiding officer's ruling appears on the record of the court *a quo*'s proceedings, as it appears on the face of her reply which lacks elaboration to the appellant's request.
- 37 In **S v Hadebe and Others**¹³ it was stated that in the absence of demonstratable and material misdirection by the trial court, its findings of fact and the law are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.

¹² 1999 (2) SA 667 (CC) at 671

¹³ 1997 (2) SACR 644 (SCA) at 645, e – f

- 38 This court is satisfied that the *court a quo* misdirected itself materially on the point of law as envisaged in **Ganes** *supra*. The challenge on Lombard's authority was wrong in law.
- 39 Therefore, as an appeal court, this court is enjoined to interfere and upset the *court a quo*'s finding.
- 40 In the premises this court finds that the appeal should be upheld with costs.
- 41 Accordingly, the order granted by this court hereunder on 29 October 2021 is for all the reasons given hereby confirmed.

ORDER

- (a) The appeal is upheld.
- (b) The decision / order of the court a quo upholding the *point in limine* is set aside.
- (c) The rescission application is remitted to the *court a quo* for hearing on the merits before another presiding officer.
- (d) The respondent is ordered to pay the costs.



T C TSHIDADA
ACTING JUDGE
LIMPOPO DIVISION, POLOKWANE

I agree, and it is so ordered:



M G PHATUDI
JUDGE
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

- | | | |
|-----------------------|---|---|
| 1. For the Appellants | : | Adv R Grundlingh |
| 2. Instructed by | : | Joubert & May Attorneys, Tzaneen |
| 3. For the Respondent | : | No appearances |
| 4. Date of hearing | : | 29 October 2021 |
| 5. Order delivered | : | 29 October 2021 |
| 6. Date revised | : | Full text of the judgement electronically |
- circulated to the parties legal representatives on the 10th January 2022. It is also to be uploaded on SAAFLI's website.