



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case No: 1869/2021

In the matter between:

THE MINISTER OF POLICE

Applicant

And

NOKUTHULA MAGQAZA obo THEMBELANI CWATI **First Respondent**

XOLANI HANISE **Second Respondent**

MNCEDISI NQIWA **Third Respondent**

**THE SHERIFF OF THE HIGH COURT FOR THE
DISTRICT OF ZWELITSHA** **Fourth Respondent**

JUDGMENT

BESHE J:

[1] The matter was on the roll on the 11 August 2022 for the hearing of an application for rescission of three orders that were issued by the Mthatha High Court. The parties agreed that the court should first determine whether the Makhanda High Court had the jurisdiction to hear the matter. Secondly, whether the matter was not *lis pendens* before the Mthatha High Court. Counsel expressed the view that these objections are dispositive of the matter, at least before the Makhanda High Court.

[2] A reading of the papers reveals that the orders sought to be rescinded were made on the 11 February 2020, 30 November 2020 and 15 April 2021 respectively. The orders were issued in respect of an action for damages that was instituted by the first respondent against the applicant for the recovery of damages that he allegedly suffered as a result of being shot at by members of the South African Police Services in October 2001. The first order declared the applicant to be liable to compensate the first respondent with such amount of damages as may be proved in due course. The order of the 30 November 2020 is *inter alia* to the effect that:

1. *The determination of the general damages is separated from the determination of other heads; and*
2. *The applicant in this matter is to pay the first respondent R2 100 000.00 as and for general damages.*

Finally, the order of the 15 April 2021 directed the applicant to pay to the first respondent certain amounts of money as interim payments in terms of *Rule 34A* of the *Uniform Rules* of this court.

[3] The jurisdiction of this court to hear the rescission application is impugned, as I understand the first respondent's case, on the basis that the matter belongs in the Mthatha Court. In the same heads of argument, it is submitted that the courts that granted the judgment are *fuctus officio* and that this is an attempt to appeal the three decisions under the guise of a rescission application/s. In argument, it was submitted that the Mthatha High Court is seized with the matter. This submission also ties in with the *lis pendens* objection. Furthermore, that those decisions can only be rescinded by the Mthatha High Court. These submissions appear to be contradictory, in that it was submitted that the courts that issued the orders are *fuctus officio*, and in the same breath it is submitted that the matter is pending before the Mthatha High Court (*lis pendens*). During argument, it was submitted on behalf of the

first respondent that a judgment can only be rescinded by a judge in the same division as the court that rendered the judgment. In this case, that division being Mthatha High Court, so the argument went.

[4] The dismissal of the application based on the two objections is opposed on the basis *inter alia* that there are no proceedings in respect of the present cause of action that are pending before the Mthatha High Court. Secondly, on the basis that this court enjoys concurrent jurisdiction with local divisions within the Eastern Cape.

[5] The applicant is seeking the rescission of the three judgments. That, in my view, is applicant's cause of action / application.

[6] It is trite that the defence of *lis pendens* consists of four requirements:

(i) *Pending litigation*

(ii) *Between the same parties*

(iii) *Based on the same cause of action; and*

(iv) *in respect of the same subject matter.*

In ***Hassan and Another v Berrage N.O.***¹ the requirement for the pleas of *lis pendens* was expressed as follows:

"Fundamental to the plea of *lis alibi pendens* is the requirement that the same plaintiff has instituted action against the defendant for the same thing arising out of the same cause."

The parties in both proceedings may be the same but the causes of action are different in my view. What served before the Mthatha High Court was the quantification of first respondent's damages. Before this court is an application for the rescission of judgment granted by the High Court in Mthatha. It was intimated that another reason that informed the launching of this application, the

¹ 2012 (6) SA 329 SCA at paragraph 19 F.

rescission application in this court, is that the motor vehicles belonging to the applicant that were attached as a result of the Mthatha judgment/s were attached by the Sheriff whose offices are in King William's Town and therefore outside the territorial jurisdiction of the Mthatha High Court. The suspension of the writ of execution which forms Part A of this application was granted by the Makhanda High Court pending the finalisation of the rescission application/s.

[7] In my view, there is therefore no merit in the *lis pendens* point raised by the first respondent. It would have been different had the applicant launched the same application before the Mthatha High Court, and same had not been finalised.

[8] Regarding the lack of jurisdiction objection: *Section 6* of the *Superior Courts Act 10 of 2013* stipulates how the High Court of South Africa is constituted. *Section (1)* provides that the High Court of South Africa consists of the following divisions:

“(a) Eastern Cape Division, with its main seat in Grahamstown (now Makhanda).

(b)

(c)

(d)

(e)

(f)

(g)

(h)

(i)”

Section 6 (4) of the Act provides that:

“If a Division has one or more local seats–

- (a) the main seat of the Division has concurrent appeal jurisdiction over the area of jurisdiction of any local seat of the division.”

Moreover, a Full Court that was constituted to consider this question of jurisdiction in the matter of *Thembani Wholesalers (Pty) Ltd v September*,² the court held that the Eastern Cape Division, Grahamstown (now Makhanda) being the main seat of the Eastern Cape High Court and has jurisdiction over the entire Eastern Cape Province. The Local divisions at Bhisho, Mthatha and Port Elizabeth (now Gqeberha) have concurrent jurisdiction over their respective areas. Litigants may choose to proceed in Makhanda rather than in a local division with jurisdiction. The change of names of court seats in the Eastern Cape Division of the High Court of South Africa as per Judge President’s directive of 7 September 2022, in my view does not change the position. The appellation of courts in this division is now the following:

1. The main seat of the Eastern Cape Division shall retain the appellation: **“EASTERN CAPE DIVISION, MAKHANDA”** and the local seats shall be identified as follows:
 - (a) IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)
 - (b) IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)
 - (c) IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)

The Makhanda High Court remains the main seat of Eastern Cape Division of the High Court of South Africa.

² 2014 (5) SA 51 (ECG). See headnote.

[9] For these reasons, both objections raised by the respondent fall to be overruled.

[10] Accordingly, the first respondent's points *in limine*, namely *lis pendens* and lack of jurisdiction are dismissed with costs.

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant	:	Adv: S H Cole SC and Adv: Somandi
Instructed by	:	J A LE ROUX ATTORNEYS C/o WHEELDON RUSHMERE & COLE INC. 119 High Street MAKHANDA Ref: SA/Farenchia/S24059 Tel.: 046 – 622 7005
For the Respondents	:	Adv: B Dyke SC
Instructed by	:	MESSRS MAKANGELA MTUNGANI INC. C/o WHITESIDES ATTORNEYSTHE STATE ATTORNEY 53 African Street MAKHANDA Ref.: Mr Barrow Tel.: 046 – 622 7117
Date Heard	:	11 August 2022
Date Reserved	:	11 August 2022
Date Delivered	:	6 December 2022