NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)

Case No. 3337/2019

In the matter between:

NTSIKELELO MZILIKAZI	Applicant
and	
MEC FOR CO-OPERATIVE GOVERNANCE	
AND TRADITIONAL AFFAIRS	First Respondent
MNCEDISI MZILIKAZI	Second Respondent
MCHWEBENI TRADITIONAL COUNCIL	Third Respondent
NYANDENI TRADITIONAL COUNCIL	Fourth Respondent
THE PREMIER OF THE EASTERN CAPE	Fifth Respondent

JUDGMENT IN RESPECT OF
APPLICATION FOR LEAVE TO APPEAL AGAINST ORDER RESCINDING DEFAULT ORDER GRANTED IN THE MAIN REVIEW APPLICATION

HARTLE J

[1] The applicant (first respondent in the rescission application) sought leave to appeal against the whole of my judgment and order delivered on 10 December 2020 in which I drew the following conclusions or made the following relevant findings for present purposes:

1. that the second respondent had not been served with the founding papers filed in the review application;
2. that because he was a vital party to the review proceedings, he was an "affected party" as envisaged in Rule 42 (1) of the Uniform Rules of Court against whom an order in the review application had been granted in his absence;
3. that the impugned order in the review application was "erroneously sought or granted" within the contemplation of that sub-rule, because the second respondent had not been served; and
4. that the court was authorized by the provisions of Rule 42 (1)(a) upon the application of the party affected (or even *mero motu*) to rescind the impugned order.

[2] Although I dismissed such an application for rescission brought by the first respondent for various reasons, I had regard to the "application" of the second respondent and accepted that it afforded a premise to rescind the judgment since the jurisdictional facts referred to in sub-rule 1 (a) were in my view established as a fact on the papers.

[3] Although the second respondent did not bring a separate application for rescission (having at first merely filed a notice to abide the outcome of the first respondent's application for recission), which was thereafter withdrawn, he later made common cause with the first respondent's position and put his weight behind the application. In a footnote I opined that he was properly (although unconventionally) before me as an applicant for the relief envisaged in Rule 42 (1)(a) as follows:

> "Although cited as a respondent in the present application, the second respondent put his full weight behind the relief sought, but for his own unique reasons that were expounded upon in an "explanatory" (sic) and other affidavits. Although the application was somewhat unconventional in form, I cannot fault it on substance. It complies substantially in my view with the provisions of rule 42 (2) of the Uniform Rules of court. Further, given the obvious shortcoming that I allude to in my judgment, I would have been inclined *mero motu* to have set the judgment aside in any event."

[4] Upon concluding that he had the requisite interest to be before me as an "affected party" and that the jurisdictional fact as envisaged in Rule 42 (1)(a) had been established, I found as a result that I was permitted to rescind the review order without further ado, in other words I found that it was not necessary for the second respondent additionally to have shown good cause for the sub-rule to apply.

[5] In respect of the issue of the second respondent not having been served, the applicant had been obliged to deal with this allegation in reply even *viz-a-viz* the first respondent (even though his application failed), because it was a common complaint that the second respondent had not been served with the papers in the review application. In this respect I held that:

"[17] In this instance although confronted with the allegation that the second respondent had not been served with the review application, the first respondent[1] very glibly dealt with the issue and failed to produce a return of service which would have evidenced this as a fact and put the matter beyond contention. Further, the actual review file was not placed before the court and the odd documents alluded to by the parties that were included as annexures in the present application do not reveal that the second respondent, a vital party to the proceedings in the review application, was copied in as a litigant."

[6] The corresponding relevant footnotes from my judgment are included to elucidate my finding that the second respondent had not been served with a copy of the review application:

"[22] The first respondent asserted that the review papers were served on 26 September 2019 but did not attach the sheriff's returns of service. Elsewhere he made the general allegation that all the relevant parties were served but did not provide proof. The review papers were not placed before me, but regard being had to the few pleadings in the review application that were coincidentally included as annexures to affidavits filed in the present application, there is a glaring absence of any indication that the second respond was served. The mere say-so of the first respondent, very generally I might add, does not create a genuine dispute of fact on the papers concerning this issue.

[23] The first respondent attached a copy of the notice of motion in the review application, but *sans* the service page (assuming there is page beyond what constitutes annexure "NVM 1" to the first respondent's answering affidavit). The notice to oppose filed by the State Attorney for the select few respondents is served only on the registrar and the "applicant's attorneys" (read first respondent), suggesting that that the second respondent's details may not have been indicated on the Notice of Motion at all. In annexure "NVM 2" (the Rule 30A notice placing the applicant on terms) the details of the second respondent appear, but there is no indication of service on him. In the urgent application to strike out only the applicant and the House's opposition to

[1] This is the applicant in the present application for leave to appeal.

the review application, there is also no mention of the second respondent. It is in my view significant that his opposition would self-evidently have stood in the way of the order being granted. Consequently, if such relief was being sought against the applicant and the House, why not seek the same order against him? This suggests to me that his interests were simply glossed over as insignificant in the whole scheme of things. The second respondent's particulars are also not reflected on the notice of set down of the proceedings (annexure "NVM 6") and when it came to satisfying this court that it had been properly served, the first respondent's attorney only alluded to how the applicant had been served."

[7] In consequence I found that:

"[18] … the order would not have been granted under these circumstances if the court had been made aware that the second respondent had not been served. In the result I conclude that the order was granted erroneously in the absence of the second respondent who has a direct and substantial interest in the review application and for this reason the order falls to be rescinded."

[8] I further observed that it was unnecessary for the court to have gone any further to establish whether good cause had been shown by the second respondent. This notwithstanding, I generally touched on his explanation regarding why he had come to the party late so to speak:

"[19] I need not consider whether good cause has been shown but I accept as correct the second respondent's explanation (nothing having been said to gainsay this) concerning how it happened that he came to learn of the order and the steps he took to try and ameliorate his position as expeditiously as possible."

[9] I emphasize that it was on the basis of my finding that the second respondent had not been served that I ordered the applicant to pay the second respondent's costs. I set out my reasons in this respect as follows:

> "[36] … In the premises, despite partial success in favour of the applicant by the grant of the order below, he is to be deprived of his costs.[2] As for the first respondent, although justified in opposing the matter *vis-á-vis* the applicant's claims of irregularity, he should not have resisted the application *vis-à-vis* the second respondent who was plainly not served with the review application. The position of the second respondent however is that he should be entitled to his costs on the basis of success as against the first respondent."

[10] At the commencement of the hearing of the present application for leave to appeal, I granted the applicant condonation for the late filing of his application. For the record this was on the basis of the parties' acceptance that the applicant had made the common mistake that litigants seem to make over the Christmas recess of counting such a period as *dies-non* for purposes of calculating when the next step or pleading is due to be taken or filed, resulting in the present application having been filed out of time.

[11] The applicant raised several proposed appeal grounds against my judgment which I do not intend to repeat here as they appear from the notice of application.[3]

[12] The respondents opposed the application on the basis essentially that a successful recission order is generally not appealable because it is not final in effect.

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[2] This deprivation of costs was the MEC's lest there be any confusion. The effect of this court having found in favour of the second respondent though, on the basis of his own unique application, resulted in the applicant losing out on a costs award vis-à-vis the first respondent despite him appearing to have been successful in opposing the MEC's application for recission.

[3] The fourth ground that the second respondent's counsel had a conflict of interest because he himself had participated in the same headman-ship dispute in its early stages was fairly abandoned by Mr Mhlana who appeared for the applicant.

[13] On the simple basis that I adopted an unconventional approach in accepting that the second respondent was properly before me as an “applicant”, I believe that there is merit in the applicant’s submission that the second respondent, having been allowed to “participate” as he was, may have suffered trial prejudice as a result.

[14] In this respect Mr. Mhlana contended, for example, that whereas the second respondent’s “application” had ostensibly been brought out of time, without any application to condone it, in elevating his status to that of an applicant proper in his own right (rather than as a mere observer willing to abide the outcome), the court missed that he had not pertinently applied for condonation for the late bringing of his “application” and did not interrogate this or hold him to account for it as it would a regular applicant so to speak. It is so that I dealt with the second respondent’s delay in coming to the fore with his complaint that he had not been served with a copy of the review application (the error) in very general terms whereas our courts have held that it is settled law that even an application in terms of Rule 42 (1)(a) must be brought within a reasonable time of establishing the fact of the error or erroneous state of affairs contemplated by the sub-rule and that the delay ought to be fully explained in all the circumstances.[4]

[15] Additionally, so the argument went, the awkward manner in which the second respondent interposed his dilemma and his failure to have followed recognized procedures in withdrawing his notice to abide and initial affidavit, and thereafter changing the course of his direction by filing a different affidavit, meant that the applicant was compromised in replying thereto in the ordinary course. (The applicant claims that it would have dealt with the second

[4] Minister of Home Affairs & Others v Zuma, Case No. 3014/2017: Heard on 06 August 2020, delivered on 13 August 2020, paragraph 8, Eastern Cape Division, Mthatha.

respondent's claim that he had not been served with a copy of the application by putting up proof of the sheriff's return of services which he purported to do only after the fact and as random annexures to the application for leave to appeal)[5].

[16] Mr. Mhlana submitted further that I failed to properly deal with the applicant's unopposed application to strike out the second respondent's papers which should have happened before I heard the recission application. (In this regard I mention that I considered it unnecessary to hear the striking out application which became moot by the second respondent's withdrawal of the impugned affidavit, which I had no regard to in the ultimate determination of the issues before me. I accept though that the filing of the affidavit in its place under the peculiar circumstances may have constituted an irregularity.)

[17] A further ground was raised that even assuming that the second respondent was properly before me, I should not have come to his assistance since he failed to set out "with sufficient particularity, a valid a *bona fide* defence to the main application". In this respect Mr. Mhlana relied on the authority of Bayport Securitization RF Ltd v Sakata[6] in support of his contention, but I am not convinced that this supports the applicant's position *in casu*. Bayport[7] dealt with the peremptory provisions of Rule 49 (1), (3) and (8) of the Magistrate's Court Rules. Rule 42 of the Uniform Rules of Court however caters for a completely different situation in this court and provides for its own requirements. Rule 42 (1) (a) is a procedural measure designed to rectify a procedural error. It is a remedy distinctly different from the relief allowed

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[5] As an aside I pointed out to Mr Mhlana at the hearing that the purported returns of service which the applicant sought to introduce as annexures to the application for leave to appeal had not before been made available (in other word they were not placed before the court when the parties argued the recission application before me), and additionally appeared to be irregular on the face of the two returns. He sought to persuade me however that the applicant would probably, given the chance and not having been caught off guard by the irregularity of the second respondent's application as it were, have offered an explanation around the returns.

[6] 1320/17 [2019] ZASCA 73 (30 May 2019)

[7] *Supra*.

under the common law. The court found in National Pride Trading 452 v Media 24[8] that the requirements of Rule 42 are prescribed by the wording of the rule itself and are not imported from the common-law. Hence there is no requirement under Rule 42 (1)(a) that the showing of "sufficient cause" by such an applicant is a necessary requirement.

[18] This has been authoritatively settled by the judgment of the Supreme Court of Appeal in Lodhi 2 Property Investments CC and Another and Bondev Developments (Pty) Ltd where that court held that "(t)he existence or non-existence of a defence on the merits is an irrelevant consideration" under the sub-rule.[9]

[19] The approach adopted by this court in National Pride[10] has also been endorsed by the Supreme Court of Appeal in the more recent judgment of Rossiter v Nedbank Limited.[11]

[20] In National Pride Trading 452[12] the court explained why it believed that it was also a consideration of policy why it is not a requirement that an applicant raising a procedural irregularity under Rule 42 (1)(a) has to show a *bona fide* defence under the sub-rule, as follows:

> "[56] There is, I believe, also a consideration of policy why it is not a requirement that an applicant has to show a *bona fide* defence under Rule 42 (1) (a), and that is this: Any order or judgment made against a party in his absence due to an error not attributable to him, is such a profound intervention in his right to a fair trial and right

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[8] 2010 (6) SA 587 at [54].
[9] 2007 (6) SA 87 (SCA) at para [27]. See also National Pride Trading 452 *supra* at para [55].
[10] *Supra*.
[11] Unreported judgment of the Supreme Court of Appeal, case no. 96/2014 dated 1 December 2015, at para [16].
[12] *Supra* at para [56] – [59].

to be heard, that, for this reason alone, the judgment or order should be set aside without further ado.

[57] If Jones AJA[13] did not intend to mean that the common law grounds apply to Rule 42, what then did he intend to convey by saying that the Rule is *"... a restatement of the common law ..."*? In my respective view, what he intended to convey was no more than this: Rule 42 contains a similar remedy to that of the common law, namely to restore the parties to their same position before the wrong order was made.

[58] The one feature which runs like a golden thread through all the decided cases on the common law grounds for rescission, is that its historical origin lies in the remedy of *restitutio in integrum.* Its aim is to correct an injustice and to place the aggrieved party in the same position in which he was before the error or fraud or other form of injustice was committed. Although Rule 42 provides for a different mechanism, namely to set aside a procedural irregularity, its aim is the same as that of the common law, namely to restore the applicant in its previous position before the irregularity occurred. And it is in this context, against the background of the common law, that the words of Jones AJA in *Colyn* (*supra*) must be read and understood where he stated (at 7B-C (para 6)):

> "*…It (Rule42 (1)(a)) is, for the most part of any rate, a restatement of the common law. It does not purport to amend or extend the common law, ..."* (my emphasis).

[59] What Jones AJA clearly meant by the above, is that Rule 42, as does the common law, provides for the remedy of *restitutio in integrum.* It does not purport to amend or to extend the common law, but merely restate the same defence in procedural form, having as its only requirement an order or judgment which was (procedurally) erroneously sought or erroneously granted in the absence of a party affected thereby. It is a procedural error explaining the absence of the affected party."

[13] The court was here referring to the judgment of the SCA in Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA (1) (SCA).

[21] In the result I do not agree with Mr. Mhlana's submission that I overlooked or ignored three judgments, of the Supreme Court of Appeal and of this Division, in concluding that it had been unnecessary for the second respondent in the rescission application to set out his defence to the review application. To the contrary, the judgments relied upon by him pertain uniquely to the requirements for recission applications in the magistrate's court.[14] The authorities cited in footnotes 10 – 21 of my judgment in my view continue to remain good law.

[22] For the rest, it is unnecessary in my view to pertinently go into the proposed appeal grounds individually. I am satisfied that another court may well find that I should not have entertained the "application" of the second respondent, but rather simply have dismissed the first respondent's application (with costs going to the applicant as the successful party in opposing the application) and thus have brought an end to the matter. I accept too that by

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[14] Bayport Supra was an appeal from an appeal judgment of the Bhisho High Court which I co-wrote that was overturned on appeal after special leave was granted to the parties ostensibly in terms of section 16 (1) (b) of the Superior Courts Act, No 10 of 2013. In our judgment we found that once there is a procedural error in the grant of a judgment (of the magistrate's court), that it is unnecessary for an applicant to set out a valid and *bona fide* defence and that we were entitled to invoke the court's inherent jurisdiction to rescind the judgment. The SCA found however that our judgement was at odds with Leo Manufacturing CC v Robor Industrial (Pty) Ltd 2007 (2) SA 1 (SCA) as well as two judgments of the ECD in Diniso v African Bank Ltd [2017] ZAECGHC 3 and Smith v Finbond Mutual Bank [2017] ZAECGHC 4 in which it had been held that where recission is sought *in terms of rule 49 (8)* on the basis that the judgment was void *ab origine*, the applicant must still set out a valid and bona fide defence to the claim. This is however clearly because of the peremptory nature of the provisions of rule 49 (3) of the magistrate's court (which is a creature of statue) which makes it clear that the grounds of the defendant's defence to the claim must be set out. Not only are the courts distinctly different (the high court obviously entertaining an inherent jurisdiction in respect of its own process) but so is the procedure set forth in each of the respective rules. The procedure in the high court provides as follows: "42 Variation and rescission of orders

> (1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
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> *(a)* An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
>
> *(b)* …;
>
> *(c)* ….;.
>
> (2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.
>
> (3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

having given the second respondent a platform on which to have participated as he did that the applicant's fair trial rights may have been compromised, even though I remain convinced that a procedural irregularity exists which warranted a recission of Mjali J's order.

[23] Since the costs order I granted against the applicant *vis-a-vis* the second respondent rests on the same premise that the second respondent was properly before the court, it follows that another court may also well find that it was inappropriate to mulct the applicant with a punitive costs order for opposing what it regarded as a putative and irregular application for rescission. Another court may also find that the approach I adopted had the unintended effect that the applicant was denied costs that he would otherwise have been entitled to if I had simply dismissed the first respondent's application for recission with costs to follow that result.

[24] On the issue of appealability I am satisfied on the basis of the special circumstances pertaining to this matter and the applicant's complaint that his fair trial rights have been compromised by the alleged flawed or irregular procedure adopted by this court that it is manifestly in the interests of justice to grant him leave to appeal. Further, far from being a mere interlocutory matter, the costs order I made (and did not make according to Mr Mhlana but which ought to have gone in his client's favour) are final in effect and can only remedied upon appeal.

[25] In the result I issue the following order:

1. The applicant is granted leave to the Full Bench of this Division sitting in Mthatha, or elsewhere as the Judge President may direct, to appeal against the order of this court dated 10 December 2020

rescinding the review order of Mjali J dated 4 February 2020 at the behest of the second respondent, as well as the adverse costs order(s) granted against him.

2. The costs of the application will be costs in the appeal.

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B HARTLE

JUDGE OF THE HIGH COURT

DATE OF APPLICATION: 7 April 2021

DATE OF JUDGMENT: 16 April 2021*

*Judgment delivered electronically on this date by email to the parties.

APPEARANCES:

For the applicant: Mr. Mhlana instructed by Sicwetsha Attorneys Inc., Mthatha (ref. NVM/Civil/Sicwetsha-2019).

For the first and fifth respondents: Mr. Maliwa instructed by The State Attorney, Mthatha (ref. A6N – Mr. Nqiwa).

For the second respondent: Mr. Ndamase instructed by Siyabulela Parkie Attorneys, Mthatha (ref. Mr. Parkie).