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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 41092/16

- (1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES:
YES/~~NO~~
(3) REVISED.

24/2/2020
DATE

SIGNATURE

In the matter between:-

LLENGA PAULUS MONAMA

First Applicant

(Identity Number: [...])

ANNA MAPULA MONAMA

Second Applicant

(Identity Number: [...])

And

NEDBANK LIMITED

Respondent

JUDGMENT

RANCHOD, J**Introduction**

[1] This is an opposed application for the rescission of a judgment granted on 05 December 2018 when the applicants' application for leave to appeal was dismissed with costs by Deputy Judge President Ledwaba.

[2] The application is ostensibly brought in terms of Rule 42(1)(a) of the Uniform Rules of Court on the basis that the judgment was erroneously sought and erroneously granted in the absence of the applicants.

Background facts

[3] The applicants were the defendants in an action instituted by the respondent (Nedbank) in 2016 on the basis that the applicants were in breach of a loan agreement concluded between the parties on 10 November 2003. The loan was secured by a covering mortgage bond over the applicants' immovable property which was duly registered in the office of the Registrar of Deeds at Pretoria on 19 December 2003. Nedbank claimed payment of R281 304.36 together with interest, an order that the mortgaged property be declared executable, a writ of execution be authorised and costs on the attorney and client scale.

[4] The applicants' entered appearance to defend whereafter Nedbank applied for summary judgment which was granted by Maluleke AJ on 14 October 2016. It appears to be common cause that the learned acting judge did not furnish reasons for the judgment.

[5] More than six months later an application for leave to appeal the judgment of Maluleke AJ was launched by the applicants. Answering and replying affidavits were respectively filed by June 2018 and 08 May 2017. Nedbank says as the applicants did nothing thereafter to have the application heard, its attorneys approached the Deputy Judge President (the DJP) for the application to be heard.

[6] The DJP's office informed the parties by an email dated 03 December 2018 that the application would be heard on 05 December 2018 by the DJP himself.

[7] Nedbank's attorneys served a notice of set down on the applicants' attorneys by email on 04 December 2018. On the same day its attorneys received a notice of appointment of the applicants' current attorneys of record the previous attorneys seemingly having withdrawn as such. The email dated 03 December 2018 of the DJP had been sent to the applicants' previous attorneys, being ML Kekana.

[8] A Mr David Blaauw from Nedbank's attorneys telephoned applicants' new attorneys of record to ensure that they are aware of the hearing of the application for leave to appeal and to enquire whether they are in possession of the reasons for judgment.¹ The deponent to the answering affidavit says 'BM Mudzuli confirmed that they are aware of the hearing of the application for leave to appeal.'²

[9] In the founding affidavit the first applicant says he had been telephonically informed 'on or about' 03 December 2018 by his former attorney of record, Mr L Kekana that the application for leave to appeal had been set down for hearing on 05 December 2018.

[10] The first applicant says his current attorneys of record briefed an Advocate Simon Simani to attend to the hearing of the application and has attached a confirmatory affidavit from the said advocate, being annexure "LPM3" to the founding affidavit.

¹ Answering affidavit p.70 of paginated bundle at para 20.

² Answering affidavit p.70 of paginated bundle at para 21.

[11] First applicant says advocate Simani came to this court on 05 December 2018 but did not find the matter on any roll displayed at the court for that day. After searching for about thirty minutes at various offices in the court building Mr Simani believed that the matter was not on the roll. The next day attorney Mudzuli made enquiries at the Judge President's clerk's office with one Gift who did not find the matter on the lists she had. He made further enquiries during December 2018 and January 2019 and eventually found the court file on 07 February 2019 when he discovered that the application for leave to appeal was dismissed on 05 December 2018 because there was no appearance by the applicants. Mr Mudzuli was told by the DJP's clerk that the application was heard in chambers.

[12] In the circumstances, say the applicants, their default on 05 December 2018 was due to the matter not being on any roll for that day and it was heard in chambers by the DJP.

[13] Nedbank confirms that the application for leave to appeal was not on the daily roll of the court. However, it says, there were two other applications for leave to appeal before the DJP at the allocated time for 14h00 and its counsel decided to be in court at the time in case the applicants' application was called. The application was called and dismissed with costs.

[14] The question that arises is whether the applicants, through their attorneys and counsel had made sufficient attempts on 05 December 2018 to see whether the matter was indeed going to be heard by the DJP in light of the fact their attorney had been informed of the hearing by the first applicant himself as well as Mr Blaauw of Nedbank's attorneys.

[15] The explanation about Mr Simani's attempts to find out if the matter was indeed on the roll raises several concerns. Firstly, the daily roll had on it two other applications for leave to appeal before the DJP and which were to be heard at 14h00 in Court 2C on 05 December 2018. One would imagine that it was a simple matter to present oneself in that court (as did Nedbank's counsel) at the stated time and raise the issue of the matter not being on the roll before the DJP. Mr Simani have found that the matter was indeed to be heard that afternoon. Mr Simani and applicants' attorneys could have contacted Nedbank's counsel and attorneys respectively to ascertain if they know whether and when and where it was to be heard.

[16] The applicants say their attorney was informed by the DJP's clerk that the matter would be heard in chambers. No confirmatory affidavit has been filed from the clerk that she had indeed told him so. It seems to me to be improbable that she would say it would be heard in chambers when she in all probability would have been aware of the two similar applications being heard in open court and bearing in mind the DJP's email to the parties.

[17] Rule 42(1)(a) provides:

- '(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:
 - (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.'

[18] Generally speaking a judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment.³

³ Nyingwa v Moolman NO 1993 (2) SA 508 (Tk) at 510D-G; Naidoo v Matlala NO 2012 (1) SA 143 (GNP) at 153C; Rossitter v Nedbank Ltd (unreported, SCA case no 96/2014 dated 1 December 2015) at paragraph [16]; Thomani v Seboka NO 2017 (1) SA 51 (GP) at 58C-E; Occupiers, Berea v De Wet NO 2017 (5) SA 36 (CC) at 366E-367A.

[19] An order or judgment is also erroneously granted if there was an irregularity in the proceedings,⁴ or if it was not legally competent for the court to have made such an order.⁵

[20] The applicants contend that the word 'erroneously' covers a matter such as this where, allegedly, merely for want of appearance on their behalf the application for leave to appeal was dismissed.⁶

[21] The applicants rely solely on the allegations made by Mr Simani who deposed to an affidavit in support of the applicants' case.⁷

[22] It bears mentioning that Mr Simani is no longer involved in this matter on behalf of the applicants as a different counsel Mr RN Rathidili drafted and signed the heads of arguments filed on their behalf and argued the matter before me.

[23] During arguments counsel for the applicants submitted that the DJP did not furnish reasons for dismissing the application for leave to appeal so it was erroneously sought or granted. Also, it was granted in the absence of the applicants. In any event, so it was submitted, at common law the court has unlimited powers to rescind a judgment if it finds that the merits were not adjudicated upon.

[24] Summary judgment in this matter was granted on 14 October 2016 by Maluleke AJ without having furnished reasons for the judgment. The order was for payment of a monetary amount, interest and costs. A prayer for the immovable property to be declared specially executable and a writ of execution be issued was postponed *sine die*.

[25] At a later stage the postponed prayer was granted. The applicants applied for leave to appeal but it was dismissed.

⁴ De Wet v Western Bank Ltd 1979 (2) SA 1031 (A) at 1038D; Tshabalala v Peer 1979 () SA 27 (T) at 30H-31A. See also Wahl v Prinswil Beleggings (Edms) Bpk 1984 (1) SA 457 (T) at 461D; Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz 1996 (4) SA 411 (C) at 417H-I; National Pride Trading 452 (Pty) Ltd v Media 24 Ltd 2010 (6) SA 587 (ECP) at 593F-594I.

⁵ Athmaram v Singh 1989 (3) SA 953 (D) at 956D and 956I; Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz 1996 (4) SA 411 (C) at 417G-H. In First National Bank of South Africa Ltd v Jurgens 1993 (1) SA 245 (W) it is stated (at 247D), without reference to any authority, that she subrule only has operation where the applicant has sought an order different from that to which it was entitled under its cause of action as pleaded.

⁶ Para 18 of the founding affidavit at paginated p14.

[26] The applicants applied for leave to appeal against the summary judgment only about 8 months later on 11 May 2017 but without attaching the reasons for judgment. The reasons for judgment were also not filed before the matter was heard by the DJP on 5 December 2018. They also failed to attach it to their founding affidavit or to the replying affidavit in this application for rescission before me although they make specific reference to paragraph 2.10.3 of the written reasons (dated 30 March 2017) in the latter affidavit. When preparing to write this judgment I deemed it necessary to have sight of the reasons for judgment of Maluleke AJ. The applicants' attorney was approached by my registrar and he immediately provided a copy. Attached to the written reasons was a copy of the first page of trailing emails exchanged between the first applicant and a member of the staff of this court. The first applicant was notified on 4 April 2017 that the reasons for judgment were ready to be uplifted from the court. It is safe to assume that the first applicant uplifted them shortly after 4 April 2017. Why they were not provided to the court by the applicants remains a mystery as no explanation was provided for this failure to do so. It should be noted that the first applicant stated he was an attorney and it was also so noted by Maluleke AJ. He should be aware of the consequences of what appears to be a deliberate decision not to file the written reasons from the time the application for leave to appeal against the summary judgment was filed to the time when the matter was heard by the DJP and he persisted in this course even up to this application for rescission was heard.

[27] The applicants have also persistently not complied with the time frames set out in the Uniform Rules and have thereafter filed applications for condonation. The application for reasons for judgment was also filed outside of the time limit of ten days prescribed in Rule 49(1)(c) and an application for condonation was filed. Maluleke AJ stated in paragraph 5.4 of the reasons:

'Consequently, I am not inclined to condone the Respondents' [here the applicants] non-compliance with the Rules. The request for reasons is out of time.'

⁷ Affidavit at paginated pages 26-27.

[28] However, the learned judge then went ahead and provided the reasons anyway.

[29] On each occasion after launching their several applications the applicants failed to take further steps to bring them to finality and it was the bank that then took steps to do so. The bank's counsel submitted that this can be gleaned from the number of times the applicants take a legal step but then do not pursue it to conclusion. It was the bank that set down the applicants' application for leave to appeal the summary judgment to be heard. It was the bank's attorneys who addressed a letter to the DJP on 08 November 2018 for the application for leave to appeal to be allocated a date on which it should be heard. As I said, the DJP informed the parties that he will himself hear the matter on 05 December 2018 and in fact did so. A transcript of the proceedings of that afternoon was obtained by the bank's attorneys and handed in to the court. It was again the bank that set down the application by the applicants for rescission of the order of the DJP when the applicants failed to do so.

[30] In view of the applicants' submissions that the DJP did not furnish reasons for his dismissal of the application for leave to appeal it is necessary to quote the transcript of the proceedings in full:

‘ PROCEEDINGS HELD ON 05 DECEMBER 2018 [14:23]

COURT: ...file an application for leave to appeal. There is no appearance on behalf of the applicants today, they did not pursue the said application for leave to appeal. And it is clear from the record and from the submissions made by the counsel representing Nedbank that there are no reasons for judgment, so in my view this application before me it is irregular and it is an abuse of the process, so that the respondent should not proceed with their judgment that had been granted in his favour. There is also confirmation from Digital Audio Recording Transcription that there was no judgment it is only a order I fail to understand as to how could the applications

proceed to file an application for leave to appeal without first obtaining reasons from the acting judge who made an order on this matter. In my view this application before me it is irregular and it is an abuse of court process, it is just made with the aim to frustrate. The respondent Nedbank Limited to proceed with the judgment that was granted in his favour. I therefor make the following order – the application for leave to appeal is dismissed with costs.'

[31] It is immediately apparent that the DJP considered the record before him and made several findings. It was found, *inter alia*, that the applicants had failed to obtain and file Maluleke AJ's reasons for granting summary judgment, hence the application was irregular. The learned DJP also stated that the applicants were abusing the process of court and frustrating or delaying the bank from pursuing the judgment obtained in its favour.

[32] It is important to note that the applicants and their erstwhile and current attorneys were aware of the application before the DJP. Mr Simani's explanation – which I deal with below – about why he was not present when the matter was heard are not convincing at all.

[33] It is also important to note that the immovable property was sold in execution on 17 May 2019. An order rescinding the summary judgment would ordinarily and in all probability be academic and of no avail to the applicants. However, the crux of their defence is that the bank unlawfully or irregularly debited legal costs to their mortgage bond account even before summons was issued without having them taxed. This was first brought to the bank's attention by the first applicant in response to the letter it sent to the applicants in terms of section 129 of the National Credit Act 34 of 2005. A further issue raised by the applicants (albeit in the rescission application) is that whereas the bank obtained summary judgment for R281 304.36 together with interest at the rate of 9.75% per annum from 1 April 2016, in its answering affidavit in this rescission application the deponent states:

'31. The current outstanding balance due to the Respondent has increased to R616 321.47 . . . (almost three times more than the judgment amount), and the amount in arrears currently stands at R427 409.87 . . .'

There is no explanation as to how the amount increased almost threefold. The bank itself purchased the attached immovable property at the sale-in-execution and it is not apparent from the papers before me whether that has been accounted for.

[34] A strict technical approach about the application of the Rules of court in this instance would to my mind, go contrary to the provisions of section 173 of the Constitution of the Republic of South Africa, 1996 which provides:

‘Inherent power

173. The Constitutional Court the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.’

[35] In *Eke v Parsons*⁸ the Constitutional Court (per Madlanga J) held:

‘39. . . . Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. (Footnote omitted) Not surprisingly, courts have often said “[i]t is trite that the rules exist for the courts, and not the courts for the rules”. (Footnote omitted)

⁸ [2015] ZACC 30.

40. Under our constitutional dispensation, the object of court rules is twofold. The first is to ensure a fair trial or hearing. (Footnote omitted) The second is to “secure the inexpensive and expeditious completion of litigation and... to further the administration of justice”. (Footnote omitted) I have already touched on the inherent jurisdiction vested in the superior courts in South Africa. (Footnote omitted) In terms of this power, the High Court has always been able to regulate its own proceedings for a number of reasons, (Footnote omitted) including catering for circumstances not adequately covered by the Uniform Rules, (footnote omitted) and generally ensuring the efficient administration of the courts’ judicial functions. (Footnote omitted)

[36] I am of the view that despite the shortcomings and failures of the applicants it would be in the interest of justice that they be provided an opportunity to present their case in the application for leave to appeal the judgment and order granted by Maluleke AJ. Without deciding the issue I will only go so far as to say that the applicants may well have prospects of success.

[37] An issue that deserves comment relates to Advocate Simon Simani himself. He provided a confirmatory affidavit to the applicants verifying his attempts to determine where the application was going to be heard. In the affidavit he gives his full name as well as his identity number and states that he is an ‘Advocate of the High Court presently carrying on business at Number 4, 2nd Street, Protea Glen Building, Orange Grove.’

[38] Mr David Blaauw of Nedbank’s attorneys says he could not find Mr Simani’s name on the roll of advocates so he contacted the Legal Practice Council (LPC) on 16 May 2019 and spoke to a lady called ‘Akhone’. He says the LPC also searched their records both with reference to Mr Simani’s name and his identity number and could find no record indicating that Mr Simani is an admitted advocate.

[39] In the answering affidavit Mr Simani was challenged to produce the Court Order showing his admission as an advocate. None was forthcoming in the replying affidavit nor in any other manner. The deponent to the answering affidavit requests that this court instruct the LPC as well as the National Prosecuting Authority to 'investigate and prosecute Simani since he is clearly conducting a fraud on this Honourable Court.' A serious allegation indeed.

[40] In the replying affidavit the applicants' response to the allegations by Nedbank about Mr Simani is set out in paragraph 68 – 73.

[41] The applicants say the allegations made against Mr Simani are 'immaterial' to their application. That in my view cannot be. If it is indeed so that Mr Simani is not a qualified legal practitioner then it is a material issue which inevitably must be investigated. The applicants say they deny the allegations in total. The applicants' further state:

'69. The allegations that Advocate Simani's name could not be found on the advocate's roll do not dispute our allegations are that a Counsel was briefed to attend to our matter on 05 December 2018. These allegations only relate to his registration compliance with the professional body.'

[42] The applicants seem to miss the point. The issue is not whether Mr Simani has complied with registration with a professional body but whether he is admitted as an advocate by the High Court or not.

RANCHOD, J
JUDGE OF THE HIGH COURT

Appearances:

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Instructed by BM Mudzuli Attorneys

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Appearance for respondent:

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