

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION: MTHATHA**

Case No. 815/08

In the matter between

**THE MEMBER OF THE EXECUTIVE COUNCIL  
(MEC) FOR THE DEPARTMENT OF ROADS AND  
TRANSPORT, EASTERN CAPE:**

Applicant

and

**MPENDULO THEMBELANI NDLAZI:**

Respondent

*In re*

**MPENDULO THEMBELANI NDLAZI:**

Plaintiff

And

**THE MEMBER OF THE EXECUTIVE COUNCIL  
(MEC) FOR THE DEPARTMENT OF ROADS AND  
TRANSPORT, EASTERN CAPE:**

Defendant

**JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL**

**MNYATHELI AJ**

[1] This is an application for leave to appeal a judgment and order of this court whereby Applicant's application for the rescission of a judgment granted by consent between the parties was dismissed.

[2] The rescission application had been brought on the ground that Applicant had committed an error in consenting to the judgment and order in issue.

[3] Applicant now applies for leave to appeal against the dismissal of its rescission application.

[4] The facts of this matter are common cause and I need not repeat them here save as a matter of clarification and application of the law on those pertinent facts. The pertinent and salient aspects thereof are, however, the following:

- 4.1 Applicant alleged that it committed a just error in consenting to a judgment in respect of the instant case when in fact it was referring to facts of a different case;
- 4.2 The advice to the deponent to the rescission application to settle or consent was conveyed by another colleague who was at that same time dealing with another matter and he (the colleague) confused the two and gave incorrect Information to settle to the deponent in mistake;
- 4.3 The purveyor of the advice to settle himself did not testify;
- 4.4 Other colleagues of the deponent who were directly or indirectly involved in the trajectory also did not testify though they were mentioned by the deponent;
- 4.5 Respondent submitted that the evidence of the deponent was hearsay and inadmissible, and 'elected to oppose the application for rescission on the basis, *inter alia*, that the papers in the application do not contain allegations sufficient to sustain a cause of action';
- 4.6 The court found that as it is required that the application for condonation must be on notice and that an affidavit supporting the notice ought to be deposed to, the affidavit must comply with all the requirements of an affidavit and succeed to persuade the court that the error occurred;
- 4.7 The court further found that the deponent, not being the person who actually committed the error, that is at the centre of the application, was not the ultimate person to testify and that in the absence of a confirmatory affidavit from the primary source of the evidence, in the minimum, the evidence was insufficient and the affidavit underwhelming.

4.8 The court also reasoned that for an application for rescission based on an error, an onerous responsibility rests on the applicant to persuade the court that it is entitled to the relief that it seeks. It found itself unpersuaded and dismissed the application with costs, in light of absence of primary deposition to the error.

[5] The Applicant seeks leave to appeal on the above factual matrix; the issue being whether Applicant's explanation of the alleged mistake had merit, and whether I was correct in dismissing the application for the rescission of the judgment and order given by agreement between the parties in the above circumstances. Ultimately, whether leave to appeal should then be granted.

[6] The test for these kinds of applications, it is trite; is whether there are reasonable prospects of success on appeal justifying the grant of leave. This does not refer to a mere possibility of success. **See Masinga v S<sup>1</sup>**. Previously the test was merely put as; whether or not there are reasonable prospects that another court could come to a different conclusion to that arrived at by the trial court. **See New Clicks SA (Pty) Ltd v Tshabalala-Msimang NNO; Pharmaceutical Society of SA v Minister of Health<sup>2</sup>**.

[7] Section 17 (1) of the Superior Courts Act 10 of 2013 (the Superior Courts Act) deals with circumstances in which leave to appeal may be granted. What is specifically relevant is section 17 (1) (a). It is convenient to set out section 17 (1) in its entirety below:

*"(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*

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<sup>1</sup> [2016] 4 All SA 564 (KZP)

<sup>2</sup> [2005] 4 All SA 80; also in 2005 (3) SA 231 (C)

*(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.”*

[8] The trial court, however still enjoys discretion on whether to grant the leave or not. This is a judicial discretion exercised by, *inter alia*, taking into account all the facts of each particular case, and is not to be exercised arbitrarily. **See Melani v Santam Insurance**<sup>3</sup>

[9] What emerges from section 17 (1) is that the threshold to grant a party leave to appeal has been raised. It is now only granted in the circumstances set out and is deduced from the words 'only' used in the said section. **See The Mont Chevaux Trust v Tina Goosen & 18 Others**<sup>4</sup> , Bertelsmann J held as follow:

*"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.”*<sup>5</sup>

[10] The thrust of the dispute at the hearing of the application for rescission was whether Applicant had placed before court sufficient and persuasive evidence to show that the mistake that was at the centre of the application had occurred. According to the Applicant the single deponent who made averments on behalf of his colleagues and statements to the effect that such colleagues had made a mistake were sufficient. In addition Mr Notshe argues that it is clear from the issues that the fact that the concession did not include a counterclaim, which was all along part of the Applicant's case demonstrates that Applicant was labouring under a mistake.

[11] Mr Hobbs on behalf of the Respondent has argued that the evidence is of the nature of inadmissible hearsay and thereupon, Applicant fails to place before court

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<sup>3</sup> 1962 (4) 531 (SCA)

<sup>4</sup> 2014 JDR 2325 (LCC)

<sup>5</sup> at para [6]

sufficient averments necessary to sustain its case. This sounds more like arguments or language usually employed in cases of exceptions to particulars of claim in an action in terms of Rule 23 of the Uniform Rules of this court. It is, however, clear that it is intended to connote that the averments contained in the applicant's affidavit are either not clear or inadequate to make a case for the Applicant for purposes of the application for rescission.

[12] It is trite law and practice that an applicant makes its case in its founding affidavit and stands and falls thereby, and may not endeavour to bolster it in a replying affidavit. **See Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others<sup>6</sup>; Director of Hospital Services v Mistry<sup>7</sup>; Port Nolloth Municipality v Xhalisa and Others<sup>8</sup>** This should apply perforce in so far as heads of arguments are concerned. Whilst counsel may creatively argue its case and strenuously put flesh and meaning to pleadings, it cannot conceivably make any additions of fact thereto. Facts are facts and they mean what they say, nothing less nothing more. They may not be added to in argument.

[13] The evidence of the deponent to the application for rescission is in summary that he gave instructions to one Mr Nqiwa to agree that 'the order should be taken between the parties. The instruction was made in error'. In discussions with Mr Zani he got instructions 'that we should concede the merits of this matter. He duly gave such instructions to Mr Nqiwa. Mr Hanise, the deponent then goes on to say, 'It has now transpired that Mr Zani made a mistake in issuing such an instruction to me as he was referring to the other matter, to wit, Diko and 40 others. He finally says that 'This error is supported by the fact that I only gave instructions for the cession of the merits in so far as the main claim is concerned'.

[14] That was essentially the length and breadth of the deposition of the Applicant for rescission. It is common cause that Mr Zani has himself not offered an affidavit relating to the ramifications of this mistake, neither has a confirmatory affidavit been given at the very least, confirming the averments made by Mr Hanise in so far as the material facts of the mistake are concerned. No explanation has been given for this omission. There is also no supporting affidavit from Mr Nqiwa who was also involved in the relay of information on this matter. There was also mention of a Mr Mlola from whom Mr Hanise took the matter over.

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<sup>6</sup> 1974 (4) SA 362 (T) at 368B-369A

<sup>7</sup> 1979 (1) SA 626 (A) at 636A-F

<sup>8</sup> 1991 (3) SA 98 (C) at 111E

[15] Mr Hanise seems strangely prepared to testify for everybody and in the process deposes to matters that are not within his own senses, thereby giving evidence of a hearsay nature. One wonders why he took responsibility all the responsibility. He was merely expected to say his part and leave those parts in which he was not personally involved to those who were. It does not buttress the probative value of his evidence if he assumes the responsibility to unlawfully testify for other people. If anything it raises a question as to why are these 'colleagues' not testifying on their own. Does our law of evidence allow this?

[16] I decry a situation where a court is expected to assume, conjecture or speculate, as to fill in gaps of factual issues left open by a deponent or litigant in its case. It is grossly unfair to the court, to put it mildly. Courts do not litigate but adjudicate. They do so on the basis of material presented to them by the litigants. If these facts or material do not exist in a litigant's case, the litigant should be allowed to count its losses. **See Herbstein & Van Winsen: *The Civil Practice of the High Courts of South Africa***<sup>9</sup>

[17] On behalf of the Applicant Mr Notshe contended that the evidence that was adduced by the deponent in the affidavit in support of the application for rescission was not of a hearsay nature in so far as it related to the fact that a mistake was made in conceding to the order sought to be rescinded. Fair enough, but the mistake must be explained by the person who committed it. There can be no vicarious responsibility on Hanise to say things that he cannot legally say, evidentially speaking.

[18] Even in terms of the **Law of Evidence Amendment Act**<sup>10</sup> there are limits to the admission of hearsay evidence. That Act provides:

*3. Hearsay evidence*

- (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-*
- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*
  - (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*

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<sup>9</sup> 5th Ed (Vol 1) pp440-441

<sup>10</sup> No. 45 of 1998

*(c) the court, having regard to-*

*(i) the nature of the proceedings;*

*(ii) the nature of the evidence;*

*(iii) the purpose for which the evidence is tendered;*

*(iv) the probative value of the evidence;*

*(v) the reason why the evidence is not given by the person upon whose  
credibility the probative value of such evidence depends;*

*(vi) any prejudice to a party which the admission of such evidence might entail;*

*and*

*(vii) any other factor which should in the opinion of the court be taken into*

*account, is of the opinion that such evidence should be  
admitted in the interests of justice.*

*(2) The provisions of subsection (1) shall not render admissible any  
evidence which is inadmissible on any ground other than that such  
evidence is hearsay evidence.*

*(3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the  
court is informed that the person upon whose credibility the probative value of such  
evidence depends, will himself testify in such proceedings: Provided that if such  
person does not later testify in such proceedings, the hearsay evidence shall be left  
out of account unless the hearsay evidence is admitted in terms of paragraph (a) of  
subsection (1) or is admitted by the court in terms of paragraph (c) of that  
subsection.*

[19] Now in this case the court is enjoined to evaluate the admissibility and the probative value of the evidence of the deponent against the principles enunciated in the above provision. I bear in mind that a decision has already been made that there was not enough material or evidence placed before court to entitle the Applicant to the rescission. The provisions of the Law of Evidence Amendment Act are resorted to since the question ultimately is whether another court could have had regard to the possibility of admission of the evidence of the deponent and therefore grant the rescission application.

[20] Applying the provisions as conveyed by the measure, it is firstly clear that the evidence of the deponent is of a hearsay nature. It is also apparent in light of the provisions of subsection (3) above, that the probative value of the deponent's evidence

deopended on the credibility of Mr Zani who has not testified. No confirmatory affidavit has been procured from him either. The evidence can, therefore, as a whole, not be legally admitted. It will be found that it is inadmissible hearsay. Having found that the evidence is not admissible, then the Applicant's application becomes sterile, unaccompanied as it is, by evidence that would have been gleaned from an acceptable affidavit or evidential source.

[21] Mr Notshe further drew attention to the issue of the counterclaim. The argument in this regard is that in the original plea, Applicant had included a counterclaim. This demonstrates, he argues, that Applicant had a good case and was intent on defending the claim of the Respondent. He submits that in the erroneous instruction conveyed to the deponent by Mr Zani no mention was made of the counterclaim, meaning that the mistake is *bona fide*. That in my view may well be so, but it is still incumbent upon the applicant for rescission to make its case and make it the legally and procedurally correct way.

[22] It did not.

[23] The test for leave to appeal is whether there are reasonable prospects of success or that there is some or other reason for the matter to be heard. It is hard to find such reason in this case nor do I think that there are reasonable prospects of success on appeal.

[24] In argument before me Mr Notshe vehemently submitted that the court should not ignore the fact that by the inclusion of a counterclaim Applicant may well have a triable and strong case, that Applicant's error is *justus*. He further submits that this is a factor to be taken into account as justifying reason to grant leave to appeal. Again this raises no more than a 'possibility', short of conviction.<sup>11</sup>

[25] Although I find the issue of a counter-claim not directly apposite to the question whether a proper case has been made in the application for leave to appeal, it is quite possible that another court might find the argument attractive as to be worth ignoring the deficiencies in the application as a whole. I am reluctantly relenting to the possibility even at the risk of not conforming to the test if the Superior Courts Act.

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<sup>11</sup> See Section 17 (1) of the Superior Courts Act (supra)

[26] I bring this forward because of the provision in the Law of Evidence Amendment Act that hearsay evidence may not be admitted unless:

(a)....

(b)....

(c) *the court having regard to*

(i) *the nature of the proceedings;*

(ii) *the nature of the evidence;*

(iii) *the purpose for which it is tendered* <sup>12</sup>

(iv)... to (vii)

[27] These are, otherwise interlocutory proceedings and the application is one based on an alleged mistake, the evidence that is 'missing' is perhaps connectible with the story of the deponent and has not been gainsaid. The original claim against an organ of state may have far reaching consequences, though I lamented even in the main findings, that the matter had seen many postponements mostly at the behest of the Applicant.

[28] I have also taken into account the provisions of Subsection 3 of the Law of Evidence Amendment Act read as it must be with the provisions of paragraph (1) (c) possibly (vii)- (the interests of justice consideration) to afford the Applicant a proverbial fighting chance at appeal.

[29] In other words it may well be that the story of the presence of the counter-claim is plausible and that therefore it is reasonable to afford the Applicants such an opportunity

[30] In the final analysis, leave to appeal will be granted and costs shall be costs in the appeal.

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**M MNYATHELI**

**ACTING JUDGE OF THE HIGH COURT**

*Appearances*

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<sup>12</sup> Subsection (1) (c) of the Act

*On behalf of the Applicant:*      *Adv V Notshe SC with Adv V Msiwa*

*Instructed by:*                      *The State Attorney*  
                                                 *MTHATHA*

*On behalf of the Respondent:*      *Adv Hobbs*

*Instructed by:*                      *TL Luzipho Attorneys*  
                                                 *MTHATHA*

*Date Heard:*

*Date Delivered:*                      *21 May 2019*