

IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION: MTHATHA]

CASE NO. 96/2017

In the matter between:

MINISTER OF POLICE

1st Applicant

STATION COMMISSIONER, MADEIRA

POLICE STATION, MTHATHA

2nd Applicant

WARRANT OFFICER MBARANE

3rd Applicant

And

SINIKO NSELEMANE

Respondent

JUDGMENT

JOLWANA J

[1] The applicants seek an order for the rescission of a court order granted by this court in unopposed motion court proceedings as well as leave to defend the main application.

[2] Without delving deeply into the full factual background of the matter a brief history of the proceedings which resulted in the granting of the order sought to be rescinded is necessary. Some of the respondent's factual averments, even though not necessarily common cause, do give a glimpse into the events of what lead to the respondent approaching this court for its assistance.

[3] The respondent is an employee of Kentucky Fried Chicken (KFC), Elloit Street, Mthatha. On 27 January 2015 he was at work when KFC was robbed of a trolley full of meat. With the assistance of police he went to one of the taxi ranks being Northcrest Taxi Rank in apparent pursuit of the robbers. He, together with the police saw a young man pushing a trolley with meat in it. They gave chase after the young man ran away. Apparently the suspect was a taxi conductor in the taxi rank.

[4] Unhappy about the fact that the young man was apprehended some of the taxi drivers assaulted the respondent in defense of the taxi conductor in front of the police who did not intervene. He went to Madeira Police Station where he laid charges against the assailants and a case docket was opened being CAS265/01/2015. On 28 November 2016 he received this docket and it appeared to him that the investigation had not progressed much and in fact the docket had been disposed of as undetected in circumstances in which he had not been advised about the difficulties in investigating the charges he had laid against his attackers.

[5] On the basis of these facts as summarized above the respondent approached this court in which the following court order dated 14 February 2017 was granted:

"It is ordered that:

1. That the second respondent's disposal of docket under Madeira CAS No. 265/01/2015 as undetected be and is hereby declared unlawful, invalid and accordingly set aside.
2. That the second and third respondents' actions of discontinuing the investigations on the criminal charges laid under Madeira CAS No. 265/01/2015 be and are hereby declared unlawful, invalid and accordingly set aside.

Alternative to paragraph 2 above:

- 2.1 Third respondent's delay in investigating the criminal charges laid under Madeira Cas No. 265/01/2015 be declared unlawful, invalid, unreasonable and accordingly set aside;
3. That the third respondent be and is hereby directed to forthwith re-instate the docket under Madeira Cas No. 265/01/2015.
4. That the third respondent be and is hereby directed to forth with conduct thorough investigations on the criminal charges laid under Madeira Cas No. 265/01/2015.
5. That the second and third respondents be and are hereby directed to advise applicant of the progress of the investigations on a regular basis and of the outcome of their investigations on or before the expiry of thirty (30) days of this order.
6. That the respondents be and are hereby ordered to pay costs of this application on Party and Party scale."

[6] A number of observations about this order are apposite to the extent that they are relevant for the determination of the rescission application. On the face of the order it appears that the respondents were represented by Mrs Shumane. The court order itself does not indicate that it was obtained by consent even though Mrs Shumane is reflected on the court order itself as having represented the respondents.

[7] The explanation of who Mrs Shumane is and how the order was obtained is given by the applicants in their founding affidavit in the rescission application as follows:

“17. On the 16th and 17th January 2017 respectively the Sheriff of the Court caused the application to be served upon the applicants (respondents in that application). The returns of service in respect thereof are marked annexure “D” “E” and “F” respectively glaring enough, as clear from annexure “E” the third applicant was served upon the 2nd applicant. I submit that the 3rd applicant was wrongly served because he is stationed at Old Savoy Park, Office No.9, Sutherland Street, Mthatha. Therefore he was never based within the 2nd applicants’ establishment.

18. The application attracted no notice to oppose from the office of the state attorney and as a result it was set down for hearing for the 14th day of February 2017. Apparently on the date of the hearing one Mrs Shumane from the offices of the State Attorney took an order by consent with the respondent’s attorneys which granted the respondent all orders which he was seeking. The order is attached hereto marked annexed “A”. This order is the one which is sought to be rescinded in these proceeding.”

[8] On the applicants’ own showing the applicants were served even though an attempt is made to raise an issue about the service on the 3rd applicant. I find it difficult to understand the dissatisfaction about the service of the papers on the 3rd applicant. It appears from the papers that the 3rd applicant works under and reports to 2nd applicant in terms of their line of command even though they are not based on the same premises. Secondly the 2nd applicant accepted service on behalf of the 3rd applicant. Thirdly even though the service of the papers on the 3rd applicant is said to have been incorrect it is not the applicants’ case that the 3rd applicant did not receive the papers. In any event Mrs Shumane, an attorney of this court, did appear on behalf of all the respondents in that application and the order appears to have been granted in her presence and with her consent.

[9] An attempt is made by the applicants to distance themselves from Mrs Shumane in the following terms:

“35. Notwithstanding the fact that the impugned court order reflects, that Mrs Shumane appeared for the applicants, clearly the applicants were never represented in those

proceedings. I say so because in motion proceedings a party places, himself on record through a notice to oppose. In this matter there was no notice to oppose filed in respect of the applicants. The court should have simply not allowed her to appear for the applicants because she never placed herself properly on record. The said Mrs Shumane never consulted with the applicants hence their version was never placed on record through an answering affidavit. In any event she had no instructions from the respondents/applicants in this application."

[10] I do not understand the essence of the applicants' submission when they say that Mrs Shumane never consulted with them and an answering affidavit was never filed. The applicants having been served with the papers it was up to them to file an answering affidavit if they so wished and they did not. How their failure to do so makes an order taken by consent by their own legal representative an order granted in the absence of the applicants is difficult to discern. During the hearing of this matter Mr Notyesi who appeared for the applicants did concede that a court cannot ignore a legal representative who appears in court on behalf of his or her client and makes submissions only on the basis that a notice to oppose has not been filed.

[11] The third observation is the fact that the papers in the main application were served on all the respondents in January 2017 and the court order sought to be rescinded was served in February 2017. Thereafter correspondence was exchanged between attorneys for the applicants and attorneys for the respondents as early as March 2017 in which the court order dated 14 February 2017 is acknowledged and in their letter dated 09 March 2017 among other things the following is said by the applicants attorneys:

"Our instructions are to report on progress made in the investigations of the criminal case opened under Cas No. 265/01/2015 and to ensure compliance with the court order dated 14 February 2017 issued by the Mthatha High Court."

[12] Furthermore the respondent in the rescission application makes the following point in his answering affidavit:

"3.2.1 Further *in limine*, it is contended that a delay or acquiescence in execution of the judgment would bar success on an application to rescind as it will be regarded as acquiescence in the granting of the judgment. In the current matter and in pursuit of the court order in question, a bill of costs was prepared, delivered and ultimately presented before the taxing master for taxation in terms of the provisions of Rule 70 of the uniform rules. A taxation of the bill having been duly opposed by the respondents, was duly taxed in the amount of R37 184.96 on 29 March 2017. A copy of the notice to oppose and allocatur are hereto annexed marked "A1" and "A2" respectively. On 31 May 2017 the applicants paid the taxed bill of costs. A copy of the remittance advice is hereto annexed marked "B". I emphatically place on record that applicant's participation in the proceedings and their intention to acquiesce to the judgment did not start only during the

taxation, it started even at the time when the judgment was taken. Mrs Shumane executed her instructions to the best of her ability.”

[13] The applicants, having been aware of the court order sought to be rescinded not only because they were represented when it was taken, they also became aware of it throughout and for a period of over a year since the 14 February 2017. It is also common cause that they were aware of it. At various intervals the court order was brought to the attention of the applicants who among other things paid the taxed costs which were granted to the respondent as part of that court order. No cogent explanation has been given by the applicants for their delay in making the rescission application. This is obviously an unreasonable delay that called for a proper explanation accounting for the whole period. Mr Notyesi appeared to concede that no proper explanation for the delay has been proffered by the applicants.

[14] It must now be clear that all the above facts scream very loudly for the dismissal of the rescission application with costs. However the above facts do not represent the entire picture even though considered alone they call for the dismissal of the application. This is so for two main reasons. The first one is that there is no proper explanation why the matter was not opposed. Secondly, the substantial delay in launching the rescission application has not been properly explained. The respondent or at least, those representing him are not entirely blameless as I will demonstrate below.

[15] The court order itself appears to be ambiguous. For instance it consists of paragraphs 1 and 2 after which in the middle of the court order the following words appear, “*Alternative to paragraph 2 above.*” Thereafter a paragraph 2.1 follows which is followed by paragraphs 3-6. The question is, which court order was actually granted by the court? Is it paragraphs 1 & 2 excluding 2.1? Does 2.1 stand independently from 2? What is the position regarding paragraphs 3–6? Are they also alternatives to paragraph 2?

[16] While it was open to the applicant in the main application to couch prayers in the notice of motion to have alternatives, the draft order that was handed up to the court

should not have been handed up in that form. This calls into question whether it cannot be said that there is ambiguity or patent error in the order itself.

[17] Rule 42 (1) 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:
 - (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
 - (b) An order or judgment in which there is ambiguity, or a patent error or omission, but only to the extent of such ambiguity error or omission;
 - (c) An order or judgment granted as the result of a mistake common to the parties”

[18] I do not believe that a court should grant an order in which there are alternatives to compliance. This is so because there are consequences flowing from non-compliance. Section 165 (5) of the Constitution provides that:

“An order or decision issued by a court binds all persons to whom and organs of state to which it applies.”

[19] Were it to be permissible that a court order that allows for alternatives can be issued, that would lead to an undesirable situation in which there is dissonance between what was expected of the person against whom an order has been issued and those in whose favour the order was granted. This is obviously an untenable situation as it could create problems of compliance and enforcement. In my view the manner in which the court order dated 14 February 2017 was crafted is such as to lead to an ambiguity caused by an error in how it was crafted. Even if I am wrong on the general principle of whether an order with alternatives can be issued, I find that in this case the insertion of alternatives rendered the court order ambiguous.

[20] Furthermore applicants in the rescission application contend that the court order dated 14 February 2017 offends the doctrine of separation of powers. In their founding affidavit this is how the applicants raise the issue:

“3.1 As much as the courts have an obligation to ensure that state organs fulfill their statutory obligations, they cannot decide how the state organs should execute their mandate as such conduct would be tantamount to the violation of the doctrine of separation of powers. The court order which is a subject of litigation in these proceedings is no exception. This order violates the principle of doctrine of separation of powers. The courts cannot decide how the police shall conduct investigations.”

[21] It must be pointed out that what the applicants are raising is obviously a constitutional issue. Most importantly it is an issue in which this court has expressed itself pointedly on facts which are quite similar to the facts in the main application in this matter.

[22] In *Reformed Presbyterian Church in Southern Africa v Minister of Police and Another* [2018] 2 ALL SA 260 a judgment of this court delivered on 6 February 2018 the applicant had brought an application in which the following relief was sought:

“(a) that the Respondents’ disposal of the police docket opened at the Libode Police Station under Cas No. 159/01/2015 and the subsequent filling thereof in the police archives be declared unlawful and be set aside;

(b) that the Respondents’ discontinuation of the investigation into criminal charges made under Cas No.159/01/2015 be declared unlawful and be set aside;

(c) in the alternative to (b) that the respondents’ delay in the investigation of the above charges be declared unlawful and be set aside;

(d) that the respondents be directed to conduct thorough investigations, forthwith, into the above charges; and

(e) that the respondents be directed to advise the applicant of progress in the investigations on a regular basis and of the outcome of such investigations within 30 days.”

[23] The above prayers which were sought by the applicants in the *Reformed Presbyterian Church* matter are exactly the same prayers that were sought and granted as the order now sought to be rescinded. Laing AJ had this to say in that matter:

“50. The Constitutional Court has preferred to refer to this as the notion of respect, where it remarked in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), at para 48, that:

[a] Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field...A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker.

51. In other words, a court must be slow to intervene in the exercise and performance of powers and functions by the police in relation to the investigation of crime, especially where the officials involved possess the experience and expertise to make a better decision than a court on how to conduct such an investigation.

52. To the extent that the Applicant is not satisfied that the First and Second Respondents and their officials have carried out a sufficiently thorough investigation, the remedies under sub-section 206(5) and (6) of the Constitution, read with the Independent Police Investigative Directorate Act 1 of 2011, must first be exhausted. Moreover, given the particular facts of this matter, it is not for the court to impose a deadline by which the investigation is to be completed. The court is required to respect the approach adopted by the Second Respondent and its officials to await the finalization of the civil proceedings before taking any further steps with regard to criminal investigations.

53. Nevertheless, the Applicant remains entitled to communication about progress made in the investigation of the alleged crime to which the charges pertain. The police cannot simply ignore the Applicant and refuse to deal with any reasonable queries made. To that effect, the Applicant may insist on the provision of proper information and insofar as this is not forthcoming the Applicant may utilize the remedies already discussed. It is incumbent not forthcoming the Applicant may utilize the remedies already discussed. It is incumbent upon the Applicant to demonstrate that it has pursued such remedies before seeking relief of the nature that informs the issue listed as (e), above.”

[24] The court went on to dismiss the application. In so doing the court relied both on the relevant sections of the Constitution as well as the Independent Police Investigative Directorate Act 1 of 2011. The nature of the unopposed motion court proceedings may have resulted in the court not properly considering the intricate constitutional issues involved in circumstances in which the order was taken by consent in this matter. The impugned court order of the 14 February 2017 cannot, in my view, co-exist with the decision of this court in the *Reformed Presbyterian Church* matter as they point to different directions on exactly the same issues.

[25] There is something else that at the very least, calls for comment by this court. Mrs Shumane is an attorney of this court. So much is said about her by the applicants. Very conspicuously, no affidavit even of a confirmatory nature has been obtained from her. In the circumstances it is not known whether she had in fact consulted with applicants before consenting to the impugned court order.

[26] Despite protestations to the contrary by the applicants, I will assume that as an officer of this court she could not and would not have taken an order by consent without having taken instructions from those she represented. If applicants wanted court to believe that Mrs Shumane had not consulted with them before taking the order by consent, they could have obtained an affidavit from her or explained it if, for whatever reason, it was impossible to obtain an affidavit from her.

[27] In any event, even if it was not disputed by applicants that she had taken instructions from them before she consented to the order, that would not, in my view, necessarily be a bar to the court granting a rescission application, if the interest of justice so required. In this regard courts have very wide powers. For instance the provisions of Section 173 of the Constitution do come to mind. This section provides thus:

“The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

[28] Therefore, nothing stands in the way of a litigant in making a case that a court order, even one obtained by consent should not stand. Courts are entitled to look into and decide whether the consent itself was valid and the circumstances in which the consent to the order was made. I am fortified in this view by the sentiments expressed by Mojaelo AJ, writing a unanimous decision of the Constitutional Court in *Occupiers of erven 87 & 88 Berea v Christiaan Frederick De Wet N.O.* 2017 (5) SA 346 (CC) at para 74 where he expressed himself as follows:

“Once *justus error* is established a judgment by consent may be set aside. It will be established where there is “good and sufficient cause,” which entails the consideration of (a) the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent was entered, (b) the bona fides of the application; and (c) the *bona fides* of the defense on the merits of the case which *prima facie* carries some prospects of success.”

[29] In my view the prospects of success for the applicants to convince the court in the main application that the approach adopted by the court in *Reformed Presbyterian Church* is correct and therefore dismiss the application are good. Even if the court were to come to the conclusion that the order of the 14 February 2017 is not incompetent in relation to the constitutional issue of the separation of powers, the court should decide the matter and settle the law by explaining why Laing AJ’s decision is clearly wrong.

[30] For all these reasons, I have come to the conclusion that applicants must succeed in their application for the rescission of the court order dated 14 February 2017.

[31] The only issue left to deal with now is the costs of this application. As indicated above for reasons that have not been adequately explained the matter was not

defended. Even when the order was granted, the applicants delayed in launching this application for more than a year. Such delay has not been explained, something that could easily have been ordinarily a bar to the applicants succeeding in this application. I am of the view that even though the applicants have succeeded in their application, the costs should not follow the result. Furthermore I do not think that costs as should be costs in the main application as that would, in my view, be tantamount to possibly rewarding the applicants for the cavalier manner in which they have dealt with this matter.

[32] In the result the following order will issue:

1. The order granted by this court dated 14 February 2017 be and is hereby rescinded.
2. The applicants are hereby granted leave to oppose the main application.
3. That applicants are ordered to pay costs of this application.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Attorney for the Applicants: M. NOTYESI

Instructed by: MVUZO NOTYESI INC.

MTHATHA

Attorney for the Respondents: A.S. ZONO

Instructed by: A.S. ZONO & ASSOCIATES

MTHATHA

Heard on: 22 September 2018

Delivered on: 16 October 2018