

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE: 17/2/2017
CASE NO: 12231/2014

In the matter between:

RAMMUTLANA BOELIE SEKGALA

APPLICANT

And

NEDBANK LIMITED

RESPONDENT

JUDGMENT

MAKHOBHA, AJ

1. This matter came before me as an application for rescission of an order granted by Judge MAKUME whereby the applicant was seeking leave to appeal which

application was dismissed in the absence of the applicant. From the beginning of this matter up to date applicant has been representing himself. The respondent is opposing this application.

2. The history of the matter is as follows:

The matter came before Judge MAKUME as an opposed application, judgment was reserved and delivered on 15 September 2015 in the absence of the applicant. The said judgment was in favour of the respondent.

3. On 23 September 2015 the applicant lodged an application for leave to appeal which was duly opposed by the respondent. Judge MAKUME's register Ms Gail Constance sent an e-mail to both the applicant and the respondent's attorney, the e-mail indicated to both parties that the application for leave to appeal would be heard on 10 November 2015 at the South Gauteng High Court in Johannesburg. The reason furnished for the application to be placed in Johannesburg is that Judge MAKUME was sitting in Johannesburg during that period. Both parties confirmed to the judge's registrar the receipt of the e-mail.

4. On 10 November 2015 applicant failed to appear in court. The judge gave the applicant an indulgence and postponed the application back to the North Gauteng High Court Pretoria to the date 14 December 2015. Once again the judge's registrar informed both parties by e-mail.

5. On 14 December 2015 in North Gauteng High Court the applicant failed to appear and the court proceeded to hear the application in the applicant's absence and dismissed the application for leave to appeal.

6. Thereafter the respondent proceeded with a warrant of execution and the sheriff attached the applicant's property on or about 15 February 2016.

7. On 3 March 2016 the applicant served an application for rescission of judgment on the respondent's attorneys. The applicant's grounds for rescission are in a nutshell as follows: -

1. Applicant alleges that he was never served with the notice of set down for hearing of the application.
2. Applicant argued that the respondent did not comply with rule 49(1)(d) of the Uniform Rules of Court read with Chapter 11 of the practice manual of the North Gauteng High Court. He submits that such non-compliance with the rules renders the refusal for leave to appeal erroneous within the meaning of rule 42(1)(a).
8. Applicant further submits that the hearing of the application for leave to appeal was removed from North Gauteng to South Gauteng High Court unprocedurally and unlawfully without compliance to the law.
9. In his application applicant relies on rule 42(1)(a), the common law on rescission of judgment, practice manual, Interim Rationalization of Jurisdiction of High Courts Act, 41 of 2001 and the Superior Courts Act 10 of 2013.
10. It is common cause that the applicant received all correspondence which were sent to him via the e-mail address nominated by him. The address is [...]. Furthermore in addressing the court applicant conceded that he received all correspondent regarding this matter via the e-mail address nominated by him.
11. Rule 42(1)(a) which is applicable in this matter before me, may be utilised in order to vary or rescind any order or judgment provided that such an order or judgment is an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.
12. The court is empowered in terms of the common law to rescind any order or judgment obtained on default of appearance of any party on sufficient cause shown. The court's discretion under the common law to rescind or vary any judgments, extends beyond the grounds provided for in rules 31 and 42.
13. An applicant who seeks to have a judgment or order rescinded or varied in terms of the provisions of the common law is also required to show sufficient cause thereof

and the *onus* rests upon the applicant to do so.

14. In *Tobol and Others v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (WLD) the court found on the probabilities that the applicants had at all times intended proceeding with their application for leave to appeal and that the reason why they had not been represented at the application for leave was that they had no knowledge of the set down of the application. The judge refusing leave to appeal had proceeded on the basis that notice had been given and that the applicants were in default. The court hearing the application for rescission of judgment set the order refusing leave to appeal aside because it was "erroneously" given within the meaning of rule 42(1)(a) of the Uniform Rules of Court. The court further held that as the matter fell for rescission under rule 42(1)(a) it was not necessary to consider the position under common law.

15. In my view it is not necessary for this court to deal with the legality of whether it was unlawful for Judge MAKUME to set the matter down for leave to appeal in South Gauteng High Court instead of keeping the matter at North Gauteng High Court. Of outmost importance is that the matter was finally finalised at North Gauteng High Court where it started.

16. Explaining his failure to appear in court applicant in his heads of argument, paragraph 29 he says the following:

"For the aforesaid, I was not in wilful default - I simply refused to participate in the said illegalities and irregularities - that has always been my mental attitude."

During the hearing of this matter appellant reiterated the same explanation in court.

17. It is clear to this court that the appellant was aware of the date of 14 December 2015 when the matter for leave to appeal was heard. Appellant simply stayed away from court because he believed that the court was acting unlawfully and irregularly.

18. Unlike the applicants in *Topol and Others v LS Group Management Services (Pty) Ltd supra* the applicant in this matter before me in my view wilfully and deliberately

failed to appear in court on 14 December 2015. His explanation for failing to appear in court is totally unacceptable as he had no right to stay away from court simply because he strongly believed that the matter was unlawfully and irregularly set down for hearing. He should have appeared in court and approached the Supreme Court of Appeal if he felt there was any illegality or irregularity on the part of the judge or the registrar of the judge. See *Neuman (PVT) Ltd v Marks* 1960 (2) SA 170 (SR).

19. The court finds that the application for rescission by the applicant is not made *bona fide* and applicant stayed away from court on the wrong reasons because he wrongly interpreted the law. Thus, therefore it is not necessary to consider the position under common law. See *Topal and Others v LS Group Management Services (Pty) Ltd supra*.

I make the following order:

1. The application for rescission of the order granted by MAKUME J on 14 December 2015 is dismissed.
2. Applicant to pay the costs on attorney and client scale.

D MAKHOB
ACTING JUDGE OF THE GAUTENG
DIVISION, PRETORIA

Heard on: 8/02/2017

For the Applicant: IN PERSON

Instructed by:

For the Respondent:

Instructed by: EDERSTEIN & VAN DER MERWE INC

Date of Judgment: 17/02/2017