



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 2770/2017

In the matter between:

MASILONYANA LOCAL MUNICIPALITY

1st Applicant

LEJWELEPUTSWA DISTRICT MUNICIPALITY

2nd Applicant

and

BAREND CHRISTIAAN BUURMAN BEZUIDENHOUT

1st Respondent

WILLIAM JOSEF GOODYEAR

2nd Respondent

GERRIT PRETORIUS (JNR)

3rd Respondent

GERRIT PRETORIUS (SNR)

4th Respondent

HENDRIK PETRUS OOSTHUIZEN

5th Respondent

PIETER ROSSOUW VAN STADEN

6th Respondent

JOHANNES GEORGE ROUX

7th Respondent

HENDRIK JOHANNES DE WET SMITH

8th Respondent

JOHANNES THEODORUS PIENAAR

9th Respondent

JAN CHRISTOFFEL ELS

10th Respondent

HENDRIK DANIËL FOURIE STEYN N.O.

11th Respondent

ANNA SOPHIA STEYN N.O.

12th Respondent

HEARD ON: 29 June 2017

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 21 September 2017

- [1] This is an application for rescission of judgement and the restoration of the status quo ante between the parties. The first and second applicants are local and district municipalities as contemplated in section 2 of the Municipal Structures Act 32 of 2000. The respondents are carrying-on farming operations within the area of jurisdiction of the applicants.
- [2] The respondents (plaintiffs in the main case) individually issued combined summonses against the first applicant (defendant in the main case) for damages caused by a fire that originated at a rubbish dumping site situated at Tshepong/Verkeerdevlei. The first applicant defended the matter and duly pleaded to the allegations made by the respondents.
- [3] I pause to mention that in paragraph 2 of the Summons and Particulars of Claim under case number 1721/2014 the applicant is cited as follows:-

“The Defendant is Masilonyana District Municipality, a municipality duly incorporated in terms of the Local Government Municipal

Structures Act 117 of 1996 with main place of business at corner of Theron and Le Roux street, Theunissen, Free State Province”.

The Plea to that paragraph is couched in the following manner:-

“Save to state that the Defendant has no knowledge of the averments made in paragraph 1 and puts the Plaintiff to the proof thereof, the Defendants admits paragraph 2”.

- [4] All matters were consolidated and set down for trial before Jordaan, J. On the 20th October 2015 the parties (as cited) concluded a settlement agreement which was made an Order of Court. **In terms of the agreement, the first applicant accepted liability in the sum of R5 211 000 in favour of the respondents.** Throughout the litigation (from the summonses to the settlement agreement) both parties were assisted by eminent senior counsel and attorneys.
- [5] Between the 11th February to 30th September 2016, the first respondent effected monthly payments totalling R5 400 000 to the attorneys for the respondents. Thereafter the payments stopped. The respondents issued the writ of execution to enforce the court order. The notice of sale was served on the first applicant on the 18th April 2017 with the sale in execution scheduled for the 19th May 2017. On the latter date, Daffue, J granted the first applicant an interdict suspending the sale in execution pending the finalisation of the application for rescission of judgement. The issue of costs (including costs of the auction) were ordered to stand over to be adjudicated on the conclusion of this application.
- [6] Mr Burger, counsel for the applicants, submitted that the parties made a *justus error* with reference to the law. The applicant is a

creature of statute deriving its powers and functions from the Municipal Structures Act 170 of 1998. There is no entity named Masilonyana District Municipality in existence. His oral submission centred around the relevant provisions of the aforementioned Act which provide for different categories of municipalities. Further that the powers and duties of municipalities are clearly defined according to their category. In this matter, it was not within the purview of the applicant to deal with the matter similar to the one that is the subject matter in the main action. The essence of his submission was that the respondents have relied on the common law powers of the applicant in their particulars of claim. The correct position is that it is the statutory powers that must be adhered to. He also referred to the provisions of the National Veld and Forrest Fire Act which stipulate that the landowner must maintain fire breaks and that the respondents have failed to do so.

- [7] In his response, Mr Zietsman argued that in this matter, the only defendant before the court in the main case was the first applicant. The description of the first applicant in the papers was a misnomer. He submitted that the case for the respondents was not based on the failure of the applicant to exercise statutory powers but on delict. The first applicant did not deny such allegations but admitted the responsibility and pleaded that all the necessary steps were taken as required by the common law and National Veld and Forrest Fire Act. In essence, negligence alternatively contributory negligence. He argued that the wrong impression of the applicant on the applicable powers and functions cannot be attributed to the respondents. He pointed out that this was a contested claim which was compromised. In addition, the parties were endowed with a wealth of legal expertise and experience which was instrumental in

the crafting of the settlement agreement eventually made an order of court.

- [8] The factual background to this application is for all practical purposes common cause between the parties. The application turns on whether the applicant(s) have made out a case for rescission of the judgement in terms of Rule 42 of the Uniform Rules of Court alternatively the common law. The applicants contend that the order was erroneously sought and granted on the basis of a common mistake. The pitfall is that the papers are silent as to who induced the mistake and whether the first applicant relied on it.
- [9] At this stage it is imperative to deal with the provisions of the law that Mr Burger relied on in advancing his argument. I find it necessary to quote the relevant passages. Section 84 of the Municipal Structures Act 117 of 1998 specify the division of functions and powers between district and local municipalities.

Section 84 (1)(e) and (j) provide the following:-

(1)A district municipality has the following functions and powers:

- “(e) Solid waste disposal sites, in so far as it relates to -**
 - (i) the determination of a waste disposal strategy;**
 - (ii) the regulation of waste disposal;**
 - (iii) the establishment, operation and control of waste disposal sites, bulk waste transfer facilities and waste disposal facilities for more than one local municipality in the district; and**
- (j) Fire fighting services serving the area of the district municipality as a whole, which includes —**

- (i) planning, co-ordination and regulation of fire services;
- (ii) specialised fire fighting services such as mountain, veld and chemical fire services;
- (iii) co-ordination of the standardisation of infrastructure, vehicles, equipment and procedures;
- (iv) training of fire officers.”

Rule 42 (1) of the Uniform Rules of Court read as follows:-

“(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)
- (b)
- (c) an order or judgement granted as the result of a mistake common to the parties”.

[10] The difficulty in this matter is that the facts or circumstances or basis which culminated in a settlement agreement being made an Order of court are not set out by any of the parties. It is trite that the settlement agreement creates new rights and obligations between the parties which exist independently of the original cause. Such an order brings finality to the matter and the *lis* becomes a *res judicata*. In the event of non-compliance with the order, such can be enforced *inter alia* through writ of execution see: **Eke v Parsons 2015 (1) BCLR 1319 (CC) at paragraph 3** and **Slabbert v MEC for Health and Social Development of Gauteng Provincial Government (2016) ZASCA 16 at paragraph 7.**

- [11] The applicant is seeking the setting aside of the order relying on the *justus error*. The requirement of a *justus error* were laid out as a “mistake common to the parties” and that “there must be a causal link between the mistake and the grant of the order” see **Tshivhase Royal Council v Tshivhase 1992 (4) SA 852 at 863 A-C**.
- [12] Every municipality whether a local or district entity is headed by a Municipal Manager who is the administrative head of that creature of statute. Such an official is expected to possess the necessary skills and knowledge in order to execute his responsibilities as per his powers and functions derived from the relevant legislation and policies. In situations where s/he fall short, s/he must seek advice sourced internally and externally which must be accepted after satisfying oneself that it is correct and in accordance with the law.
- [13] The applicant is relying on an error. The founding affidavit of Ratolo Stephen Kau is unhelpful in that it does not go to the genesis of the error. It is simply a recording of the chronology of events as they unfolded. It would have been prudent that Maputsoe David Nthau, the municipal manager of the first applicant at the time had filed a detailed affidavit explaining the circumstances around the *justus error*. At the centre of this contention is that the first applicant did not plead in accordance with section 84 of the Municipal Structures Act *supra*. There is no merit in this argument. The respondents based their case on a delict not failure to exercise statutory authority or power. The allegation is that the applicant was the owner of and/or in control of the dump from which the fire emanated. The applicant duly pleaded absence of negligence alternatively contributory negligence on the part of the respondent for not maintaining fire breaks as required by the statute.

- [14] These provisions that the respondent is relying on have been in our statute books for more than a decade. They are pieces of legislation well known to the officials in the position of *inter alia* Maputsoe David Nthau and legal representatives as eminent as silks. I find it strange that a person in the position of the Municipal Manager will not be conversant with the provisions of the very legislation that regulate his powers and functions. Perhaps that explains the underlying causes of the parlous financial position of the applicant. The mistake of law on the part of the official(s) and legal representatives of the applicant can never be equated to a common mistake of the parties.
- [15] On the facts it is apparent that this was not a common but a unilateral mistake on the part of the applicant. It was simply self-created. The principle of the law is clear that one cannot rely on unilateral mistake to resile from the agreement made an order. See **Sonap Petroleum (SA) (Pty) Ltd vs Pappadogianis 1992 (3) SA (SCA)**.
- [16] The defence that the applicant wishes to introduce should the rescission be granted was always available from the onset of the litigation. It required only a basic research and home work as to the appropriate law applicable in the circumstances on hand. It was reconfirmed and emphasized in **Eke and Slabbert *supra*** that **“litigation after the consent order will relate to non-compliance with the consent order and not the underlying dispute”**. It is on this basis that I deem the said agreement on behalf of the applicant misplaced. There can never be any reference to a common mistake because the mistake referred to was not relevant at the time the settlement was made an Order of court. The principle laid in **Tshivhase *supra*** at **page 863 D** is that **“you cannot subsequently**

create a retrospective mistake by means of fresh evidence which was not relevant to any issue which had to be determined when the original order was made". The applicant is attempting to do just that.

- [17] It is trite that a court has no discretion to set aside a current order where there are no grounds for setting aside the underlying agreement pursuant to which the consent order was made. This was reconfirmed in **Botha v Road Accident Fund 2017 (2) SA (SCA)**. In paragraph 13 the following is illuminatingly stated:

"In Theron NO v United Democratic Front (Western Cape Region)& others 1984 (2) SA 532 (C) at 536G this court held that a court has a discretion whether or not to grant an application for rescission under rule 42(1). But where, as here, the court's order recorded the terms of a valid settlement agreement, there is no room for it to do so".

As a judge of the High Court, I am bound by the decision of the Supreme Court of Appeal. The application ought to be dismissed.

- [18] It is an undeniable fact that the description of the first applicant throughout the proceedings was incorrect. This is the reason why the 1st applicant is arguing that a wrong party was before the court. There is no entity called Masilonyana District Municipality. The respondents refer to this omission as a "**misnomer**". The Oxford Paperback Dictionary & Thesaurus (3rd edition) meaning of a misnomer is described as "**a name or term that is wrong or inaccurate**".
- [19] The respondents argued that at all times the parties were certain and knew precisely of the identity of each other. It is interesting to

note that in the “Notice of Intention to Defend” served and filed on the 6th April 2014, the defendant is cited correctly as Masilonyana Local Municipality. This demonstrates that the parties treated this omission as a minor issue. In so doing, the applicant showed the connection with the claim notwithstanding the error in its description. I am satisfied that the wrong description is simply a misnomer and the parties treated it as such through their conduct. This is in line with the approach adopted by the court in **Foxlake Investments (Pty) Ltd t/a Forway Developments (Pty) Ltd v Ultimate Raft Foundation Design Solutions CC t/a Ultimate Raft Design and another 2016 ZASCA 54 at Paragraph 13 and 14**. In this regard, the respondent is entitled to the relief sought.

- [20] The general rule governing the issue of costs is that the costs follow the result. There remains the dispute regarding the costs of the application under case number 2458/2017 granted by Daffue, J on the 19th May 2017. In that application the applicant obtained an interdict halting the scheduled sale in execution on the 19th May 2017 at 11H00 pending the finalisation of the application for rescission of judgement. The sale was cancelled approximately two (2) hours before its commencement. It is patently clear that given the lot that was to be sold, the respondents incurred auctioneers costs. I do not intend to deviate from the principle of awarding costs to the successful party.
- [21] Counsel for the respondents submitted that I should make an order for costs on attorney and client scale. He lamented the use of public funds for ill-advised and unconscionable litigation such as this application. Although I agree that a costs order must be granted against the applicant, I do not agree that it should be on attorney and

client scale. The applicant did not act frivolously or inappropriately in bringing an application setting aside the court order.

[22] In the result I make the following order:-

1. The application is dismissed.
2. The first applicant is ordered to pay the costs of the application.
3. The first applicant is ordered to pay the application and auction costs under case number 2458/2017.
4. The order of the court of the 20th October 2015 is corrected by substituting the word "District" with the word "Local".

MATHEBULA, J

On behalf of applicant:

Adv. A. Burger SC

Instructed by:

Finger Attorneys

c/o Michael Du Plessis Attorneys

On behalf of respondents:

Adv. J. Zietsman

Instructed by:

Honey Attorneys

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