

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

Case No.: 1166/2012

In the matter between:-

LANNY MOKOENA
JOSEPH MOLABA
KANTI MIYA
KOBELI MOKOENA
LAZARUS MABILI
MOJALEFA MTAMBO
JOSEPH NHLAPO
DANIEL MOTAUNG
THABO LEABA

First Applicant
Second Applicant
Third Applicant
Fourth Applicant
Fifth Applicant
Sixth Applicant
Seventh Applicant
Eight Applicant
Ninth Applicant

and

DAVID LENGABALA

Respondent

In re:

DAVID LENGABLA

Applicant

and

JOHANNES NHLAPO
THABO LEABA
LANNY MOKOENA
JOSEPH MOLABA
KANTI MIYA
KOBELI MOKOENA
LAZARUS MABILI
MOJALEFA MTAMBO
DANIEL MOTAUNG

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seven Respondent
Eight Respondent
Ninth Respondent

CORAM:

DAFFUE, J

JUDGMENT BY:

DAFFUE, J

HEARD ON:12 NOVEMBER 2015

DELIVERED ON:22 JANUARY 2016

I INTRODUCTION

- [1] This is a belated application in terms of the common law for rescission of a judgment. The notice of motion does not contain a prayer for condonation although averments were made in this regard in the founding affidavit. The judgment applicants seek to set aside was granted in interdict proceedings as long ago as 31 May 2012. The present application was issued in November 2014 and heard by me exactly a year later when I reserved judgment. Both applications bear the same case number, to wit 1166/2012.

II THE PARTIES

- [2] There are nine applicants, to wit Messrs Lanny Mokoena, Joseph Molaba, Kanti Miya, Kobeli Mokoena, Lazarus Mabili, Mojalefa Mtambo, Jospeh Nhlapo, Daniel Motoung and Thabo Leaba. First applicant deposed to the founding and replying affidavits in this application whilst Mr Nhlapo, the seventh applicant, deposed to the answering affidavit in the initial application, he being cited in that application as the first respondent.

- [3] All nine applicants are now represented by a Johannesburg firm of attorneys, TT Hlapolosa Attorneys Inc. whilst they were previously

represented by Legal Aid South Africa during the original interdict proceedings. Although applicants' heads of argument was drafted by Adv MZ Makoti, an attorney, Mr Lesome, presented oral argument before me on their behalf.

- [4] Respondent in this application and the applicant in the interdict proceedings is Mr David Lengoabala. He was at all relevant times represented by the same Bloemfontein firm of attorneys, Phatshoane Henney Inc. Adv Loubser appeared for him in the interdict proceedings, but he was represented by adv P R Cronje in the rescission application. In order to avoid confusion I shall throughout refer to the parties as cited in the rescission application.

III THE RELIEF CLAIMED

- [5] Applicants seek the following relief *ex facie* their notice of motion:

- “1. Setting aside the order of the above Honourable Court granted on the 31st May 2012.
2. Ordering the Respondent to pay the Applicants costs only in the event of opposition alternatively costs be costs in the main application.
3. Further and/or alternative relief.”

IV THE FACTUAL MATRIX

- [6] The following background appearing from the undisputed facts is relevant:

- 6.1 On 16 March 2012 respondent brought an urgent application whereupon a rule *nisi* was issued calling upon the present

applicants to show cause on Thursday, 12 April 2012 why the following orders should not be made:

- “2.1 That the respondents are restrained and interdicted from attacking, injuring or threatening violence against applicant or any members of his household and family;
- 2.2 That the respondents are restrained and interdicted from attacking, causing damage or threatening violence to any properties and assets belonging to the applicant or members of his household and family;
- 2.3 That the respondents are restrained and interdicted from using vulgar and abusive language against the applicant or members of his household and family;
- 2.4 That such respondents opposing this application be ordered to pay the costs thereof, jointly and severely.”

The orders contained in paragraph 2.1, 2.2 and 2.3 *supra* served as interim interdicts with immediate effect pending the outcome of that application.

- 6.2 The rule *nisi* was extended on two occasions, first of all because applicants failed to file their answering affidavits timeously and secondly because of respondent's failure to file his replying affidavit timeously. The application was eventually heard on 31 May 2012.
- 6.3 On 31 May 2012 Mr Loubser appeared on behalf of respondent before Snellenburg AJ whilst Me Oosthuizen of Legal Aid SA appeared on behalf of applicants. The learned judge was informed *ex facie* the transcript of proceedings placed before me that the parties had settled the merits of the

application and that prayers 2.1, 2.2 and 2.3 of the rule *nisi* should be made orders of court subject to minor amendments.

- 6.4 There was clearly no agreement as to the costs of the application. The following is quoted and I regard it as important as will be appearing from my analysis *infra*:

“All that I actually want to convey is that **I initially assumed and I also conveyed the same to my learned friend that it was not necessary for the court to make the costs order**. I took it on two basis (sic), the one is that the applicant says in his own pieces (sic) the respondent and now we further know from the pieces (sic) that nine respondents received legal assistance to defend the action, for that reason I was under the impression that the costs order that the court would make against the respondents would not have much effect because their wishes were unsuccessful and the application is not going to have any effect, because these people have nothing, that is how I felt. I received instructions (between themselves).

Court: Your client does not feel the same?

Mr Loubser: I received instructions that it was now such that they have nothing, and applicant will in the end be saddled with a *nulla bona* return and then it is in any case the end and **I received instructions to ask for costs**. It is the only reason why my learned friend, I am here before you.”

“... **Mr Loubser:** **To utilize it to reach settlement** so that a court of this stature does not have to listen to this type of application and listen to arguments over it, but in the end there are two factors ...”
(emphasis added)

- 6.5 Me Oosthuizen was totally taken by surprise when she was

confronted with Mr Loubser's stance that respondent would be asking for costs. She did not have instructions to argue costs and informed the court accordingly. However, she did her best to argue, bearing in mind the general principle that costs follows the suit.

- 6.6 Taxation of the bill of costs took place in July 2012 without applicants personally being informed of such taxation. Nothing further transpired for approximately 18 months as far as the applicants were concerned.
- 6.7 During December 2013 applicants were confronted with notices in terms of s 65 of the Magistrates' Court Act in terms whereof they were to appear in the Bethlehem magistrate's court for the required financial enquiry and in order to obtain orders against them for payment of the taxed costs in the high court application.
- 6.8 I am prepared to accept the affidavit of Mr Harrington, an attorney practising in Bethlehem and acting on behalf of respondent, who was responsible for issuing of the s 65 notices. It is clear that seven of the nine applicants not only appeared in the magistrate's court, but made offers to pay the judgment debt in instalments. Several of them have in fact been paying several monthly amounts from about 30 April 2014 in accordance with their undertakings and subsequent court orders. Although first applicant attended court proceedings he did not make an offer as he alleged at the time that he was not employed. The s 65 notice could not

be served on Mr Kobeli Mokoena by the time Mr Harrington made his affidavit. Although seven applicants made offers to pay, three of them have not made any payments at all.

6.9 *Ex facie* the application papers, no letters were sent on behalf of applicants to respondent's attorneys informing them of the intention to apply for rescission of the aforesaid judgment. The notice of motion is dated 12 November 2014, but it is unclear when exactly it was issued. Answering and replying affidavits were filed on 15 and 30 January 2015 respectively. Nothing happened for four months until 2 June 2015 when applicants' attorney set the application down for hearing on 18 June 2015, only to remove the matter from the roll on 12 June 2015 unilaterally.

6.10 On 28 August 2015 respondent's attorney set the matter down for hearing on 17 September 2015. In the absence of both the Bloemfontein and Johannesburg attorneys of applicants, but in the presence of applicants who personally attended court, the matter was then postponed to 12 November 2015 and both firms of attorneys were called upon to show cause why they should not be ordered to pay the costs of postponement *de bonis propriis*.

V **EVALUATION OF OPPOSED APPLICATIONS**

[7] In motion proceedings the affidavits constitute both the pleadings and the evidence and the issues and averments in support of the parties' cases should appear clearly therefrom. See **Minister of Land Affairs**

and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA) at 200D. It is trite that the applicant in application proceedings must make out his/her case in the founding affidavit. A litigant should not be allowed to try and make out a case in the replying affidavit. The founding affidavit must contain sufficient facts in itself upon which a court may find in the applicant's favour. An applicant must stand or fall by his/her founding affidavit. See **Director of Hospital Services v Mistry** 1979 (1) SA 626 (AD) at 635H – 636D.

- [8] A court should adjudicate factual disputes in application procedure having regard to the well-known **Plascon-Evans Paints** *dicta* recently approved and considered in more depth in **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another** 2008 (3) SA 371 (SCA). I quote from paras [12] and [13]:

“[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion, must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C. See also the analysis by Davis J in *Ripoll-Dausa v Middleton NO* 2005 (3) SA 141 (C) at 151A-153C with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate.)

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.

There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

VI THE LAW RELATING TO APPLICATIONS FOR RESCISSION OF JUDGMENT

- [9] It is not applicants' case that they are entitled to relief in accordance with Uniform Rule of Court 31. In fact, although there is no indication from either the notice of motion or the founding affidavit whether they rely on rule 42(1) or the common law, it is now apparent that they rely on the common law only. The counsel who

prepared the heads of argument on their behalf submitted that either rule 42(1) or the common law finds application in *casu*. However, Mr Lesome submitted during his oral argument that rule 42(1) is not applicable and that relief could and should only be granted in terms of the common law.

[10] Rule 42(1)(a) stipulates as follows:

“The court may, in addition to any 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. ...”

The other sub-rules are clearly irrelevant. The most important jurisdictional fact which could not be established to be successful in terms of rule 42(1)(a) is the fact that the order of 31 May 2012 was not made in applicants’ absence. Their attorney was present and even argued costs on their behalf. See: **Britz and Others v Matloga and Others** (21653/2011) [2015] ZAGPPHC171 (25 March 2015) at para [21]. Therefore, even if applicants personally did not attend the proceedings, the judgment was not granted in their absence and Mr Lesome’s concession was therefore correctly made. It is in the light hereof unnecessary to labour the issue any further pertaining to the other requirements of rule 42(1)(a).

[11] The requirements for rescission of judgment at common law are the following:

(a) The applicant must proffer a reasonable explanation of the circumstances in which judgment was entered;

- (b) The application must be *bona fide*;
- (c) The defence on the merits of the case must *prima facie* carry some prospect of success.

These factors must be viewed in conjunction with each other and with the application as a whole and too much emphasis should not be placed on any of them as an unsatisfactory explanation may be strengthened by a very strong defence on the merits. See **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)** 2003 (6) SA 1 (SCA) at para 11.

- [12] In order to consider the reasonableness of the explanation proffered by an applicant and the *bona fides* of his or her application for rescission, it may also be considered whether or not the applicant acted in a manner inconsistent with an intention to apply for rescission of judgment. Such conclusion may be drawn if he or she has acquiesced in the judgment granted against them. See **Qoboshiane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others** 2013 (3) SA 315 (SCA) at para [3].

- [13] An application for rescission of judgment under the common law may be granted if the judgment was obtained by *inter alia* fraud or *iustus error*. In *casu* there is no suggestion of fraud, but it will have to be considered whether a *iustus error* occurred. I will deal with this issue *infra*, but wish to mention at this stage that respondent holds the view that he and/or his legal representatives did nothing that could have contributed to any alleged *iustus error* on behalf of applicants. Whether this viewpoint is correct needs to be

considered.

VII EVALUATION OF THE EVIDENCE, LEGAL PRINCIPLES AND SUBMISSIONS BY THE PARTIES

[14] Applicants want to create the impression of total ignorance of many aspects, such as the agreements relating to extension of the rule *nisi*, the reasons why the rule *nisi* had to be extended, the advice pertaining to the concessions to be made, the acceptance of such advice, the instructions in that regard as well as the ultimate conveyance of the terms of the court order of 31 May 2012 to Mr Nhlapo, the seventh applicant and spokesperson at all relevant times during the interdict proceedings. I am prepared to accept Me Van Rooyen's version in this regard. Instructions to concede the merits were in fact received from Mr Nhlapo on behalf of himself and the other applicants and the contents of the aforesaid court order were eventually conveyed to him. There is no reason to reject this version as being far-fetched and/or untenable. In this regard Mr Nhlapo's version is not only vague, but improbable and insofar as his version is contradicted by that of Me Van Rooyen, her version is accepted.

[15] Mr Lesome argued that there is a difference between a settlement agreement and a concession of the merits. He submitted that there was in *casu* no settlement agreement, but merely a concession of the merits. The applicants did not seem to be bothered by the relief granted in terms of prayers 1, 2 and 3 and the only issue was the costs order against them. If they (the applicants) had to pay costs, no settlement agreement would be reached between the parties.

Therefore Mr Lesome submitted that the only issue to be considered in *casu* was indeed the costs issue as it would not be in the interest of justice to reopen the case and allow arguments to be heard on the merits.

[16] Mr Lesome also submitted that it is clear from the transcript of proceedings before Snellenburg AJ that Me Ooshuizen did not have instructions to argue costs and was not ready to present a forceful argument. In this regard she did not act in the best interests of applicants and notwithstanding a general mandate she needed specific instructions to argue costs which she did not have. It is clear that Me Oosthuizen found herself between the devil and the deep blue sea at the moment when the merits were conceded and Mr Loubser informed the court that he had received instructions to argue costs. Bearing in mind the concession on the merits, there was literally nothing that Me Oosthuizen could do to advance the case of her clients. If she asked for a postponement to obtain proper instructions the applicants would have been mulcted with a costs order in respect of wasted costs and it is uncertain what could have been achieved by a postponement in any event. She might have informed the court, with the benefit of hindsight, that the merits were conceded on the basis that a settlement was agreed upon on the basis that the applicants would not be liable for respondent's costs of the application, bearing in mind that costs was never an issue during settlement negotiations if Adv Loubser's version is understood correctly.

[17] Respondent stated in several paragraphs of his answering affidavit that he was not the author of any misrepresentation relied upon by

applicants. That may be so as he did not negotiate any agreement with applicants directly. Negotiations took place between the legal representatives. There is no doubt in my mind, having considered the record of proceedings, that Me Oosthuizen and/or Me Van Rooyen of Legal Aid SA were under pressure the morning of 31 May 2012 to settle the matter and that the one or the other or both of them were brought under the impression by either Mr Loubser or his attorney, acting on behalf of respondent, that the matter should be dealt with on the basis that the merits be conceded and that not a word was spoken in respect of costs. It is only in open court when Mr Loubser addressed the court, to the surprise of Me Oosthuizen, that he had in the meanwhile received instructions from his client to ask for costs.

[18] In my view Mr Nhlapo, acting on behalf of applicants when instructing the attorney to concede the merits, acted in *iustus error*. If he knew and/or if Mrs Oosthuizen and/or Mrs Van Rooyen knew that once the merits were to be formally conceded in open court, costs would be argued, there would in all probability be no settlement or concession at all. It would be clear that a negative costs order would be a foregone conclusion as costs would follow suit. I am satisfied that applicants conceded the merits based on *iustus error* and that respondent's legal representative(s) should be blamed therefore. As mentioned I base this on the version presented by Mr Loubser in open court.

[19] However this is not the end of the matter. We are dealing in essence with the issue of costs only. Snellenburg AJ indicated quite clearly during argument that he regarded the applicants' version as

far-fetched and/or untenable and made it clear that he would be prepared whilst studying the papers and accepting that it was his *prima facie* view only, to grant the interdict even in the absence of any concession. The general rule is that costs follow the event. In such instances he would in all probabilities, bearing in mind his comments, confirmed the rule *nisi* with costs.

[20] Mr Lesome, if I understood him correctly, argued that the whole order of 31 May 2012 should not be set aside, but merely the costs order. In my view this would be untenable and even if such an order is granted, there is little doubt that the eventual outcome would probably be the same, bearing in mind the applicants' concession in respect of the merits.

[21] Notwithstanding my comments above I am satisfied that by their conduct the applicants clearly and unconditionally decided to abide by the judgment of 31 May 2012. They have not convinced me of the first two requirements for rescission of judgment in terms of the common law referred to above. Their right to apply for rescission has become perempted. I refer to **Qoboshiane NO and Others** *loc cit* at para [3]. I have also considered the judgment of the SCA in **Rossitter and Others v Nedbank Limited** [96/2014] ZASCA 196 (1 December 2015) para [10] and further where the SCA came to a different conclusion, but upon facts which are totally different from the facts in *casu*. See paras [10] and [11] of the judgment.

[22] I am not satisfied with applicants' version presented to me and the explanations given as to why it took them nearly a year to launch the rescission application. Their inaction has not been explained

properly and is further evidence that they acquiesced in the orders made on 31 May 2012. It is only when the shoe started to pinch and when some of them had to make payment in terms of the provisions of s 65 of the Magistrates' Court Act that they reconsidered the matter and eventually instructed an attorney to act on their behalf.

[23] A matter should not be allowed to drag out indefinitely and unnecessary time has already been wasted. Although a dismissal of the application will have severe consequences for applicants, it must also be recognised that finality in litigation must also be achieved.

[24] I have considered the discussions between Snellenburg AJ and counsel when arguments were advanced pertaining to costs and I have also scrutinised the founding affidavit to try and find evidence about the strength of applicants' defence in the interdict proceedings. I am not persuaded that applicants have made out a proper case in respect of the third requirement for rescission in terms of the common law.

[25] In conclusion applicants failed to convince me that they had met the three requirements for rescission applications in order to be successful. They acquiesced in the judgment of 31 May 2012, the explanations proffered are not reasonable and I do not accept that the application is *bona fide*. In any event I am not persuaded that they have a *bona fide* defence on the merits which carries some prospect of success.

VIII COSTS

- [26] I was requested to grant a costs order in respect of the wasted costs incurred on 18 June 2015. I have indicated above that applicants' attorney enrolled the matter for that day, but removed it again unilaterally less than a week before the date of the hearing. By that time the parties' heads of argument had to be filed in terms of the rules of practice of this Division. Applicants' attorney should not have done that and respondent is entitled to the wasted costs of 18 June 2015.
- [27] The wasted costs of 17 September 2015 must also be considered. Phalatsi AJ, who presided over the matter that day, ordered the Bloemfontein correspondent attorneys, Morobane Inc. and the Johannesburg attorneys, TT Hlapolosa Attorneys Inc. to provide reasons why costs *bonis propriis* should not be granted against them. Both Messrs Morobane and Hlapolosa filed affidavits to set out the relevant facts. I am satisfied with the explanation provided by Mr Morobane. His office was nothing else but a "postbox" and he did not hold any instructions either to appoint counsel or to appear at court that day. Mr Hlapolosa wanted to put the blame on respondent's attorney for setting down the matter without prior agreement. However it is clear that applicants as *domini litus* dragged their feet over a period of several months. Respondent's replying affidavit was filed as long ago as 30 January 2015 and in terms of the practice in the Free State the matter could have been set down for hearing in February 2015 already. Nothing happened *ex facie* the papers until the matter was initially set down for hearing on 18 June 2015, i.e. five months later. Instead of the matter being argued, it was removed from the roll unilaterally. Respondent's

attorneys eventually set the matter down for 17 September 2015 by giving proper and due notice to applicants' attorney.

- [28] There is no indication that applicants' attorney was dissatisfied with the set down although Mr Hlapolosa wanted to convey to the court that there was a standing agreement that the matter would be set down for a date that suited both counsel. Instead of communicating with respondent's attorney, explaining the predicament, he merely communicated with his clients in order to seek financial funding and eventually instructed them to personally attend court on the 17 September 2015. He failed to attend and failed to instruct, even a junior counsel or attorney, to attend and explain his predicament. This is inexplicable behaviour and contrary to what is expected of an attorney. It is a flagrant and gross disregard of his duties as officer of court. There is no reason why the applicants, who had to incur costs to drive from Clarens in the Eastern Free State to Bloemfontein, a distance of 300km one way, to attend court proceedings shall be penalised with a costs order. There is also no reason why respondent shall be held liable for the wasted costs of 17 September 2015. It is apparent from the e-mail communication presented to me during argument that applicants' attorney did not play the game and did not co-operate to finalise the matter. As mentioned, finality could have been obtained in February 2015 already if all parties were prepared to co-operate fully. On 29 June 2015 respondent's attorney wrote an e-mail to Mr Hlapolosa, advising him that respondent's counsel was available for 31 July, 7 August or 14 August 2015 and requesting Mr Hlapolosa to set the matter down for hearing on any of these dates. Nothing transpired and it is thus not surprising that respondent's attorney took the

matter on himself to set the matter down for 17 September 2015. Mr Hlapolosa testified under oath that he had received a notice of set down as well as a notice of withdrawal from his correspondent attorney, Mr Morobane and that these documents came to his attention on 10 September 2015 only. It is apparent from Mr Morobane's affidavit that the notice of set down was e-mailed to Mr Hlapolosa on 8 September 2015 and thus nine days prior to the hearing on 17 September 2015. Mr Lesome was not prepared to make any submissions in respect of the costs order to be made in this regard and left the matter for the court to decide.

IX ORDERS

[29] Therefor the following orders are issued:

1. The application for rescission of judgment is dismissed.
2. Applicants are directed to pay respondent's costs of the application, including the wasted costs of 18 June 2015, but excluding the wasted costs of 17 September 2015, such costs to be paid jointly and severally, the one to pay, the others to be absolved.
3. Thebogo Taunyane Hlapolosa, a male attorney practising as such at [...], Bramley, Johannesburg, Gauteng is directed to pay the respondent's wasted costs of 18 September 2015 *de bonis propriis*.

J. P. DAFFUE, J

On behalf of the applicants: Mr B. Lesome
Instructed by:
Matsepes Inc.
BLOEMFONTEIN

On behalf of the respondent: Adv. P. R. Cronje
Instructed by:
Phatshoane Henney Inc.
BLOEMFONTEIN

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