

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

CASE NO 3642/2015

In the matter between:

MINISTER OF POLICE, LIBODE

1st Applicant

STATION COMMISSIONER

2nd Defendant

And

REFORMED PRESBYTERIAN CHURCH

IN SOUTH AFRICA

Respondent

IN RE

REFORMED PRESBYTARIAN CHURCH

IN SOUTH AFRICA

Applicant

And

MINISTER OF POLICE

1st Respondent

STATION COMMISSIONER, LIBODE

2nd Respondent

JUDGEMENT

MGXAJI A.J.

[1] This matter came before me as an application for rescission brought according to the applicants' papers under common law alternatively in terms of rule 42(1) (a) of the Uniform Rules of court. The respondent had launched by way of long form the main application on the 9th December 2015 and service was effected on the 11th December 2015 at the office of the State Attorney Mthatha. Following an expiry of fifteen days from the 11th December 2015 the main application was set down for hearing on the 12th January 2016, with the notice of set down having been served at the State Attorneys' office on the 6th January 2016. On the 12th January 2016 an order was granted against the applicants herein notwithstanding requests from the bar for postponement by Ms Madyibi who pitched up at court on behalf of the applicants herein.

[2] The main application was served for the 2nd respondent at the State Attorneys' office as also for the 1st respondent with the stamp thereof reflecting that Yandisa Damane, described in the sheriff's return of service as a receptionist, acknowledged receipt of the application.

[3] In this rescission application it is so that the applicant's founding affidavit, deposed to by Sabelo Mbeki who describes himself as a Colonel in rank and a Commander of Mthatha Civil Litigation Centre in the South African Police Services, states that the 1st respondent was alerted to the main application on the 12th January 2016 by Mr Tshitshi whose attention similarly had been drawn to such application in the early hours of the 12th January 2016. In his confirmatory affidavit Mr Tshitshi states that the applicants had not been made aware of the main application until that 12th January 2016.

[4] Further raised by the applicants in their papers is that the 2nd applicant was not served with the main application and given that service in respect of him had been effected at the office of the State Attorney as with the 1st applicant, so is it contended on behalf of the applicants, the order of the 12th January 2016 was granted in their absence and without having afforded them an opportunity to be heard on the merits.

[5] The respondents herein dispute the applicant's contention stating that Ms Madyibi on behalf of the applicants was given an opportunity to address the court on the 12th January 2016 during which she pointed to the court the shortcomings in the main application. Moreover the applicants, contends the respondent, had been given adequate dies prior to the setting down of the main application for hearing over and above the palpable failure by Mr Tshitshi in his confirmatory affidavit to detail how it came about that Ms Yondisa Damane could have missed bringing to his attention the main application papers.

[6] On behalf of the respondent herein, during the hearing, Mr Zono submitted that Ms Madyibi having been present and actually addressed the court before the order of the 12th January 2016 was granted the applicants should have appealed the order of the 12th January 2016 instead of seeking a rescission relief. On these facts, so submitted Mr Zono, the order cannot be considered to have been granted in the applicants' absence.

[7] There is no dissonance in the papers that the main application was served as was the notice of set down on the 6th January 2016 at the office of the State Attorney in respect of the 2nd applicant herein. It is this preliminary yet pivotal

issue of service, in my considered view, which needs determination as applicant's subsequent steps culminating to the order of the 12th January 2016 turn on whether there was compliance or not with rule 4(9) of the uniform rules of court as a requisite for the court to granting the order. Barring all other additional considerations pertinent in the adjudication of rescission applications whether in terms of rule 31 (2) (b) or rule 42(1) or under common law, service of the process initiating the legal proceeding is the primary issue for consideration. It is my considered view that it is decisive in this application.

[8] Mr Zono argued before me on behalf of the respondent that in terms of rule 4(9) of the Uniform Rules of court service in respect of the 2nd applicant herein was properly done since the 2nd respondent as an Administrator should be served at the Office of the State Attorney, Mthatha. Further argued is that the order of the 12th January 2016 could not have been erroneously sought nor erroneously granted in the applicant's absence as Ms Madyibi appeared and made representations to the court before the granting of the order. To the latter submission Ms Madyibi submitted that she made no arguments regarding the merits on the 12th January 2016 as it was ruled by court that she had not filed a notice to oppose and could not be heard.

[9] It was argued on behalf of the respondent that this aspect of appearance in court on the 12th January 2016 by Ms Madyibi is a point of dispute resolvable on the basis of the Plascon –Evans' principle. Whether this court will have to take a view on this issue of whether there is or not a dispute of fact depends on the view I take hereunder of what I consider to be the first substantive issue to be disposed of in this matter before determining, if at all, whether the presence

during the hearing of the main application of Ms Madyibi constitutes a dispute of fact. That substantive issue is whether there was proper service of the main application upon the 2nd applicant herein or not before other issues fall to be considered.

[10] I have above indicated that the return of service reflects the main application to have been served at the State Attorney's office on behalf of the 2nd applicant herein and, as I understand the argument on behalf of the respondent to be, reliance for the appropriateness of such service is placed on behalf of the respondent herein on rule 4(9) of the uniform rules to the extent that the rule authorises service of a notice or summons instituting legal proceedings against an Administrator to be at the State Attorney's office situate in the area of the court jurisdiction in which the legal proceedings are instituted. In issue herein is whether the Station Commissioner, Libode, or a Station Commissioner in general, can be construed as an Administrator for purposes of service of a notice of motion instituting legal proceeding for the service at the office of the State Attorney on behalf of the 2nd applicant to be regarded as a proper service in compliance with rule 4(9) of the uniform rules of court.

[11] The Constitution of the Republic of South Africa, Act 108 of 1996 section 207 (3) thereof makes provision for the National Commissioner, with the concurrence of the Provincial Executive to appoint a Provincial Commissioner to exercise control over and manage the police service in the province in accordance with national policing policy. Such Provincial Commissioner in terms of section 12 of the South African Police Service Act 68 of 1995 (hereinafter referred to as Act) establishes Police Stations and

determines their boundaries. Members of the Police Service are appointed in terms of section 5 of the Act and exercise such duties and functions as are conferred by law or assigned to as Police official.

[12] What the Act has no assigned to Police Officials in particular in the position of the 2nd applicant is the duty to act as an Administrator neither is there in my view a law nor have I been referred to any legislation conferring powers to the 2nd applicant to perform or function as an Administrator. In my view for a Police Official to act as an Administrator as envisaged in rule 4(9) of uniform rules of court there has to be an empowering legislation enacted for that role for there to be a notice of instituted legal proceeding against him served at the office of the State Attorney.(See: NIGEL TOWN COUNCIL v AH YAT¹).

[13] It seems to me that the Station Commissioner, Libode can never be an Administrator as conceived in law and even worse not as contemplated in rule 4(9) of Uniform Rules of Court and any notice of legal proceeding instituted against him or her has to be served upon him or her and not at the office of the State Attorney as was done in the main application by the respondent herein. On these facts the respondent in approaching court and obtaining the order granted on the 12January 2016 erroneously sought such order in the absence of the 2nd applicant as it was obtained on a flawed return of service when it should not have been granted.

¹ 1950 SA (2) 182 at 185

[14] For completeness sake on the issue in the foregoing paragraph, the 2nd applicant is not an organ of state as defined in section 1 of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002. In terms of section 5 (1) (b) (11) of this Act service of any process by which any legal proceedings against an organ of state are instituted such process must be served on the National Commissioner or Provincial Commissioner of the province in which the cause of action arose. So that even in terms of this Act relative to an instituted process the 2nd applicant's position as Station Commissioner has no capacity as an aspect which is consistent with the South African Police Service Act of 1995. Therefore service at the office of the State Attorney on behalf of the 2nd applicant as Station Commissioner is not contemplated in any legislation and short of service upon him of the main application any subsequent order obtained shall remain invalid.

[15] Notwithstanding my finding on the issue of improper service of the main application in regard to the 2nd applicant herein I deem it proper to deal as well with whether the order granted on the 12 January 2016 is not rescindable on another basis too that it was granted erroneously in the absence of the applicants.

[16] It is common cause that the respondent had obtained in its favour an interdict order issued by the Magistrate Court, Libode and on the basis of which the respondent's members laid with Police Officers in Libode Police Station, contempt of court complaint against the respondent's members against whom such interdict relief was. In the main application attached thereto is ANNEXURE 'M' being a copy of the applicant's investigating diary and in

which diary is acknowledged the receipt of the court order forming the basis of the complaint, as also the returns of service already of the court order and a note that the recording that the police officers had received the Magistrate court final order. The last entry note in ANNEXURE ‘M’ is to the effect that the “*civil side of this matter should be finished first*”.

[17] The Contempt of Court alleged in respect of the Magistrate’s Court order, unlike the established practice in the High Court, is a criminal offence created by statute in terms of section 106 of the Magistrate’s Court Act 32 of 1944 as amended, and the requisites of which in order to secure conviction are:

- (a) That there must be a court order;
- (b) That there must have been service or notice;
- (c) That there was no compliance with the court order by the respondents and are found to have been wilful and mala fide.

In this regard reference is made to **FAKIE NO v CCIISYSTEMS (PTY) LTD²**.

[18] From the above outlined requisites for a contempt of court charge it becomes clear that, apart from the last recorded note in annexure ‘M’ above which in its reading dissuaded any further action by Police Officers, even though not decipherable by whom it was, in law no investigations let alone thorough investigations needed to be undertaken save the service of summons by Police Officers upon the respondents against whom the contempt of court complaint was laid.

² 2006 (4) SA 326 at 344H-345A

[19] In terms of section 13 (4) of the South African Police Service Act 68 of 1995 as amended Police Officials are authorised as their duty and function to serve court orders and summons and, inferably, no investigations were on these facts required or necessary save to summon the respondents therein to appear before the Magistrate's Court, Libode on charges of contempt of the court order of the 22nd January 2015 which they were alleged to have disobeyed.

[20] In the present matter the respondent's complaint was the disregard of the court order of the 22 January 2015 by its interdicted members but has not specified what investigations had to be pursued by the 2nd applicant where the interdicted members failed to observe the provisions of the interdict. In my view such interdicted members' disdainful attitude and forceful entrance in the church premises to disrupt church services was an act of disobedience to the court order which needed no investigations but opening of criminal charges only as arresting such members for entering church premises was not competent for the police to have done. In fact the Magistrate's Court order itself does not authorise the Police to arrest such interdicted members of the respondent.

[21] For purposes of such contempt charges it was to remain and still remains the duty of the applicant in whose favour the order was to prove the three requisites for contempt of the court order in order for conviction to follow unless the interdicted members in rebuttal evidenced absence of wilfulness and mala fides by creating a reasonable doubt to escape such conviction.

[22] Consequently I find that the order of the 12 January 2016 directing the applicants to conduct a thorough investigations in a contempt of court order complaint, where on the applicable legal principles it indisputably remained onerous on the respondent's members to give evidence at the Magistrate's Court establishing beyond reasonable doubt the alleged non compliance by the interdicted members with the court order, to have been granted erroneously.

[23] The applicants did not file a notice to oppose the main application but showed up at court seeking to have the matter postponed to enable them to file opposing affidavits. In their founding affidavits the applicants contend they have a good explanation alternatively reasonable explanation and a bona fide defence entitling them to the relief sought. It is the applicants' alternative ground on which the rescission application is sought that the order of the 12 January 2016 was granted erroneously in their absence.

[24] There are three ways in which a judgement taken in the absence of one of the parties may be set aside and those could be in terms of Rule 31(2) (b) or Rule 42(1) of Uniform Rules and under common law if the party seeking the rescission has satisfied the requirements in one of each of the above mechanisms. See: **NYINGWA v MOOLMAN**³. In view of the lack of service of the main application on the 2nd applicant as I have found above the order granted on the 12 January 2016 is rescindable in terms of rule 31(2) (b) of the Uniform Rules as in my evaluation good cause has been shown by the applicants.

³ 1993 (2) SA 508 at 510B-D

[25] Similarly where the nature of the complaint revolves around the disobedience of the Magistrate's Court orders of 19 November 2014 and 22 January 2015 proof of which depends on the evidence of the respondent's members who witnessed the forced entry by the interdicted members into the church and the alleged disruptions, an order directing thorough investigations by Police was erroneously granted. Had the court been aware that the proof of the alleged disobedience exclusively dependant on the observations and evidence of the church members present at Zandukwana it would not have granted such order as nothing needed to be investigated by the Police on these facts.

[26] Consequently such an order becomes rescindable as well in terms of Rule 42 (1) (a). In each of the ways by which a default order could be set aside the overriding consideration is whether an applicant in his papers has satisfied the requirements of the rule in terms of which the order is rescinded.

[27] Before me it was strongly argued by Mr Zono that the order of the 12th January 2016 could not be regarded as having been granted in the absence of the applicants as the applicants' legal representative Ms Madyibi appeared and was afforded opportunity to orally address the court. It was however contended by Ms Madyibi that in her address she was not allowed to make any substantive submissions as the court ruled that she had not filed a notice to oppose the matter and even a postponement she had applied for was turned down.

[28] It is manifest that the court order of the 12 January 2016 reflects only the respondent herein as having been legally represented which lends credence to

the applicants' allegations. In the view that I take on this aspect without a party having meaningfully participated in the court hearing of the proceedings substantively engaging in the presentation of the merits of the matter for court's adjudication, it cannot be conceived that such mere presence in court is not akin to absence. As the court order of the 12 January 2016 depicts on the aspect of who was present at court during the hearing, it does seem to me without further evidential matter casting doubt, a dispute as to whether the applicants were present, in the sense of being involved in the hearing of the matter, does not arise.

[29] The foregoing notwithstanding it seems to me given the respondent's failure to serve the 2nd applicant with the application which should have notified him/her of the relief sought to be obtained on the 12 January, the order of the 12 January 2016 remains rescindable and falls to be set aside.

[30] Inevitably further consideration of other issues as raised and argued before me, inviting and cogent as they are, in my view it remains unnecessary for purposes of this rescission application to delve into.

[31] Accordingly I make the following order:

- (a) The order granted on 12 January 2016 be and is hereby set aside;
and
- (b) The respondent is ordered to pay costs in the ordinary scale.

MGXAJI

ACTING JUDGE OF THE HIGH COURT

Date heard: 12 May 2016

Date handed down: 24 May 2016

For the Applicants: Ms Madyibi

Instructed by Mvuzo Notyesi Inc

For the Respondent: Mr Zono

Instructed by A S Zono Attorneys