

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, MTHATHA**

CASE NO: 563/2008

In the matter between:

NONTWAZANA MANGQO

Plaintiff

and

**MEC FOR THE DEPARTMENT OF SOCIAL
DEVELOPMENT, EASTERN CAPE**

Defendant

JUDGMENT

SANGONI JP

[1] In a previous court application, registered under case no. 454/07, Schoeman J ordered on 6 July 2007 that, the disability grant in favour of the applicant was unlawfully cancelled by the Eastern Cape Department of Social Development. It was further ordered, *inter alia*, that the said grant be reinstated retrospectively to 1 November 2004.

[2] Based on allegations of failure to comply with the court order, particularly to reinstate the grant and to pay the outstanding benefits thereof within the period stipulated in the order, a new

application for contempt of court was launched on 7 May 2008 against the MEC for Social Development, Eastern Cape registered under number 563/08. On 30 June 2008 a counter application was brought by the MEC seeking to set aside the order of 6 December 2007 on the basis that the order was obtained fraudulently. That is the application before court. The application for contempt of court has already been disposed of. Pakade J dismissed the application on 14 October 2010.

- [3] On 16 May 2008 the respondent filed and served a Notice to Oppose the application for Contempt of Court. On 30 June 2008 a Notice of Counter-application with an accompanying affidavit by one Mandisa Mpunzi was delivered. The purpose of the affidavit, as stated in the affidavit is to support the application to set aside the order by Justice Schoeman (counter-application) and also to serve an answering affidavit in the application for Contempt of Court. For the sake of convenience I will continue to refer to the applicant in the counter-application as the resident.
- [4] The basis for the application to set aside the order of Schoeman J is fully set out on para 5 of Mpunzi's affidavit. It reads like this:

"I shall first deal with the application to set aside the order. The basis of that application is that the Applicant did not set out all the relevant evidence in her founding affidavit with the intent to mislead this Honourable Court. It is my submission that she confirmed fraud. As more fully set out below, the picture that the Applicant painted in Case No. 454/07 diverged from the true facts to such an extent that Schoeman J would, if the true facts had been known to her, have granted an order different

from the one granted on 6 December 2007 which the Honourable Ms Justice Schoeman was induced to give by the aforesaid false representation.”

- [5] This current application seeks to set aside an order made under case 545/07 by Schoeman J. That does not imply I am sitting in appeal or review of that order. What puts me at ease is the fact that there is no suggestion on the part of the respondent that the order was not justified by the facts on the basis whereof the order was made.
- [6] Before dealing with the merits of the counter-application I should first consider the points in *limine* raised by the respondent in its opposing affidavit delivered on 22 August 2008. The sum total is that the so-called counter-application is in fact an application for rescission of the judgment delivered by Schoeman J without an application for condonation for the late filing. It is submitted that the said rescission is not provided for in the Rules of this Court e.g. Rules 42 or 31 and is not provided under common law. It is further submitted that the respondent is attempting, through this application, to make averments it could have made so as to be considered before the judgment was handed down by Schoeman J. The contention by applicant is that the respondent is attempting to have case 454/07 re-opened through irregular means. The rest of the answering affidavit contains argumentative material with applicant expressly stating that she was in no position to respond to what could have been raised in an answering affidavit by the respondent if the latter had filed one before judgment. As a result the applicant did not address the issue of whether he committed the alleged fraud or not.

- [7] Much later, in fact on 26 July 2012 the applicant filed what it referred to as Applicant's Supplementary Opposing Affidavit to the counter-application. In this affidavit the applicant acknowledges that it did not address what is referred to as a fraudulent conduct on her part. She then proceeded to do so without seeking condonation for late filing. After the opposing affidavit was filed by the applicant on 22 August 2008 the matter was enrolled on several occasions. It was on occasion postponed and sometimes removed from the roll without any specific reason given. As indicated, above the application for Contempt of Court was dismissed on 14 October 2010.
- [8] It would appear no focus was placed on the fact that the respondent did not file any replying affidavit in this application for setting aside. Not even on the question of whether the supplementary opposing affidavit by the applicant should be considered even though filed out of time. At the hearing the parties were silent on these issues. No suggestion was raised by either of them as to what approach the court should adopt. In the light of there being no objection raised I assume that the parties are impliedly indicating that the papers be adjudicated upon as they are. It will be apparent from the judgment that even without considering the supplementary opposing affidavit the outcome of the application would be the same.
- [9] To go back to the in *limine* points raised I wish to state as follows. Indeed, as alleged by the applicant, the respondent seeks to reopen the case that was made final through the order made by Schoeman J. The grounds the respondent is relying on are fraudulent misconduct by the applicant leading to her obtaining the order. I will set out here below the precise allegations of

fraud.

- [10] I understand the legal position to be that a court may set aside its own final judgment in terms of the Uniform Rules, particularly Rule 42. This may also be done in terms of the common law. At page 198 of Lawsa¹ it reads:

“At common law, a judgment obtained by fraud (including forgery and perjury) may be set aside at the suit of an interested party. The fraud must be of such a nature as to entitle the other party to *restitutio in integrum*. It is necessary to allege and prove that the successful party (or someone to his knowledge) gave incorrect evidence, that the evidence was given fraudulently and with the intent to mislead the court, and that the false evidence was the *causa causans* of the unfavourable judgment.”

- [11] There is no prescribed procedure under common law for an application to set aside a judgment obtained by fraud. A litigant who seeks such relief is not even bound to do so by way of action only.² There is therefore no merit in the submission that the procedure used by the respondent in this counter-application is foreign to our law. It may perhaps be correct to say it is uncommon.

- [12] What constitutes fraud according to the respondent's version is made up of the following:

12.1 In her affidavit in support of the order granted

¹ The Law of South Africa – 2 ed – Vol. 3 Part 1

² Santos Erec v Cheque Discounting 10 (Pty) Ltd 1986(4) SA 752 (W)

she created the impression that the disability grant was unexpectedly cancelled by the respondent or the Social Development Department and yet she knew that the grant was of a temporary nature or she should have known that as a letter was addressed to her on 12 January 2004 advising her that the approved grant was from 1 September 2003 for a period up to 31 August 2004. There is however no confirmation that the said letter was received by the applicant. What complicated this issue is the fact that the grant was not terminated at the end of August 2004. There is however no confirmation that the said letter was received by the applicant. What complicates this issue is the fact that the grant was not terminated at end of August 2004. It became necessary for the respondent, so it is alleged to send another letter notifying that the grant would be terminated on 31 October 2004. This attempt towards establishing fraud is seriously wanting.

- 12.2 In the letter dated 12 January the applicant was notified that after the expiry of 12 months from the date the grant was made it would lapse the applicant was at liberty to re-apply for the grant for a disabled person of the medical condition makes her eligible for such grant. This was not placed before court in case 454/07. The applicant denies she received

that letter.

[13] In ‘Schierhout vs Union Government’³ De Villiers JA held:

“Baseless charges of fraud are not encouraged by courts of law. Involving as they do the honour and liberty of the person charged they are in their nature of the greatest gravity and should not be lightly made, and when made should not only be made expressly but should be formulated with a precision and fullness which is demanded in a criminal case.”

There is thus no way that fraud can be said to have been established without further evidence.

[14] I must mention that on 14 October 2010 both the application for contempt of Court and, the current counter-application were simultaneously before Pakade J. When discussing the application for contempt of Court, the learned Judge remarked:

“This is the end of the matter, there being no need to consider the Counter-Application brought by the respondent in which he seeks the setting aside of the Order in issue on fraudulent ground. A judgment tainted with fraud can be *impugned* on common law grounds. This is, however, not an issue to be decided in this contempt of court judgment.”

Nothing was indicated as to the future conduct of the counter-application. It has since been set down by the applicant for the

³ 1927 AD 94 at 98

following dates:

- 4 March 2011 when postponed sine die
- 8 November 2011 when removed from the roll
- 31 July 2012 when proceeded with

[15] In my view the costs of the counter-application did not warrant being on punitive scale.

In the result the counter-application is dismissed with costs.

C. T. SANGONI
JUDGE PRESIDENT
EASTERN CAPE HIGH COURTS

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DELIVERED ON 11 OCTOBER 2012

