



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

Reportable:
Of interest to other
Judges:
Circulate to Magistrates:

Case number: 660/2021

In the matter between:

SMANGA SIMON NTESHE
APPLICANT
and
MAVIS CHRISTIAAN
RESPONDENT
IN RE:
MAVIS CHRISTIAAN
PLAINTIFF/APPLICANT
and
SMANGA SIMON NTESHE
DEFENDANT/RESPONDENT

CORAM: BOONZAAIER AJ
HEARD ON: 2 MAY 2024
JUDGMENT BY: BOONZAAIER AJ

DELIVERED ON:

6 MAY 2024

INTRODUCTION:

1. The application is for rescission of a Contempt of Court order granted by this Court on the **9th November 2023** in terms of Rule 42(1)(a) of the Uniform Rules of Court and the Common Law, which was granted against the Defendant/ Respondent in the main action. The dispute arises from Divorce proceedings and Rule 43 and R 43(6) procedures which have already taken place.

2. In this instance I share the sentiments of the judge in the recent case of **D [...]** **N [...]** **Q[...]** **v P [...]** **Q [...]** where it was stated ¹:

"This application is yet another example of how expensive protracted divorce proceedings can be. It demonstrates how divorce parties, at times, fail to resolve disputes that arise pending their divorce and are more than willing to spend money on unnecessary litigation."

FACTUAL BACKGROUND:

3. On the **25th March 2021** G Wright AJ, issued an order that:

"The Respondent is to pay maintenance for and in respect of the Applicant in the amount of R3 500.00 per month. The R3 500.00 monthly maintenance payment is to commence on / or before **7th April 2021**, and is to continue thereafter on/or before the 7th day of each consecutive month."

4. It is not contested and the evidence before court illustrates that the Applicant made inconsistent payments and not in full.

¹ Unreported case 49090/2021 in the High Court of Gauteng, delivered on 12 January 2024

5. On the **09th of November 2024** Mthimunye AJ, ordered that the Applicant is in Contempt of the Court order of this Court issued by G Wright AJ, on the **25th of March 2021** under case number 660/2022 read with order 1760/2019.
6. The above-mentioned order was granted in the absence of the Applicant and goes to the core of the application *in casu*.

APPLICANT:

7. The Applicant sought condonation for the failure to lodge the application timeously;
8. It is the Applicants case that it is evident, that the Applicant has substantially complied with the court order in that:
 - 8.1 his non- compliance was not wilful;
 - 8.2 his legal representatives negotiated in bad faith.²
 - 8.3 he has made payments towards the Rule 43 order and therefore not in non-compliance or total disregard of the order.
 - 8.4 there were settlement negotiations on the **8th November 2023**, that a payment of R 3000.00 was made towards maintenance and R 3000.00 towards legal costs respectively.

² Page 42 of the paginated opposing affidavit par 27.4

8.5 The Applicant alleges that his non – compliance was not *mala fide* and that he has on several occasions communicated the fact that he was unable to pay the full amount. He further alleges that the Respondent negotiated in bad faith. The order was allegedly obtained in default.

9. It is further the contention of the Applicant that the cost order which was granted is open ended and open for interpretation.

10. Adv. Nyembane on behalf of the Applicant argued that in terms of rule R 42(1)(a) the court in **Zuma v Secretary of Judicial of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others**,³ held that:

“...the word “absence” exists to protect litigants whose presence was precluded.”

11. The court however directed him to the rest of the sentence which stated:

“...not those whose absence was elected.”⁴

12. Applicant sets out the background to the judgment having been granted.

12.1 On **25th March 2021**, Wright AJ granted the R 3500.00 maintenance order.

³ [2021] ZACC28; 2021(11) BCLR 1268(CC) at para47.

⁴ At 7 supra para 61

12.2 On **02 December 2021** Chesiwe J granted a further order to comply with Wright AJ's order of the **25th March 2021** in full and to pay henceforth R1500.00

12.3 On **24 November 2022** the matter was set down again and postponed to the **1 December 2022**, when Daniso J granted an order that the Applicant needs to pay R 850 within 20 days of her order and that he continue to make payments in terms of the orders by Wright AJ and Chesiwe J, per month.

12.4 The matter was the again set down for **7th September 2023** and was subsequently postponed to **14 September 2023**. On that day it was removed from the roll.

12.5 The Respondent then enrolled the matter on **27th October 2023** for the hearing on **2nd November 2023** when it was further postponed to the **9th November 2023** where the following order was granted by Mthimunya AJ against the Applicant *in casu* who was the Respondent in the Contempt of Court application:

"1. The Respondent is in contempt of the Court order of this court granted by the honourable Acting Justice Wright on the 25th March 2021 under case number 6660/2021 read with order 1760/2018(hereinafter referred to as the Court Orders).

2. The Respondent is in contempt of Court order of this Court in terms of all cost orders granted under case number 243/2019(herein referred to as the Cost orders).

3. The Respondent is committed to imprisonment of a period of 60(Sixty) days.

4. The aforementioned term of incarceration of the Respondent is suspended for a period of 60 days on condition that the Respondent comply with the Court Order, a copy of which is annexed hereto and marked as **Annexure "A"**.
 5. The aforementioned term of incarceration of the Respondent is suspended for **a period of 60 days** on condition that the Respondent comply with the Cost Orders of Court, copies of which is annexed hereto and marked as **Annexure" E1 to E 18"**.
 6. Leave is granted to the Applicant to approach the above honourable Court on the same papers, duly amplified, for the putting into operation of the suspended imprisonment, should the Respondent fail or neglect to comply with prayer 4 and 5 above"
13. Adv Nyembane submits that it is evident that the Applicant meets both the requirements of Rule 42(1)(a) namely that the judgment was granted in its absence and that the Applicant provided a reasonable and satisfactory explanation for its failure to appear.
14. Applicant indicated that due to the following he has a good cause:
- i) it is important that he requires at least the opportunity to air a real dispute between the parties.
 - ii) he is giving a reasonable explanation of his default;
 - iii) he is showing that his application is made *bona fide* and
 - iv) he is showing that he has a *bona fide* defence to the plaintiffs claim which he *prima facie* has some prospects of success.

15. Adv. Nyembane further argues that Rule 42(1)(a) caters for a mistake in the proceedings. The mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in its application for rescission of judgment.

16. The Applicant relies on the judgment of **HMI Healthcare Corporation (Pty) Limited v Medshield Medical Scheme & others**,⁵ where it was held that:

"Here again, it seems to me to be clear that an order merely rescinding a judgment does not cause irreparable prejudice, for the definitive sentence the effect of the decision can obviously be repaired"

The Applicant submits that the Respondent will not suffer prejudice in this matter and it appears that the balance of convenience favours the granting of the rescission

17. The Applicant advances not only an explanation that he was not wilful in default but also gives a satisfactory explanation why the contempt order should be rescinded, notwithstanding the Respondent contention that good cause is absent to justify the rescission.

RESPONDENT:

18. The Respondent conceded that the application for condonation for the late filing of the application may be granted.

⁵ (2013/2016) [202] ZASCA160 (24 November 2017)

19. The Respondent is however adamant that the Contempt of Court Order was granted properly and correctly in terms of the Uniform Rules of Court.
20. It is Respondent's main issue that the Applicant must explain how the rescission will prejudice or not prejudice the other party, for the requirement of "good cause" to arise. Applicant takes the stance that because he can go to prison, he is prejudiced and not the Respondent. Applicant shifts the blame to Respondent, even though the Respondent is in possession of a valid Court order. Applicant does not deal with the Respondent's prejudice at all. Hence no "good cause" has been shown.
21. Further the Respondent contends that the Applicant has failed to adequately explain why he could not comply with the court order. Applicant alleges that he was only paid half of his salary but do not append any proof thereof in the founding affidavit.
22. Adv. Ploos von Amstel on behalf of the Respondent directed the court to an annexure which shows that the Applicant's monthly installment on his car is more than half of his indicated net salary. He argued that maintenance is preferential to other expenses the Applicant might have.
23. It was further contended by Respondent that the Applicant does not provide a list of income and expenditures in the Founding Affidavit therefore does not disclose his means to comply or not to comply with the Court order. In the Replying Affidavit the Applicant attempts to cure the defects in his application by appending the documents the Respondent had taken issue with, thereby not affording the

Respondent an opportunity to fully canvass the said documents in her opposing Affidavit.

24. Adv. von Amstel relies on the matter of **Swissborough Diamond Mines v Government of the RSA**⁶, where the court held that an Applicant must raise the issues upon which it seeks to rely in the founding affidavit. It must do so by defining the relevant issues and setting out the evidence upon which it relies to discharge the onus of proof on it in respect thereof.
25. It is not in dispute that the Applicant remains in arrears with maintenance and cost in the amount of R 67187.02
26. Respondent submits that it is the nub of the issue that the Applicant needs to make out a case for the relief sought. He did not fully canvass the issue of the Contempt Order that was granted in his absence.
27. The Respondent explained in her founding affidavit in the Application for Contempt of Court that since the Respondent has failed to make payments in term of Cost Orders granted against him, she had to go as far as issuing a Writ of execution in order to recover the arrear costs due to her. The writ however was not served due to the Respondent's absence at any of the attempts made by the Sheriff.⁷
28. The Respondent contends that there were no formal negotiations but for the request for the Applicant to pay the arrears in terms of the order. The Applicant

⁶ 1999(2) SA 279 On 323F-324E

⁷ Page 11 paginated papers par 9

misconstrued negotiations that took place in **August 2023** and relies on those negotiations in Reply to amplify purported settlement on **8th November 2023** to justify his failure to defend the matter.

29. The Applicant has consistently dragged his feet and prevented the matter being finalized since **January 2019**- it is indicated by the vast amount of Court Orders and correspondence between the parties' legal representatives. (which was not all referred to in the application) [my own insertion]

30. The Applicant fails to address the essential facts in this application. There is no proof of any letter or e- mail from the Applicant's attorney to indicate that the parties have negotiated payment and that they would therefore not attend the matter on the **9th of November 2023**.

31. Respondent points out that "good cause "means that the Applicant:

i) has a reasonable explanation for its default;

ii) that the application is *bona fide* and not with the intention to delay the Respondent's claim.

iii) and the third requirement in most of the cases is if the Applicant can show that it has a *bona fide*, *prima facie* defence to the Respondent's claim and that it has a *bona fide* intention to raise the defence if the application is granted.

32. In terms of the common law, a court is entitled to rescind a judgment obtained in default of appearance if good cause can be shown. What constitutes good cause is that the Applicant can explain that it has a reasonable and acceptable explanation for the default and that on the merits, it has a *bona fide* defence.
33. The Respondent communicated verbally to the Applicant after the order of Wright AJ, to enquire about the arrear payments. The Applicant however indicated via a voice note that he will not pay the extra amount as ordered and that he does not agree with the order.
34. This voice note was forwarded to the Applicant's attorney. He listened to it and the attorney's secretary also heard the conversation as recorded by the Respondent where the Applicant stated that he will not abide with the Court's order. Confirmatory affidavits in this regard were attached. This voice note is not available anymore. The Applicant took issue with the probative value of this voice note. Adv. Ploos von Amstel is however of the view that this voice message does not constitute hearsay evidence.
35. The Respondent points out that the Applicant is a Magistrate since 2015. One can only assume that he has, in civil matters made cost orders against parties. Further the court can consider the fact that the Applicant is an Officer of Court and is surely bound by an ethical code to adhere to the Constitution and to uphold justice at all cost. The Applicant in this matter is not your general litigant and ought to know better, as well as act better. Adv Nyembane took issue with this submission and argued that everybody is equal before the law.

36. The Respondent contends that she is not in a position to proceed with the Divorce action financially and this is completely due to the Applicant's willful failure to attend to his obligations in terms of the cost orders. Therefore, the divorce action cannot be finalised until the cost orders have been finalized.

THE LAW:

37. The requirements for contempt of court are now trite. They are the existence of a court order; the contemnor must have knowledge of the court order; there must be non-compliance with the court order; and, the non-compliance must have been wilful or *male fides*. Once the first three elements have been shown, wilfulness and *male fides* will be presumed and the evidentiary burden switches to the contemnor.⁸

38. Judicial Authority can be referred to as the power vested in judicial officers to preside over disputes and independently decide the outcome of such disputes without fear, favour or prejudice through the application of the law. There is a constitutional expectation that once courts have determined disputes, the orders they grant will not only be respected but will also be carried out. Obeying court orders not only demonstrate unwavering respect for the important role played by

⁸ Fakie NO v CCII Systems (Pty) Ltd [2006] ZASCA 52; 2006 (4) SA 326 (SCA); Phoko and Others v Ekurhuleni Metropolitan Municipality [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711

the judiciary but also the commitment to the rule of law. It is a crime to disobey court orders unlawfully and intentionally.⁹

HEARSAY:

39. Section 3(4) of the Hearsay Act¹⁰ defines hearsay as:

"Evidence whether oral or in writing, the probative value which depends upon the credibility of any person other than the person giving such evidence"

Case law dictates that hearsay should be evaluated by

" a holistic approach, assessing whether on the whole the statement was of adequate probative value in the light of the other circumstantial evidence taken together."¹¹

LEGAL PRINCIPLES GOVERNING RULE 42:

40. **Rule 42** states:

"Variation and Rescission of Orders:

1. The court may, in addition to any other powers it may have, *mero motu* or upon the
2. application of any party affected, rescind or vary:

⁹ Matjhabeng Local Municipality v Eskom Holdings Limited and others; Mkhonto and Others v Compensation Solution (Pty) Ltd 2017(11) BCLR 1408 (CC); 2018(1) SA 1 (CC) para 50.

¹⁰ Law of Evidence Amendment Act 45 of 1988.

¹¹ Kapa v S 2023(4) BCLR(CC) handed down on 24 January 2024 marked a groundbreaking departure from the approach and treatment of hearsay evidence that has so far been standard practice.

- a) An order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby.
 - b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission.
 - c) An order or judgment granted as the result of a mistake common to the parties.
- 2. Any party desiring any relief under this rule shall make application therefore upon notice to all parties whose interests may be affected by any variation sought.
 - 3. The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed."

41. The legal principles governing the rescission of judgment under rule 42 have long been settled by the courts. In terms of rule 42(1)(a), a judgment may be rescinded on the basis that it was erroneously sought or erroneously granted in the absence of any party thereby.

The legal principles are as follows:

- 1. The rule must be understood against its common law background.
- 2. The basic principle of common law is that once a judgment has been granted, the judge becomes *functus officio*, but subject to certain exceptions of which rule 42(1)(a) is one.

3. The rule caters for mistakes in the proceedings.
 4. The mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgement.
 5. A judgment cannot be said to have been granted erroneously in light of a subsequently disclosed defence which was not known or raised at the time of default judgment.
 6. The error may arise in the process of seeking the judgment on the part of the Applicant for default judgment or in the process of granting default judgment on the part of the court.
42. In the **Zuma** case *supra*, the court emphasized the requirements which Applicant is required to prove under to succeed with rescission under the common law. The Court held:

“The requirements for rescission of a default judgement are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for his default. Second, it must show that on the merits it has a *bona fide* defence which *prima facie* carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in a refusal of the request to rescind.”¹²

¹² At 7 *supra* para 71

43. It is trite that an Applicant who invokes this rule must show that the order sought to be rescinded was granted in his or her absence and it was erroneously granted or sought. Both grounds must be shown to exist.¹³ Once the Applicant meets these jurisdictional requirements the court has a discretion whether or not to rescind its own order.

Was the order erroneously sought and erroneously granted?

44. Generally, a judgment would have been erroneously granted if there existed at the time of its issue a fact of which the court was not aware of which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment.

45. The Supreme Court of Appeal held that Rule 42(1)(a) was essentially a restatement of the common law. The position of the courts in interpreting the Rules had been to vary and expand their application as little as possible. Rule 42(1)(a) was intended to provide for rescission of an order that had been erroneously sought or erroneously granted.

46. On whether the judgment was erroneously sought or granted, the Supreme Court of Appeal held that the rule properly applied, depended on the nature of the error and not whether the error appeared from the record of the proceedings. The error had to be one related to the proceedings themselves. [own emphasis]

¹³ Zuma case supra

47. An application for rescission on common law grounds must be brought within a reasonable period. For the Applicant to succeed with the application for rescission on common law grounds, the Applicant must show good cause or sufficient cause by giving a reasonable explanation for delay and showing that application for rescission was *bona fide* and showing a *bona fide* defence to the claim with a *prima facie* prospect of success.

48. The Appeal court dealt with the concept of "sufficient cause" or "good cause" stated that, "these concepts defy precise or comprehensive definition, for many and various factors require to be considered." The learned Judge stated that "it is clear that in principle the two essential elements of "sufficient cause" for rescission of a judgment by default are:

- (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
- (ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success. As it was held in **Chetty v Law Society, Transvaal**.¹⁴

CONCLUSION:

49. I conclude that the voice note to the Attorney is not hearsay.

¹⁴ 1985(2) SA 756(A) at 765 A-E

50.To establish whether the Applicant willfully and in bad faith failed to carry out the Court order, he must be judged holistically regarding his commitment to the maintenance order.

51. Applicant did not explain or give reasons why he did not make full payments. It is clear that on the Applicant's own version he did not comply with the court order.

52.Applicant persists that the mere fact that he made partial payments suffice and therefor the Respondent was not entitled to seek a Contempt of Court order against him.

53.He relied on the case of **FAKIE NO v SYSTEMS CCIII(Pty) Ltd**¹⁵ which facts are different than the matter *in casu*.

54.What is however relevant in the **Fakie** case supra is that

"...once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to willfulness and *mala fides*: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was willful and *mala fide*, contempt will have been established beyond reasonable doubt."¹⁶

¹⁵ 2006(4) SA 326 (SCA)(CC) para 8.

¹⁶ At paragraph 42

55. Whether the failure to meet his financial obligations to the Respondent was intentional, or as a result of the deterioration of his financial circumstances must be considered holistically. In the absence of proof of his financial position I can only come to the conclusion that the Applicant's conduct was *male fide* and wilful beyond a reasonable doubt.

56. This leads me to the *bona fides* of the application. It should be apparent from the sequence of the events that the Applicant was dragging his feet. As a Magistrate and an officer of court he should know the law.

57. All South Africans have a duty to respect and abide by the law. More so officers of court. [My own emphasis.] As the Constitutional Court stated in the **Zuma and Others supra**, courts 'unlike other arms of the State . . . rely solely on the trust and confidence of the people to carry out their constitutionally mandated function'¹⁷ which is to uphold, protect and apply the law without fear or favour.¹⁸ Disregard of court orders is an attack on the very fabric of the rule of law.

58. Despite being a Magistrate and presiding over criminal and civil law in the Magistrates Court, the Applicant had an attorney throughout. It can safely be assumed that the Applicant was not oblivious to the consequences of failing to

¹⁷ Ibid para1

¹⁸ S v Mamabolo [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) para 17.

comply with a court order. There has been a total disregard for the order to pay the Respondent since 2021. I am satisfied that the Applicant has not shown good cause for the rescission of the judgment.

Costs for 18 APRIL 2024:

59. Applicant rely on the fact that his counsel was not available that day. It was proffered only in his Heads of Argument that his attorney was writing Notary exams

60. Respondent invited the Applicant to file a substantive application for postponement so that instructions can be taken in this regard. Despite this request no such application was lodged.

61. The order which was granted is not ambiguous. If a Court does not pertinently mention the party to pay- it follows that the party seeking the indulgence pays the wasted costs on a party and party scale.

62. Unavailability of counsel is not a *bona fide* reason to seek postponement.¹⁹

COSTS:

63. The general rule is that costs should follow the event and this rule should be departed from only when there are good grounds to do so.

¹⁹ Moloi v Medi Clinic (Pty) Limited(A38/2014[204] ZAFSHC153

64. The general rule, viz that costs follow the event is subject to the overriding principle that the court has a judicial discretion in awarding costs.²⁰

65. An opportunity to rectify any inequity may reflect in the court's award of costs.²¹

66. In the matter of **W v H**²² the judge granted a punitive cost order on an attorney and client scale against the defendant and the following remarks in the judgment are relevant:

"189 As indicated in my judgment I am quite satisfied that the husband was adopting a "scorched earth" policy to this litigation. he was deliberately seeking to delay the proceedings and from the very beginning was engaging in a dilatory tactics to drum up the costs of the action so as to put the wife in a position where she could not afford to defend herself...

203. Throughout the matter the husband engaged in selective and piecemeal discovery."

ORDER:

67. The following order is made:

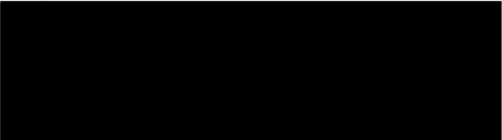
- i) The Applicant is ordered to pay the costs of the postponement occasioned on the 18 April 2024 on a party and party scale.

²⁰ Jonker v Schultz 2002 (2) SA 360.

²¹ Gore and another NNO v The Master 2992(2) SA 283 (E)

²² (25394/2010[2016] ZAWCH 97; [2016] 4 ALL SA 260 WCC; 2017 (1) SA 196(WCC)(5 Aug 2016)

- ii) The application for rescission is dismissed
- iii) The Applicant is ordered to pay the costs of this application on an attorney and client scale.
- iv) The cost of counsel to be taxed on "Scale B" of the Uniform Rules.
- v) The Registrar of this court is ordered to submit a copy of this judgment to the Magistrate's Commission.


A/S BOONZAAIER, AJ

ON BEHALF OF APPLICANT: ADV S NYEMBANE
INSTRUCTED BY: THEBE ATTORNEYS
SUITE 18, KELLNER PARK
65 KELLNER STREET
BLOEMFONTEIN

ON BEHALF OF RESPONDENT: ADV PC PLOOS VON AMSTEL
INSTRUCTED BY: MC INTYRE & VD POST ATORNEYS
12 BARNES STREET
BLOEMFONTEIN