

CORAM: TSOKA; RAULINGA JJ & BRESLER AJ:

INTRODUCTION

- [1] The applicant, Tsundzuka Kevin Maluleke (Mr Maluleke), launched an application for recession of an order authorizing his removal from the roll of practicing advocates in terms of section 7 of the Admission of Advocates Act 74 of 1964, which Act has since been repealed by the Legal Practice Act 28 of 2014.
- [2] The application is in terms of Rule 42(1)(a)(b) and (c) of the Uniform Rules of Court. As Mr Maluleke readily conceded that there is no patent error in the order sought to be rescinded and the order against his striking off the roll of practicing Advocates was not granted by mistake common to the parties, the application is solely premised in terms of subrule (c), that is to say the order granted against him was erroneously sought or granted by the court. Thus, the application is in terms of Rule 42(1)(c) of the Uniform Rules of Court.
- [3] It is common cause that the order sought to be rescinded, was granted in his absence as he had not filed an answering affidavit to the founding affidavit filed by the Polokwane Society of Advocates. This order sought to be rescinded was granted on the 17 January 2023 by Ranchod and Mashile JJ.

PARTIES

- [4] Mr Maluleke is an adult male person of full legal capacity residing at Unit no.[...] J[...], B[...] Street, Northview Estate, Bendor, Polokwane, Limpopo Province.
- [5] The Respondents is the Polokwane Society of Advocates, a legal entity created in terms of the Legal Practice Act 28 of 2014 to look after the affairs and interests of all Advocates enrolled and entitled to practise in terms of the Act.

BACKGROUND OF RELEVANT FACTS

- [6] On or about 17 October 2017, the Limpopo Society of Advocates issued an application in the Limpopo Division of the High Court, Polokwane under case number: 7113/2017, to have Mr Maluleke's name struck off the roll of practising advocates. Mr Maluleke filed a Notice of intention to oppose and thus the matter became an opposed application.
- [7] A myriad of interlocutory applications between the parties then followed. However, Mr Maluleke did not file an answering affidavit to the founding affidavit of the Polokwane Society of Advocates. To date, no answering affidavit has been filed. And thus, Mr Maluleke is in default.
- [8] In striking him off the roll of advocates, the court, amongst others, considered the fact that Mr Maluleke concealed to the court that admitted him as an advocate that he had previously been charged and convicted of theft of monies belonging to his employer while serving articles of clerkship and was also charged and convicted of intimidation against the witness that intended to testify against him. These previous charges and convictions, to date, have not been disputed by Mr Maluleke. Neither has he challenged the Polokwane Society of Advocates to have brought the application against him as they did.

ISSUES

- [9] The sole issue to be determined by this court is whether the orders granted on 17 January 2023 are in terms of Rule 42(1) (c). erroneously granted.

MR MALULEKE'S SUBMISSION

- [10] Mr Maluleke contends that the order striking him off the Roll of Advocates was erroneously sought and granted. He also contends that there are facts, which if the Judges who granted the order on 17 January 2023 had been aware of, would not have granted the order sought by the Polokwane Society of

Advocates. His authority in this regard is the matter of *Nyingwa v Moolman 1993 (2) SA 508 (TK) at 510F-G*.

[11] He further complains that the Polokwane Society of Advocates concealed from the court, the fact that the Pretoria Society of Advocates brought a similar application against him in the Gauteng Division of the High Court, Pretoria, which application to have him struck off the roll of advocates was refused as the court had no jurisdiction and the matter was referred to the Local Division of the High Court Thohoyandou, the court that has jurisdiction. The application has not been proceeded with.

[12] According to Mr Maluleke, had the above facts been brought to the attention of the court on the 17 January 2023, the order to strike him off the roll of advocates would not have been granted.

[13] The contentions and submissions of Mr Maluleke have no merits. There is no causal link between the application brought in Pretoria High Court by a different entity and the present application brought by Polokwane Society of Advocates, which is a different entity to the party that litigated in Pretoria. In any event, there is no error in the granting of the order of 17 January 2023. The order granted on that day was not erroneously sought. Neither was it erroneously granted.

POLOKWANE SOCIETY OF ADVOCATE'S SUBMISSIONS

[14] Polokwane Society of Advocates raised a preliminary point of *lis pendens* in that this court cannot entertain the application for rescission, as there is a pending appeal in this matter.

[15] The basis of the preliminary point is that Mr Maluleke not only launched an appeal against the order of 17 January 2023, which appeal to date is still pending but simultaneously launched this application for rescission.

[16] As pointed out during argument, the preliminary point is dead in the water. It has no merit. There is no bar that the two distinct remedies may be sought simultaneously. In **Thivhase Royal Council and Another v Tshivhase and another; Tshivhase and Another v Tshivhase and Another 1992 (4) SA 852 (A)** at page 865 the Supreme Court of Appeal reasoned thus:

“..In principle , I can see no reason why Kennedy and Ligege were not entitled to pursue this quite separate and independent remedy, irrespective of the pending first appeal. Rule 42(1)(c) does not (Unlike s 36(c) of Act 32 of 1944) require that no appeal should be pending. Nor, as counsel suggested, were the applicants put to an election between pursuing the appeal and of applying for rescission. They could do both”.

[17] In the result, the point *in limine* is dismissed.

COMPLIANCE WITH THE REQUIREMENTS OF RULE 42(1) (C)

[18] That Mr Maluleke has failed to file an answering affidavit despite the elapse of a long period, is common cause. To date, in spite of his appearance in court and arguing the application, no answering affidavit has been filed.

[19] As his authority to challenge the court order of 17 January 2023, he heavily relies on the decision of Mathopo JA in the matter of **Crockery Gladstone Farm v Rainbow Farms (Pty) Ltd (592/18) [2019] ZACA 61 (20 May 2019)** that the application is erroneously sought or granted.

[20] Reliance on the authority of Crockery Gladstone is misplaced. In that matter, the parties had engaged in settlement negotiations and instructions from the applicant were still awaited when a default judgement was sought and granted. That the order sought in that matter was erroneously sought and granted, is more than clear.

[21] In the present matter, the parties were not involved in the settlement negotiations. No agreement was reached for Mr Maluleke not to file an answering affidavit. That Mr Maluleke was in default of filing an answering affidavit, admits no doubt.

[22] His further submission that his constitutional rights of fair hearing were infringed, as the court did not grant him an opportunity to be heard, is without merit. In terms of the rules of court, once a party has filed an intention to oppose, he is expected within 15 days thereof to file an answering affidavit.

[23] In the present matter, despite the launching of a myriad of applications, Mr Maluleke consciously elected not to file an answering affidavit. Even though he appeared in court on 17 January 2023 and argued the application himself, he still did not file an answering affidavit. In these circumstances, it is not far-fetched to surmise that he failed to file an answering affidavit, as the Polokwane Society of Advocates case was unanswerable.

[24] The conclusion reached is that the application is not erroneously sought or granted. In the result, the application is dismissed with costs.

Tsoka J
Judge of the High Court

I agree

Raulinga J
Judge of the High Court

I agree

Bresler A.J
Acting Judge of High Court

APPEARANCES

For Applicant: Adv T.K Maluleke (in person)

Instructed by: Ntsako Phyllis Mbhiza Attorneys

For the Respondent: Mr J.F Moolman

Instructed by: Pratt Luyt & De Lange Attorneys