

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE No: 6904/2020

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED: YES/NO

MG PHATUDI J



SIGNATURE

08/03/2024

DATE

In the matter between:

SINA CHABA

1ST APPLICANT

KGOSHI M R L MATLALA

2ND APPLICANT

and

GA – SEEMA COMMUNITY

1ST RESPONDENT

MAFIWA CUTHBERT SEEMA

2ND RESPONDENT

In Re:

GA – SEEMA COMMUNITY

1ST APPLICANT

MAFIWA CUTHBERT SEEMA

2ND APPLICANT

and

SINA CHABA

1ST RESPONDENT

KGOSHI M R L MATLALA

2ND RESPONDENT

CORAM

:

M.G. PHATUDI J

HEARD

:

24 NOVEMBER 2023

DELIVERED

:

This judgment was circulated electronically to the parties' legal representatives by email and released to SAFLII. The date and time for delivery of this judgment is deemed to be **08 March 2024 at 10:00AM.**

SUMMARY

: Urgency – re-instatement of fatally defective application not supported by an affidavit contrary to rule 6(1), Uniform Rules of Court – Rule 41(1) (a) creates mechanism for withdrawal of ‘any proceedings’ at any time before set down of matter – issue in *casu* whether a litigant may reinstate by notice of otherwise withdrawn proceedings not tainted by defects – such proceedings capable of reinstatement subject to the provisions rule 41(1) (a) and provided that there was no set down.

Held, in *casu*, reinstatement application structurally defective not capable of revival – furthermore, even not so, application lacks urgency and had to be struck off the roll with costs.

JUDGMENT

M.G. PHATUDI J:

A. BACKGROUND:

[1] This application, brought by the First and Second Respondent (the applicants) is one of a rescission of the judgment and/or order of Naudé AJ (as she then was) issued in this court on 16 February 2021. The said application is brought pursuant to the provisions of Rule 42(1) (a), of the Uniform Rules of Court (the rules) alternatively, the common law. The applicants also sought condonation for the late filing of the application, and if successful, they be granted leave to deliver opposing papers in the main application (interdict) in respect of which the order impugned was obtained by default.

The application is opposed by the Second Respondent, **Ms. Mochadi Khomosto Seema** (Seema) the successor – in – title in the litigation of her

deceased's father, **Mafiwa Cuthbert Seema** (the deceased) in the present proceedings. A notice of substitution of the parties was duly filed of record on 07 December 2022.

B. THE FACTS

- [2] The First and Second Respondents (the respondents) in the rescission application, obtained a default order against the Applicants herein on 16 February 2021 in terms of which Naudé AJ issued a prohibitory interdict and also a declaratory order against the latter, the First Applicant, Sina Chaba, (Chaba) from exercising what she claimed were powers conferred upon her as Headwoman and a traditional leader of Ga – Seema traditional community, an area which comprise of the Farms Goedevonden and Schoongelezen within Ga – Matlala.
- [3] Aggrieved with the default order granted against them the Applicants brought the present rescission application in terms of Rule 42(1) (a) of the rules, albeit late. This application was issued by the registrar on 23 November 2022 and served on the Respondents of even date. The Applicants are now faced with the hurdle to cross, namely, condonation for the delay in bringing their rescission application.

C. CONDONATION:

- [4] In an attempt to cross that hurdle and to gain audience in this court, the applicants placed considerable reliance on the order of Naudé AJ made on

18 October 2022 to bring the present application within 15 court days. This the Applicants did not do. Explaining their delay, they alleged to have been financially constrained by lack of fees to pay their attorneys of record, which could only be raised on 20 November 2022, whereafter counsel was appointed to prepare the application, in which event, the *dies* would have expired on 09 November 2022. The application, therefore, was 2 weeks out of time.

It was submitted on behalf of the Applicants that the 2 weeks period of lateness was not “too excessive”, so argued Adv. Mathabatha.

Counsel for the Respondents, Adv. Maake, argued from the bar that the 2 weeks delay was according to him quite unreasonable. He contended that the explanation was not “satisfactory”. This is not good enough.

- [5] In **Darries v Sheriff, Magistrate’s Court, Wynberg & Another 1998 (3) SA 34 (SCA)** at 401, the court not only considered as to when and how a litigant seeking condonation must go about. That court also emphasized that “in applications of this sort, the appellant’s prospect of success are, in general, important though not decisive consideration...”

I venture to suggest that the Applicants’ prospects of success is, but one of the key considerations material to the exercise of the court’s discretion, bar where the cumulative effect of other relevant factors in the case is such as to render the indulgence patently not worthy of salt.

In the instant case this court's discretion can only be fettered where flagrant breaches of the rules especially where there is no acceptable explanation, in which event, condonation may be refused.

See, **Tshivhase Royal Council v Tshivhase & Another 1992 (4) SA 852 (A)** at 859.

There is further dimension in modern jurisprudence to the principles espoused above, namely, the interests of justice. Therefore, lateness, is not the only decisive factor in deciding whether to lend condonation

See also, **Bertie van Zyl (Pty) Ltd & Another v Minister for Safety and Security 2010 (2) SA 181 (CC)**.

As the interest of justice test is one of the crucial requirements for condonation and, of course, granting leave to appeal, there is an overlap between these inquiries.

In the instant case. I am firm, in my view, that a proper case has been framed to grant condonation for late filing of the rescission application.

D. THE ISSUE:

- [5] At issue in this instance is whether or not the Applicants have met the threshold laid down in Rule 42 (1) (a) of the rules or the common law requirements.

The answer to this question resorts in the provisions of the rule itself which states in part that: -

“

RULE 42

VARIATION AND RECISSION OF ORDERS

(1) *The court may, in addition to any other 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;*¹

(b)

(c)

”

E. THE LEGAL MATRIX:

[6] The proper approach in a rescission application based on Rule 42 (1) (a), in particular, is that a High Court's inherent jurisdiction does not extend to its right to disturb the recognized principle of finality specifically provided for in the rules or at common law. This rule generally, finds no application to interlocutory orders.²

Furthermore, a judgment or order of the High Court could be set aside under Section 23A of the Superior Courts Act, 2013³, or Rule 42 and Rule 31 (2) (b) of the rules.

[7] This court, may in its discretion and, in addition to any other powers it may have, exercise power referred to under the common law and Rule 31 (2)(b) of the rules to rescind or vary an order granted by default. At

¹ The cause of application for a rescission is principally predicated on subrule 42(1)(a) only, and the subsidiary common law principles.

² South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 550 H.

³ Act 10 of 2013, as amended.

common law a judgment can, therefore, be set aside on *inter alia*, the following grounds (1) fraud, (2) *iustus* error, (3) default judgment in the absence of the party affected with no agreement existing to abide the judgment on the basis of *justa causa*, and (4) in exceptional circumstances when new evidential material or documents have been discovered or found to use in support of the rescission application.⁴

- [8] Reference to the word 'may' in Rule 42 (1) (a) imports situations in terms of which the court will consider a rescission or variation of the default judgment or order, either own its own accord or upon application by the affected party. In the present case, once the Applicants have satisfied one of the grounds required by the subrule that the judgment was erroneously sought and erroneously granted in their absence, the rescission of the judgment ought to be granted.⁵

F. DID APPLICANT DEMONSTRATE ERROR IN THE ORDER?

- [9] This enquiry encompasses, among other things, whether or not the Applicants have shown that:

- (a) the default order was in terms of Rule 42 (1) (a) erroneously sought and erroneously granted in their absence, and accordingly has to be "corrected expeditiously" as obviously wrong judgment or order, and

⁴ Childerley Estate Stores v Standard Bank of SA Ltd 1924 OPD 163

⁵ Mutebwa v Mutebwa 2001 (2) SA (TK) at 1991J

- (b) If one or more of the jurisdictional factors referred to in paragraphs (a) – (c) of the subrule is present, the court enjoys a judicial discretion to come to a litigant's rescue.

[10] Turning to the facts in the instant case, it is common cause or at least not in dispute that the order granted by Naudé AJ on 16 February 2001, was obtained in the absence of the present Applicants.

The Applicants contended that at the hearing of the interdict and declaratory order before the learned Acting Judge, the Respondents *in casu* did not disclose certain material facts which even if adverse to their case, should have been brought to the attention of the court. These facts are, among others, that: -

10.1. Ga – Seema village is a community located within the jurisdiction of Bakone – Ba – Matlala Traditional Authority;

10.2. That, the Goedgevonden village forms part and parcel of Ga – Seema;

10.3. That, the deceased (Cuthberth) was a Headman of Goedgevonden, and therefore, Chaba could not have had authority to allocate stands in that territory, and so was the Second Applicant (MRL Matlala).

[11] In support of the material non – disclosures which should have been brought to the court's attention, the Applicants relied on a letter issued by Bakone – Ba – Matlala's THABA Traditional Council (BBMTTC) dated 17 November

2022,⁶ in terms of which Chaba has been appointed as headwoman (Ntonagadi) of Goedgevonden, while the deceased (Cuthbert) was appointed Headman (Ntona) of Schoongelezen both wards fall within the jurisdiction of BBMTTC. The aforesaid appointments are confirmed by the Second Applicant in her confirmatory affidavit attached to the founding affidavit.

- [12] Additionally, Chaba attached to her papers a copy of her appointment letter as Acting Headwoman of Goedgevonden under the said traditional council⁷. Her recognition as such by the Premier of Limpopo was effective from 07 March 2018. On a reading of this letter, it was the Premier through COGHSTA that recognized Chaba in 2018 as Headwoman Goedgevonden Ga – Matlatla. This decision, a purely administrative action in nature, remains valid, until set aside by a court with competent jurisdiction⁸.
- [13] In sum, the Applicants' contention was that had the court been alerted to these facts as alleged, the order would and should not have been granted in the first place. The said adverse order is therefore liable to be upset by a rescission order. I agree with these submissions.

⁶ Paginated Index p25, Annexure 'RSC7'.

⁷ Ibid. p 16, Annexure 'RSC2', issued by COGHSTA, Limpopo Province.

⁸ Oude Kraal Estates (Pty) Ltd V City of Cape Town 2004 (6) SA 222 (SCA) at 242.

[14] The Respondents in their Answering affidavit contended that the rescission application “lacks prospects of success” and should, therefore, be dismissed.

[15] This assertion appears to be reliant on a copy of the Order of Potteril AJ (as she then was) issued in the then Transvaal Provincial Division, Pretoria (TPD) on 28 August 2008.⁹

I must accept that this court did not have the benefit to have sight into the issues in that matter, and how the learned Acting Judge arrived to the order she made. What remains crystal, however, is that COGHSTA, the First Respondent in the matter, is not a party to the present proceedings, either.

[16] My interpretation of the order in the paragraph which is declaratory in nature, is that “the village Ga – Seema encompasses sub – villages Goedgevonden and Schoongeleegen”. And, that M.C. Seema (the deceased) is the sole Headman of Ga – Seema, by virtue of inheritance.

[17] Crucially, however, pursuant to further development in the socio – political landscape of the area, I find as evinced in Annexures ‘RSC¹⁰’ that the Second Applicant who on 02 December 1992 was appointed Acting Kgoshigadi of BBMTTC by the outgone Lebowa Government, had

⁹ Ibid. p 50, Annexure ‘MKS²’.

¹⁰ Ibid p 18, Certificate of appointment of Second Applicant. Ms. Rosetta Matlala.

appointed Chaba on 17 November 2022 as Headwoman of Goedgevonden under her jurisdiction, and so was the deceased as Headman of Schoongelezen. Her actions were a sequel to COGHSTA's recognition of Chaba as Acting Headwoman in respect of the same village. Although never overturned by any order of competent jurisdiction, I find that Potteril AJ's order is, with respect, overtaken by prevailing circumstances and, therefore, became superfluous and, in any event, of no further practical effect to the parties. Furthermore, properly interpreted, paragraph 2 thereof, cannot be construed to extend to **Mochadi Khomotso Seema** who substituted the deceased as an heir to her father's position as a Headman over the said area, unless and until she is duly recognized in law as such by the Premier. This has so far not been done. The submission by Adv. Maake on behalf of the Respondents that the "Second Respondent", duly substituted, is the "headman" for the area is, with great respect, simply untenable.

- [18] The Respondents in their answering affidavit ("AA") did not deny the allegations in paragraph 2 to 9 of the Applicants' founding affidavit, ('FA') except for the truthfulness and noting thereof, without placing a destructive version against them. I may point out that in fact the bulk of the "AA" contains bare denials and "noting" the allegations in the "FA", which is of no assistance to the Respondents in resisting the rescission application.

G. CONCLUSION:

19.1. The view I take of the matter, as already indicated is that the period for the slight delay in seeking the rescission of judgment was not inordinate. Even if it might be so, the explanation offered is reasonable, which in turn appeals to the interests of justice to lean in favour of the granting of the application, particularly, that there are reasonable prospects of success in the main application.

19.2. The foregoing observation is reinforced, by what this court stated in the **ROAD AGENCY LIMPOPO SOS LTD V TSHEPAGA ENGINEERS (PTY) LTD**¹¹ para [25] that: -

“Having found that the order was erroneously sought and granted, this court is at large, without more, to rescind and set it aside. This is supported by the recognized principle that where an order or judgment was erroneously obtained due to non – disclosure of certain material facts, at the time it was given, it is unnecessary for defaulting party to show ‘good cause’ for the default under the subrule.”

See also, **Naidoo v Matlala N.O & Others 2012 (1) SA 143 (GNP) at 153C.**

19.3. In light of all the aforesaid considerations the rescission application should succeed with costs.

¹¹ Case No: 981/2016 (24.12.2020) “Unreported”

H COSTS:

[20] Legal costs in the majority of cases follow the event. The awarding of costs to the successful party resides in the Court's discretion, which in this case, the Applicants are entitled to costs. I, in the circumstances, make an order as follows: -

J ORDER:

1. That, the default order granted against the Applicants on 16 February 2021 (Case № 6904/2020, before Naudè AJ) is rescinded and set aside.
2. That, condonation is granted for the late filing of the rescission application.
3. That, the Applicants (in the rescission application) are granted leave to file opposing affidavit/s in the main application within 20 court days after the granting of this order;
4. Further that, the First and Second Respondents are ordered to jointly and severally pay the costs of the application.


M. G. PHATUDI J
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the Applicants : Adv. C Mathabatha

Instructed by : Mathabatha Martin Lekoloane
Polokwane

Counsel for the Respondent : Adv. E.S Maake

Instructed by : Israel Maenetja Attorneys
Polokwane
c/o De Bruin Oberholzer Attorneys

Date of the hearing : **24 November 2023**

Date of delivery of Judgment : **08 March 2024**