

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)**

CASE NO: 60/2021

(1) REPORTABLE:NO

(2) OF INTEREST TO OTHER JUDGES:YES

(3) REVISED: YES

DATE: 19/03/2024

SIGNATURE

In the matter between:

SONKE MATSANE

Applicant

and

VUSIMUZI RIBA

Respondent

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 19 March 2024 at 10:00.

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] On 26 January 2021, this Court granted judgment in favour of the Respondent (“Riba”). It is this judgment which the Applicant (“Matsane”) now seeks to rescind on the ground that the order was erroneously sought and erroneously granted, as contemplated in Uniform Rule of Court 42(1)(a). The application is opposed firstly, on the basis that Matsane deliberately chose not to oppose the urgent application duly served on his attorneys of record on 14 January 2021. Secondly, while aware of the date of 26 January 2021, the date of hearing of the urgent application, Matsane chose not to attend Court. Thirdly, Matsane completely fails to account for the inordinate delay that it took him to launch this application.

FACTUAL MATRIX

[2] This matter traces its roots to 5 January 2021 when Riba, through his attorneys, wrote to Matsane demanding that he ceased erecting structures on his land. Riba also threatened that should Matsane fail to commit to an immediate undertaking to stop the construction of the buildings, he would launch an urgent application aimed at forcing him to refrain building. On 8 January 2021, Matsane’s attorneys acknowledged receipt of Riba’s letter of demand. They advised that they were still to consult with Matsane. On 11 January 2021, the attorneys of the parties met at the offices of the attorneys of Matsane.

[3] Following the meeting and on an unknown date, Riba’s attorneys obtained diagrams of the Surveyor General and other documents from the Deeds Registries Office in Mbombela. The attorneys then forwarded the documents to Matsane’s attorneys as proof of their client’s ownership of the property. In the e-mail message that accompanied the diagrams, Riba’s attorneys again demanded Matsane to undertake to desist from erecting the structures on Riba’s property by not later than 12 January 2021. Riba alleges that Matsane refused to provide the undertaking. That said, it seems to be common cause on the papers that Matsane has to date not refuted the allegation that he was erecting structures on land that did not belong to him.

[4] On 14 January 2021 and noting that no undertaking was forthcoming, Riba launched the urgent application. The urgent application was scheduled to be heard on 26 January 2021. Riba alleges that following a threatening phone call that he received from Matsane on 17 January 2021, he filed a supplementary affidavit notifying the Court of the threat. On 22 January 2021, again alleges Riba, he attempted service upon the attorneys of Matsane. They refused to accept delivery of the papers but later, on the same day, served their notice of withdrawal as attorneys of record of Matsane.

[5] Immediately upon receipt of the notice of withdrawal as attorneys of record, Riba's attorneys forwarded it, together with the supplementary affidavit, to the WhatsApp number of Matsane as he no longer had any attorney on record representing him. The application remained unopposed until it was heard on 26 January 2021. On that date, this Court granted the order sought. It is not disputed that on 17 February 2021, Matsane and his current attorney of record attended upon the offices of Riba's attorneys to collect the Court order. Additionally, it is also common cause that on 2 February 2022, the sheriff, per arrangement with Matsane, served the Court order upon him at Galito's.

ISSUES

[6] The issues for determination are straightforward and they concern whether or not the jurisdictional factors in Rule 42(1) have been satisfied. These are firstly, whether the judgment sought to be rescinded was granted in the absence of Matsane and secondly, whether the order was erroneously sought and erroneously granted.

ASSERTIONS

[7] Matsane argues that knowledge of the order obtained against him on 26 January 2021 reached him for the first time in March 2022. The application was served on his then attorneys who did not notify him of its existence. In any event, his erstwhile attorneys withdrew without advising him of the application. Moreover, says Matsane, it

would appear that the notice of withdrawal as attorneys of record did not even contain his last known address as required by the Rules of Court. As such, he could not have been at the hearing on 26 January 2021 nor could he have approached this Court earlier than he did.

[8] Insofar as the requirement that the order must have been erroneously sought and erroneously obtained, Matsane contends that the Court had thought that he was aware of the hearing of the 26th of January 2021 when in fact, the converse pertained. The Court would not have granted the order had it known this. It was also erroneously sought and erroneously granted because the date of 26 January 2021 was meant for the hearing of Part A alone but what transpired on the day was that the Court simultaneously heard Parts 'A' and 'B' when it should have left the latter for later determination. In the circumstances, concludes Matsane, his right to *audi alteram partem* as contemplated in Section 34 of the Constitution of South Africa was contravened.

[9] Riba, on the other hand, contended that "*granted in the absence of any party affected thereby*" in Rule 42(1) has now come to mean to protect parties who had been precluded from attending the proceedings. It will not avail a party who has been afforded opportunity to be present at the proceedings but chooses to stay away. In this regard the Court was referred to the case of *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State*¹.

[10] Riba asserts further that as the owner of the property, he was procedurally entitled to the order granted on 26 January 2021. This ought to be correct, says Riba, especially in circumstances where his lawful ownership of the property and the illegal erection of structures on that land by Matsane is not refuted. Riba concludes that the application is an attempt to abuse justice processes for ulterior purposes. Additionally, he says, if the order were to be rescinded, as Matsane seeks, there will be no prospects

¹ 2021 (11) BCLR 1263 (CC)

of success because he has already accepted that Riba is the lawful owner of the property and, necessarily that Riba can defend his right of ownership.

LEGAL FRAMEWORK

[11] Rule 42(1)(a) upon which Matsane relies for this rescission application provides that 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 an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

[12] Concerned with the interpretation of Rule 42(1)(a) as described above, the Constitutional Court in the Zuma *supra* held, in addition to what I have already outlined in Paragraph 9 *supra* that the sub-rule provided for two separate requirements (although one could give rise to the other in certain circumstances): (a) a party had to be absent, and (b) an error had to be committed by the Court. Having said that, the Court proceeded to state the following:

"[60] . . . As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed. I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, ipso facto (by that same act), plead the "absent victim". If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing absentia (absence).

[61] The cases I have detailed above are markedly distinct from that which is before us. We are not dealing with a litigant who was excluded from proceedings, or one who was not afforded a genuine opportunity to participate on account of the

proceedings being marred by procedural irregularities. Mr Zuma was given notice of the contempt of court proceedings launched by the Commission against him. He knew of the relief the Commission sought. And he ought to have known that that relief was well within the bounds of what this Court was competent to grant if the crime of contempt of Court was established. Mr Zuma, having the requisite notice and knowledge, elected not to participate. Our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a). And, it certainly cannot have the effect of turning the order granted in absentia, into one erroneously granted."

[13] Unlike an application for rescission brought in terms of Rule 31(5)b), Rule 42(1) does not prescribe time limits within which it must be launched. However, this does not mean that a party can approach the Court at any time especially in those instances where the delay is unconscionable without a valid account. It is trite that for Matsane to succeed with this application for rescission he would have had to demonstrate the following:

13.1 A full and reasonable explanation for the failure to have brought the rescission application within a reasonable time;

13.2 Prejudice if the rescission is refused and absence of prejudice as far as the Respondent is concerned;

13.3 Prospects of success in the main proceedings; and

13.4 The interests of justice must favour the granting of condonation.

[14] It is trite that these must be met conjunctively. Showing therefore that one or two of them has or have been satisfied will not be adequate. Theoretically, Matsane's failure to comply with any one of the above requirements should be sufficient to dismiss the

application. As will be seen below, Matsane does not live up to any of the four prerequisites mentioned above.

EVALUATION

[15] Matsane acknowledges that although the judgment was granted against him as far back as 26 January 2021, he only acquired knowledge of it in March 2022 hence he brought this application in June 2022. He asserts that had he been properly notified that he was required to appear in Court on 26 January 2021, he would have done so and, by implication, would have made certain that the judgment was not granted and besides, only in that manner, his *audi alteram partem* right enshrined in Section 34 of the Constitution would have been observed.

[16] In terms of the *Plascon - Evans* Rule, this matter is to be decided on the facts as laid out by Riba because they have not been rebutted by Matsane. The rule provides that a party that seeks final relief on motion must, where there exists a conflict, accept the version advanced by his opponent unless such version is, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers (see paragraph 12 of Wightman²). As a result the Court must accept the following:

16.1 The idea of an urgent application against Matsane was first foreshadowed in the letter of 5 January 2021;

16.2 On 14 January 2021, Riba issued and served the urgent application on the erstwhile attorneys of Matsane;

16.3 On 22 January 2021 Riba forwarded his supplementary affidavit together with a notice of withdrawal as attorneys of record of the attorneys of Matsane to Matsane.

² Wightman v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA)

[17] The above is an illustration that Matsane knew or ought to have known through his attorneys that there was an impending hearing of the urgent application on 26 January 2021. To the extent that Matsane could be suggesting that he did not personally receive notification of the hearing of the application, it was sufficient that the application was served on his erstwhile attorneys. The failure of Matsane's attorneys to notify him of the date of hearing of the application cannot prejudice Riba. That is a matter to be resolved between Matsane and his attorneys. In any event, Matsane has not disputed that the application together with the supplementary affidavit of Riba were forwarded to him via WhatsApp.

[18] Given the above exposition of the facts, it is inescapable to conclude that like in the Zuma matter *supra*, Matsane, was not precluded from attending the proceedings but he chose to stay away knowledge of the impending hearing of the application aside. It follows that when the Court granted the order on 26 January 2021 was not under any mistaken belief that Matsane did not receive notice. In these circumstances, Rule 42(1)(a) is not available to Matsane as he was duly notified. The assertion that he did not know about the hearing of the application is rejected as being false and contrived.

UNREASONABLE DELAY IN LAUNCHING THE APPLICATION

[19] Matsane seems not to appreciate that Rule 42(1)(a), on which he relies for this rescission, requires him to give a full account for his delay in bringing the application. The delay in launching the rescission application extends over a period of approximately 500 days being between 17 February 2021, when he and his attorney collected the order from the offices of the attorneys of Riba, to June 2022 or approximately 100 days on Matsane's version that he only received knowledge of the order in March 2022. The founding affidavit is silent on why the application was not launched despite Matsane's knowledge in either period. In the result, this requirement is not satisfied.

PROSPECTS OF SUCCESS

[20] There is no attempt by Matsane to show the existence of prospects of success in the main case were this Court to rescind and set aside its order of 26 January 2021. Perhaps this does not come as a surprise as Matsane has already admitted that the property belongs to Riba and, by necessary implication, that the structures that he had erected or was erecting were on Riba's property. Accordingly, if Riba possesses proof of ownership in the form of a title deed, a real right that prevails against the whole world, what possible excuse could Matsane have to build on Riba's property? The answer must be, none. Setting aside and rescinding the judgment will be an act in futility.

PREJUDICE IF THE RESCISSION IS REFUSED AND ABSENCE OF PREJUDICE ON RIBA IF IT IS GRANTED

[21] On the admitted facts of this matter, Matsane cannot suffer any prejudice because the property on which he erected the structures is not his. In any event, it has not been alleged by him that the building of the structures on the property emanated from an agreement with the owner, Riba. Conversely, Riba's right to ownership of the property will be hugely impaired. This has to be the case because he will be required to pursue the main case in circumstances where Matsane has already conceded that the property on which he erected the structures belong to Riba. Over and above the aforesaid, there is also the issue of finality of litigation. It is in the interest of justice that this matter should stand as finalized for there is no purpose of opening it again other than to plunge both parties into gratuitous legal costs.

[22] In the result the application for the rescission of the judgment and order of 26 January 2021 fails and I make the following order:

1. The application for the setting aside and rescission of the judgment and order of this Court dated 26 January 2021 is dismissed with costs.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

APPEARANCES:

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Inc

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Mr J
Adendorff Theron

Date of Judgment:

2024

19 March