THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: 658/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.

22 May 2024 [redacted]
DATE SIGNATURE

In the matter between:

MINISTER OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT **FIRST APPLICANT**

THE REGIONAL LAND CLAIMS COMMISSIONER, MPUMALANGA PROVINCE **SECOND APPLICANT**

and

D&M MABUNDA INCORPORATED **FIRST RESPONDENT**

MATHEBULA NGIRIVANE COMMUNITY **SECOND RESPONDENT**

SHERIFF OF THE HIGH COURT FOR THE DISTRICT OF MBOMBELA **THIRD RESPONDENT**

REGISTRAR OF THE HIGH COURT MBOMBELA (MAIN SEAT) **FOURTH RESPONDENT**

J U D G M E N T

RATSHIBVUMO ADJP:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 14H00 on 22 May 2024.

Introduction

[1] This is an application for the rescission of judgment granted by this court *per* Shai AJ on 03 August 2023. The order by Shai AJ made the two settlement agreements dated 19 July 2023, orders of the court. The first settlement agreement was entered between the Second Respondent and the First Respondent. In terms of that agreement,

1.1 the First Respondent undertook to withdraw its opposition to the rescission of judgment application brought by the First Applicant and the Second Respondent;

1.2 it was acknowledged that the Second Respondent was indebted to the First Respondent as well as Kholonyane K Attorneys for legal fees;

1.3 the Commission on Restitution of Land Rights shall, within 15 days from the date of receipt of this settlement, pay directly to the First Respondent, the amount of R18.2 million from the amount payable by the Second Applicant in respect of legal fees for both the First Respondent and Kholonyane K Attorneys;

1.4 the Commission on Restitution of Land Rights, on behalf of Ngirivane Mathebula Investment Fund, shall pay the aforementioned amount into the bank account of MP Maseko Attorneys Inc.

[2] The second settlement agreement was entered between the Second Respondent, the First Respondent and the First Applicant. In terms of that agreement, the First Respondent undertook to withdraw its opposition to the rescission of judgment application brought by the First Applicant and the Second Respondent. The Applicants have no issues with the second agreement. It is the first agreement that they seek to have rescinded. This application is opposed by the First Respondent.

Background.

[3] In 1998, the Second Respondent lodged a land claim against the Land Claims Commission in accordance with the Restitution of Land Rights Act, no. 22 of 1994 (the Restitution of Land Rights Act), in respect of the area stretching from Orpen Gate to Satara Rest Camp of the Kruger National Park, including villages: Balule Mnyamani, Nsemani, Ngirivane, Sweni, Kumana, Nwantsi, Madjidji and Campiano situated in the Bushbuckridge Municipality. This claim was settled on 21 May 2016 when an agreement was signed between the First Applicant, the Minister of Environmental Affairs and the Second Respondent.

[4] In terms of the settlement agreement signed on that date, the First Applicant shall pay to the Second Respondent, sums of money in two phases. In phase one, the

amount of R15 088 792.00 shall be deposited to the Second Respondent, from which R110 947.00 shall be paid to each verified household that is a member of the Second Respondent, as compensation for loss of improvements that were on the claimed land during dispossession. In phase two, the First Applicant shall pay an amount of R37 237 055.55, being the land value in respect of the claimed land to the community to be used as a base to fund the beneficiation scheme to be entered into (development).

[5] Following this settlement, and on 24 February 2021, the First Respondent instituted motion proceedings against the First Applicant and the Second Respondent in this court, the order of which, was granted by default as it was unopposed. In terms of the order which was granted on 31 August 2021, the agreement entered between the First Respondent and the Second Respondent (involving the legal fees) was declared valid and binding between the parties. It was furthermore, declared that the First Applicant was not a party the agreement between the First and the Second Respondent (on legal fees). The First Applicant was also directed to pay the First Respondent the lesser of R25% of the settlement amount to the Second Respondent on attorney and own client bill of costs, taxed at no more than double the attorneys fee, whichever is lesser.

[6] An application to rescind the default judgment granted on 31 August 2021 was launched by the First Applicant and the Second Respondent on 08 December 2021. Following negotiations between the parties, a settlement was reached between the parties resulting in the order made by Shai AJ referred to above.

Grounds for rescission.

[7] The application is premised on the provisions of Rule 41(2) of the Uniform Rules of the High Court.[1] In the alternative, the application is in terms of the common

[1] See paragraph 78 of the Founding Affidavit on p. 29 of the paginated bundle.

law Two grounds were advanced by the First Applicant in this regard. Under the first ground, the First Applicant avers that the order was granted erroneously in that it was granted without the participation of a party with substantial interest in the subject matter of the Court order. The second ground is that the agreement is in contravention of sections 42C and 42D of the Restitution of Land Rights Act in that it seeks to make use of the funds ring-fenced for land development, for purposes of payment for legal bills.

[8] Rule 41(2) of the Uniform Rules provides,

> "(2) Any party in whose favour any decision or judgment has been given, may abandon such decision or judgment either in whole or in part by delivering notice thereof and such judgment or decision abandoned in part shall have effect subject to such abandonment. The provisions of subrule (1) relating to costs shall *mutatis mutandis* apply in the case of a notice delivered in terms of this subrule."

[9] The First's Applicant reliance on Rule 41(2) appears to have been erroneous in that the rule does not support the case advanced. To start with, the decision granted by Shai AJ favours the First Respondent in this case. If there is any party who could decide to abandon that judgment or a part thereof, it would be the First Respondent as the judgment was granted in its favour. The case advanced by the Applicants here is to the effect that the court erred when it granted an order based on a settlement agreement that the litigants did not sign and that the terms thereof, are in contravention of a national legislation.

[10] Orders erroneously sought and granted can be rescinded based on Rule 42. The Applicants must have avoided Rule 42 for the reason that the order was not granted in their absence. Unfortunately, the First Respondent presented its response as though the First Applicant presented its application based on Rule 42, which appears to have been a secondary error. This application will as such be decided under the common law. One of the basis for rescission under common

law involves judgments granted in the absence between the parties of a valid agreement to support them, on the grounds of *justa causa*[2].

[11] The document presented to the court as the basis for judgment by agreement (the first agreement) does not support the agreement in question in that the litigants sought to be bound, in particular, the First Applicant who has to pay the amount agreed therein; is not a party to it. Those whose names were listed in the settlement agreement and also appended their signatures, are the First and the Second Respondent's representatives. The absence of the First Applicant's signature in this document is conspicuous not only because he is party expected to make a payment, but also because his names appears in the second agreement that was made an order of court in the same court order, dealing with the rescission of judgment.

[12] The omission of the First Applicant as a party to the first agreement could therefore not have been by error, but out of choice. Ironically, the judgment that the first agreement rescinded included an order sought and granted in favour of the First Respondent, to the effect that the First Applicant, who had not signed the fee agreement between the First and the Second Respondent, was not a party thereto meaning, he could not have a say about its validity. It appears to me that this application is a simple extension of what the First Respondent asserted in demanding non-involvement of persons not parties to an agreement. On this ground alone, the rescission stands to be allowed.

[13] Section 42C of the Restitution of Land Rights Act provides,

> "**42C Financial aid**
>
> (1) The Minister may from money appropriated by Parliament for this purpose and on such conditions as he or she may determine, grant an advance or a subsidy for the

[2] See Erasmus' Commentary on Uniform Rules of the High Court under Rule 42 where *MEC for Economic Affairs, Environment & Tourism v Kruisenga* 2008 (6) SA 264 (Ck) was referred to as an authority. See also *Moraitis Inv (Pty) Ltd v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA)

development or management of, or to facilitate the settlement of persons on, land which is the subject of an order of the Court in terms of this Act or an agreement in terms of section 14 (3) or 42D or which is expropriated in terms of section 42E, to
(a) any claimant to whom restoration or the award of a right in land has been ordered…
(2) For the purposes of subsection (1) 'development of land' includes the facilitation of the planning of any development of land."

[14] This court was referred to a judgment of *Bakgatla-Ba-Kgafela Community Property Association v Chief Land Claims Commissioner & Others*[3] where the court in interpreting if section 42C can accommodate the usage of funds released for development purposes as envisaged in this section, to pay professional fees such as legal costs. The Land Claims Court held,

> "[I]n my view, section 42C poses no legal impediment to the use and approval of a section 42C advance or subsidy for purposes of preparing a development plan… I am not however persuaded that a section 42C advance or subsidy can lawfully be approved or used to pay legal fees that may be owed to enforce the settlement agreement. While certain legal fees may comfortably fall within the purview of a section 42C grant or subsidy, this expenditure does not serve the 'development or management of, or … the settlement of persons, on [restored land]'. While notionally, forensic fees might fall within the scope of 'management' of restored land, there is insufficient information before the Court to determine whether the forensic fees incurred in this case fall within that category."[4]

[15] It appears plainly clear from the above that if the same interpretation is adopted here, the settlement in terms of which it was agreed to use the funds ring-fenced for land development, in order to pay for legal fees, may not be enforceable. It should be remembered that at this stage of proceedings, the duty on the Applicants is merely to show *bona fide* defence. The court is not expected to pronounce on whether it agrees with the interpretation referred to in *Bakgatla-*

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[3] (LCC08/2021) [2022] ZALCC 24 (8 July 2022).
[4] See *Bagatla-Ba-Kgafela supra*, at para 84.

Ba-Kgafela. That would be dealt with when the merits of the case are adjudicated upon. The Applicants need only to show the *bona fides* of the defence on the merits of the case which *prima facie* carries some prospect of success; a balance of probability need not be established.[5] I therefore hold a view that the Applicants have a *bona fide* defence which if successfully argued, could be a valid defence against the First Respondent's claim. The rescission of judgment stands to be allowed also on this reason.

Costs.

[16] I am not persuaded that this is one of the cases where costs should follow the outcome. Given the history of the litigation, I hold a view that the First Respondent's opposition to the rescission application is reasonable. The Applicants were legally represented when the agreements were made an order of court. The legal representative present in court was afforded an opportunity in which the mandate could be verified on whether the agreements should be made court orders. Had the Applicants or their legal representative been alive to what they now present as grounds for this application, the protracted proceedings could have been avoided. For this reason, the First Respondent should be awarded its costs for opposing this application.

[17] I therefore make the following order:

17.1 The order by Shai AJ in terms of which a settlement agreement marked X1 was made an order of court, dated 03 August 2023, is hereby rescinded.

17.2 The Applicants are ordered to pay the First Respondent's costs, jointly and severally, the one paying, the other to be absolved; such costs to include

[5] *Georgias v Standard Chartered Finance Zimbabwe Ltd* 2000 (1) SA 126 (ZS) at 132G–I.

the employment of two Counsel by the First Respondent, one being a Senior (where so employed).

[redacted]VUMO

ACTING DEPUTY JUDGE PRESIDENT

MPUMALANGA DIVISION

FOR THE APPLICANTS:	**ADV C ERASMUS SC**
	ADV HA MPSHE
INSTRUCTED BY:	**TARWA ATTORNEYS INC**
	MBOMBELA
FOR THE FIRST RESPONDENT:	**ADV L KOK**
	ADV T NGWENYA
INTRUSCTED BY:	**MP MASEKO ATTORNEYS**
	MBOMBELA
DATE HEARD:	**26 MARCH 2024**
JUDGMENT DELIVERED:	**22 MAY 2024**