

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

Reportable: YES/NO
Of Interest to other Judges: YES/NO
Circulate to Magistrates: YES/NO

Case no: 2216/2023

In the matter between:

MMAKO RALETING	First Applicant
MMAKO RALETING N.O. [In his capacity as duly appointed executor of the estate of the late Sylvia Mmampho Raleting]	Second Applicant

and

MALITSEPISO THULO KOSE	Respondent
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<u>IN RE:</u> MALITSEPISO THULO KOSE	Applicant
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and

MMAKO RALETING	First Respondent
MMAKO RALETING N.O.	Second Respondent

CORAM: HEFER AJ

HEARD ON: 14 MARCH 2024

DELIVERED ON: 06 JUNE 2024

- [1] The Applicants are seeking variation in terms of Rule 42(1)(a) of the Uniform Rules of Court of the costs pertaining to an order granted by default, awarded against Applicants in favour of the Respondent .
- [2] During August 2023, Van Zyl J, granted the following order subsequent to the Applicants failing to oppose the application by the Respondent after personal service upon the Applicants had been effected:

"It is ordered that:

Part A:

- 1. The First and Second Respondent shall allow access to a land surveyor, which shall be appointed by the Applicant, to enter the premises of the Respondents being Portion [...], Erf [...], F[...], Free State Province, in order to do the necessary measurements and to determine the exact beacons of the registered boundary line as depicted on the Subdivisional Diagrams LG Nr. 606/1919.*
- 2. The Applicant is granted leave to approach the abovementioned Honourable Court at a later stage, on the same papers duly amplified, for an order in terms of Part B of this application.*
- 3. The First and Second Respondents shall pay the costs of Part A of this application, jointly and severally, the one paying the other to be absolved."*

BACKGROUND

- [3] A synopsis of the facts which were contained in the founding affidavit which served before Van Zyl J, is set out below.
- [4] A certain Mr. Henning was the owner of both properties of which the First Applicant and his late wife (the Raletings) were the owners of the one and the

Respondent the owner of the other. These two properties are adjacent to each other.

- [5] Because the residence of the Raletings had burned down, Mr. Henning thought it prudent to offer his assistance to the Raletings in their time of need and agreed to have the boundary fence/line between the two properties moved onto the adjacent erf in order to create more space for the Relatings to store their belongings until such time as their home had been rebuilt. This was during October 2004.
- [6] Once the Respondent purchased the property where he is currently residing, Mr. Henning indicated to him that the Raletings know where the correct boundary fence/line would run and that they would not have any problem to place the correct fence on the correct boundary line once again.
- [7] Once the Respondent became the sole owner of his property, he approached the Raletings and informed them that the initial agreement with Mr. Henning had lapsed. The Raletings then initially agreed that Respondent appoint a land surveyor to determine where the exact beacons of the boundary fence/line were between the two properties.
- [8] However, it appears that a land surveyor was not appointed at any stage. According to the Respondent he requested assistance of the Raletings to rectify the situation but to no avail.
- [9] Eventually Respondent consulted with his attorney of record which resulted in a letter being sent on behalf of Respondent during 2002 already. In this letter Applicant was referred to the relevant subdivisional diagrams depicting the boundary of the properties concerned as well as a description of the beacons.
- [10] The Applicants was at that stage already requested to co-operate and allow the Respondent to erect a boundary fence between the two properties on the boundary line as depicted on the diagrams.
- [11] It was also indicated to the Raletings that should they refuse/fail to co- operate, the Respondent intended to approach Court for the appropriate relief in this regard.

- [12] It appears that thereafter the Raletings still refused to rectify the situation. In his founding affidavit in the main application which served before Van Zyl J, it is stated in particular that:

"Thereafter the Respondents still refused to rectify the situation and to allow the land surveyor access to the property in order for the Applicant to move the boundary line/fence back into its original position."

- [13] However, the letter by the Respondent's attorneys does not make mention of a request to allow a quantity surveyor onto the Relatings' property.

- [14] This resulted in a further letter which was sent on behalf of the Respondent during June 2022 which then inter alia stated as follows:

"We are hereby affording you a final opportunity to inform our office within 10 (ten) days after being served with this letter, whether you are prepared to allow a surveyor on your property to determine the exact beacons of the boundary line.

Please take note, that should you fail to adhere to this reasonable request, we have instructions to apply to the High Court, Free State Division, for a declaratory order for the following:

- that the appointed surveyor be allowed and instructed to enter your premises to do the necessary measurements and to determine the exact beacons of the registered boundary line as depicted on the Subdivisional Diagram LG 606/1919;*
- that our client and/or his duly appointed agents be allowed to demolish the existing boundary fence and to replace same with a new fence on the exact boundary line as per the surveyor's prescribed measurements;*
- that you bear the wasted costs of the High Court application on an attorney and client scale as you wilfully and vexatiously disregarded our client's real rights pertaining to his property."*

- [15] Reference to the "wasted costs" is obviously incorrect whereas at that stage and also until the default judgment has been granted, there were no wasted costs. Of

importance however, is that the Raletings were already at that stage made aware of the cost implications.

- [16] Because the Raletings still, according to the Respondent, refused to assist, the Respondent had no choice to launch the application. Part A of such application provided for the relief as contained in the order of Van Zyl J, whilst Part B thereof, in broad terms provided for the Respondent to be allowed to demolish and or remove any encroachment on the Respondent's property and replacing the encroachment and or existing fence with a new fence on the exact and correct boundary line.

APPLICATION FOR RECISSION OF JUDGEMENT

- [17] The Applicants' main contentions in support of the application for rescission of judgement as contained in the present founding affidavit are as follows:

"I had laboured under an impression that a costs order would not have been granted against me as I have never opposed the application and I had a bona fide belief that my property had not encroached upon the Respondent's property nor had I at any stage constructed any wall which had encroached the Respondent's property.

I respectfully submit that paragraph three (3) of the Order of Court was therefore erroneously sought and erroneously granted.

Upon being served a Notice of Motion, I elected not to enter appearance to oppose his application as I held a view that the Respondent (Applicant in the main application) was within his rights in approaching the Court for a relief regarding the disputed boundary lines between our respective properties.

However, I submit that it is not fair and just that the Second Applicant and I be mulcted with a cost order for an application that the Respondent brought in exercising his right, which application, the Second Applicant /(sic) did not oppose."

- [18] In further support of the application, Applicants also refer to the fact that

according to a letter addressed by the Respondent's attorney of record, dated after the order in respect of Part A had been granted, the land surveyor appointed by the Respondent established that there is no encroachment between the properties. As such, the Applicants submitted that Respondent should pay his legal costs, as the Applicants did not occasion the costs he incurred in exercising his rights to institute legal proceedings.

- [19] In his answering affidavit in the present application Respondent, however, refers to a further letter relied upon by the Applicants in which it was indicated that according to the appointed quantity surveyor, the property of the Applicants indeed encroaches upon the property of the Respondent.
- [20] It is important to mention however that this aspect, namely *ex post facto* facts established subsequent to the order granted by Van Zyl J, is not taken into consideration in the present application.
- [21] According to the Respondent, the Applicants in the present application were ordered to pay the costs of Part A of the main application because, had the Applicants assisted the Respondent when called upon to do so since March 2022 there would not have been a need for the said application to be launched. With this contention I agree.

APPLICATION IN TERMS OF RULE 42(1)(A)

- [22] In **Kgomo vs Standard Bank**¹ Dodson J, confirmed the following principles governing rescission under Rule 42(1)(a), namely:

"[1] the rule must be understood against its common law background;

[2] the basic principle at 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 a mistake in the proceedings; (own emphasis)

[4] the mistake may either be one which appears on the record of proceedings or one

¹ 2016 (2) SA 184 (G)

which subsequently becomes apparent from the information made available in an application for rescission of judgment;

[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."*

[23] As was stated by Leveson J, in **First National Bank of SA Ltd vs Jurgens**²

"A judgment to which a Plaintiff is procedurally entitled in the absence of the Defendant cannot be said to have been granted erroneously as contemplated in the subrule in the light a subsequently disclosed defence. Such defence cannot transform a validly obtained judgment into an erroneous one."

[24] The facts which served before Van Zyl J, showed that the exact boundaries of the relevant registered boundary line had to be ascertained by a land surveyor. Although the Respondent did not at any stage indicate in his evidence that he attempted to arrange for a land surveyor to determine such boundary prior to approaching the Court in respect of the relief sought, the facts show that the Applicants did not at that stage (when the matter served before Van Zyl J), dispute the allegations by the Respondent to the effect that had the Applicants assisted Respondent when called upon to do so, there would not have been a need for the application to be launched by the Respondent. Mr. Raleting, in the present application, indeed concedes that he held the view that the Respondent was within his rights in approaching the Court for relief regarding the disputed boundary lines between the respective properties.

[25] Mr. Raleting's incorrect impression or belief that a cost order would not have been granted against the Applicants as the Applicants never opposed the application and he had a *bona fide* belief that the applicant's property did not encroach upon the Respondent's property, does not constitute an error in the proceeding as contemplated in Rule 42(1)(a). An error of judgment by a litigant

² 1993 (1) SA 245 (W) at 247D-E

himself cannot be construed as an error in proceedings. Coupled with this, is the fact that it was patently clear from the Notice of Motion which was personally served on Mr. Raleting, that separate cost orders in respect of parts A and B of the application were sought by the Respondent.

[26] What served before Van Zyl J, was evidence to the effect that in the absence of opposition to Part A of the application in regards to both the merits as well as the costs, the Respondent was entitled to his costs . There was no error.

[27] In the premises, the Applicants are not entitled to a variation of the order as sought.

Order:

Therefore, I make the following order:

The application for variation of the order of Van Zyl J, dated 10 August 2023, is dismissed with costs.

HEFER AJ

Appearances on behalf of the Applicant: Mr MA Maoba

Instructed by: Maoba Attorneys Incorporated
C/O Hanlie Fourie Attorneys
Bloemfontein

On behalf of the Respondent: Adv DC Hattingh-Boonzaaier

Instructed by: Du Toit Louw Botha Attorneys
C/O Hill McHardy & Herbst
Incorporated
Bloemfontein

