



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

Date:



Signature: _____

CASE NUMBER: 111218/2023

DATE: 20 June 2024

In the matter between

MAURINE BILANKULU

APPLICANT

and

DIKELEDI ISABEL MTSHALI

FIRST RESPONDENT

**GOVERNMENT EMPLOYEES
PENSION FUND (GEPF)
(ID NO. 590401 5464 082)**

SECOND RESPONDENT

**MASTER OF THE HIGH COURT, JOHANNESBURG
ESTATE LATE MONTSOI NEHEMIAH MOJEDZI
(ID NO. 590401 5464 082)
MASTER'S REFERENCE NO. 021855/2022**

THIRD RESPONDENT

REGISTRAR OF DEEDS, JOHANNESBURG

FOURTH RESPONDENT

OLD MUTUAL LIMITED

FIFTH RESPONDENT

THE MINISTER OF HOME AFFAIRS

SIXTH RESPONDENT

SHERIFF SOWETO WEST

SEVENTH RESPONDENT

In re:

In the matter between:

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and

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Coram: L DE SOUZA-SPAGNOLETTI, AJ

Heard on: 20 June 2024

Reasons requested: 4 July 2024

Delivered: 25 July 2024

REASONS FOR JUDGMENT

L DE SOUZA-SPAGNOLETTI, AJ

INTRODUCTION

1. These reasons pertain to an order granted by this Court on 20 June 2024. The application brought was one in terms of Rule 42(1) and the common law, for the rescission of a Court order granted against the applicant on 10 October 2023 ¹. Rescission was sought on the basis that it was erroneously pursued or granted.
2. The prayers in the matter sat under a two-part application. Part A of the application, in which a stay of execution of the default judgment was sought, had already been granted ² at the time of hearing. Part B of the application sought to rescind the order granted on 10 October 2023. This order *inter alia*, declares the customary marriage of the first respondent to be the only valid and enforceable marriage of the deceased, one Montshoi Nemehiah Mojedzi who succumbed to illness on 21 June 2021.
3. The format of the papers in this matter was not ideal as they were not uploaded in a completely coherent fashion. This did not assist the Court in reading the matter prior to hearing nor in the Court's preparation of its written reasons.
4. Central to this application, was the validity or otherwise of two marriages and the obvious financial implications that would flow therefrom.
5. The first marriage was that of the first respondent to the deceased, a customary marriage entered into on 20 November 1982. The second purported marriage

¹ CL16024

² CL 001-1

was the incorrectly registered civil marriage of the applicant to the deceased on 29 May 2014. For reasons set out herein, there could be no prospect of the applicant's marriage being anything but void *ab initio* and, while this fact may lead to injustice, the papers of the applicant as placed before Court, did not provide this Court opportunity to temper such injustice.

6. The applicant, in part B of the application sought an order:

- 6.1 Declaring the summons served on her by sheriff on 5 April 2023 to be null and void.;
- 6.2 Rescinding the order granted by default ³ against her on 10 October 2023 under case number 2023-021351;
- 6.3 Finding the first respondent had failed to comply with the order granted on 23 August 2022 on the basis that the summons had been issued outside of the 30 day period stipulated in the August 2022 order ⁴;
- 6.4 Barring the first respondent from instituting action against her in violation of the order granted on 23 August 2023.

7. The allegedly offending order of honourable Moorcraft J of 10 October 2023 provides for the following:

- 7.1 The customary marriage between the first respondent herein and the deceased is declared the only valid and enforceable marriage;
- 7.2 The civil marriage of the applicant herein and the deceased is declared null and void;

³ CL 02-63

⁴ CL 18-79

- 7.3 The Department of Home affairs attend to recording the registration of the customary marriage and that it expunge the record of the civil marriage between the applicant and the deceased;
- 7.4 And in essence that the assets of the deceased be administered on the basis that the customary marriage is the only enforceable marriage.

BACKGROUND

8. The applicant in the matter lived with the deceased until his death in 2022, this under a purported civil marriage entered into on 29 May 2014 ⁵.
9. The first respondent entered into a customary marriage with the deceased on 20 November 1982. The first respondent had not lived with the deceased as his wife for a great many years at the time of his death. She was nonetheless supported by his family in her application to register the customary marriage after his death and she well satisfied the requirements for such recognition under Section 3 of the Recognition of Customary Marriages Act, 120 OF 1998 (the Act).
10. The second to sixth respondents in this matter were cited to *inter alia* prevent them from performing any such acts which would contribute to or result in the assets of the deceased being administered on the basis the marriage of the first respondent is the only legally enforceable marriage of the deceased.

⁵ CL 16-7

11. None of the respondents in this matter save for the first respondent opposed the proceedings before Court nor it appears, any proceedings brought previously.
12. Subsequent to the death of the deceased in June 2021, the applicant attended on the offices of the third respondent, presumably to obtain letters of Executorship, only to find that the first respondent had already reported the estate. Letters of executorship were subsequently issued to the applicant on 19 August 2022 ⁶.
13. On 23 August 2022, the first respondent obtained an order against the applicant and the other respondents cited, interdicting them from acting in accordance with the Letters of Executorship issued to the applicant by the third respondent ⁷. This was also on the basis that she institute action within 30 days of the order, to have her customary marriage declared as the only legally enforceable marriage.
14. Summons was instituted subsequent to this order although after debate and raising of alleged irregularities, the initial summons was withdrawn and a fresh summons was served personally on the applicant on 5 April 2023 ⁸.
15. The applicant failed to enter any appearance to defend despite the summons having been served on her personally. She then also failed to react to the

⁶ CL 02-53

⁷ CL 16-42

⁸ CL 16-36

application for default judgment served on her and thereafter, failed to react to a notice of set down served on her personally by the sheriff in the month prior to the hearing of the application.

16. The applicant disputed the veracity of the judgment granted on 10 October 2023 by honourable Moorcroft, AJ⁹ due to alleged irregularities relating to the summons and the service of the summons on her which gave rise to the default judgment. It is noted that two similar summonses were issued, one having been re-published ¹⁰. Both summonses appeared similar in form and content.
17. On 1 November 2023, the applicant obtained an order from honourable Justice Mdalana-Mayisela, who stayed execution of the order obtained by default by the First Respondent on 10 October 2023 ¹¹ - this preventing payout of the deceased's policies or pension fund, and prohibiting registration of the Customary marriage or any expungement of the Civil marriage from the records of the sixth respondent. This order granted by default was stayed, pending the hearing of Part B of the application for rescission of the 10 October 2023 order which application sat before this Court on 20 June 2024.

SERVICE OF SUMMONS AND DEFAULT OF THE APPLICANT

18. The first respondent instituted action to declare her as the surviving spouse of the deceased on 14 September 2022. This fell within the 30 day period

⁹ CL 16-23

¹⁰ CL, Section 18

¹¹ CL 001-1

prescribed by the Court for institution of such action. Due to issues raised and debated between the parties, that action was withdrawn and a new action was subsequently instituted outside of the 30 day period. This is all set out in the first respondent's affidavit in support of default judgment and the Court granting the judgment would have been aware thereof ¹².

19. The applicant then claimed that the action had not been instituted timeously as directed by the Court in the August 2022 order. This Court however, could not find that there was non-compliance in this regard. Action was indeed instituted albeit, subsequently withdrawn with a fresh action thereafter being instituted. The initial action rendered the first respondent compliant with the order, with the subsequent withdrawal and new action merely indicative of her intention to pursue the relief sought by her.
20. In respect of the default judgment granted, the applicant claimed that on 12 October 2023, she was advised by her attorney that the matter between herself and the first respondent had been in Court two days prior, stating that they had not received any notice of set down. Applicant stated that it was during October 2023 and only by virtue of having seen the Order granted on 10 October 2023, that she became aware of the 14 August 2023 order handed down by honourable Lady Justice Fisher who had insisted upon personal service on the applicant. It is the very order of Fisher, J that resulted in the personal service on her of the notice of set down for the 10 October 2023 date. The absence of knowledge of the August 2023 date did not detract from the

¹² CL 02-85

personal service of the summons on the applicant on 5 April 2023, or the personal service of the application for default judgment and set down upon her prior to the hearing on 10 October 2023.

21. While the applicant claimed that she was simply not aware of the impending default judgment, this Court could not accept that.
22. Summons was served personally on the applicant on 5 April 2023¹³. The notice of set down for the default judgment was also served personally on the applicant as per the order of Fisher, J in her 14 August 2023 order¹⁴.
23. The Sheriff's return of service specifically recorded service of a notice of **set down**. The Court accepted the return of the Sheriff as proof of service of the set down¹⁵. It was, and remains highly improbable that the sheriff would have served a document other than that specified on the return of service.
24. Applicant claimed that there were material differences between the summons served on her on 5 April 2023 and the re-published summons presented by the first respondent to the Court at the hearing on 10 October 2023.
25. The applicant's claim was that the summons presented to Court on 10 October 2023 was not properly issued and as such, the judgment granted in her absence on that date, which set down date she claims she was not aware of,

¹³ CL 16-36

¹⁴ CL16-19

¹⁵ CL 16-42

was granted erroneously. She claimed that the first respondent was not entitled to the judgment granted as she failed to bring to the attention of the court that the re-published summons presented was not the one served on applicant on 5 April 2023. She claimed that the Court would not have granted the 10 October 2023 default judgment had it been aware of this.

26. Again, the two summonses appeared to this Court to be similar in form and content. It could not be stated that the applicant was unaware of the case she was expected to meet, nor that there was any real prejudice in the summons having been re-published. They were in effect one and the same summons. Further, no explanation was provided by the applicant for her failure to defend the summons served on her on 5 April 2023, nor for her failure to have provided either the summons, the application for default judgment or the notice of set down to her legal representatives prior to the hearing of the application for default judgment.
27. Applicant also claimed irregularities of the Court in its order. The basis of her claim was the failure of the Court to mention the condonation that it granted first respondent for her non-compliance with the rules of Court. Her complaint was that the order only provided for the default judgment.
28. The fact that the Court granted the default judgment, by necessity reflected its condonation of any such non-compliance and this argument could support a rescission of judgment.

29. In essence, the applicant contended that this Court should have found the summons of the first respondent was not issued. If this Court found it was issued then and, in such case, it should have found that the notice of set down was not served on her – this in the face of a sheriff's return which specifically confirmed such service ¹⁶.
30. I could not find this as the summons initially issued was similar in form and content to that presented to the Court. This Court's view was that the judgment of 10 October 2023 would have been granted irrespective. Further and for reasons set out below, the Court could not find that the applicant had any viable defence to the action, not on the papers presented.
31. In paragraph 9 of her replying affidavit in support of part A of the application, applicant admitted knowledge of the application for default judgment, admitting that she had indeed received it but had passed it onto her attorney only after their offices had identified the matter on the Cour roll for 10 October 2023 ¹⁷. The Court could not but question why she would simply have neglected to provide this incredibly important document to her legal representative on receipt. Similarly, applicant denied having consulted her legal representative in respect of the summons served on her on 5 April 2023 ¹⁸. As stated afore, why the applicant chose to simply ignore such a document, remained unexplained.

¹⁶ CL02-83

¹⁷ CL 01-45

¹⁸ CL 1-47

32. It is not an uncommon practice, where a party chooses to serve an application for default judgment on his or her opponent, to serve a copy which does not reflect a hearing date. This is because the document once served, is filed at Court and the allocation of a date follows thereafter. As stated above, it was, and remains highly improbable that a sheriff of the Court would have mistakenly referred to a notice of set down if that is not the document it had served.
33. The court considered the service of the summons on the applicant in April 2023, which she by her own admission confirmed receiving but doing nothing about. With the service of the application for default judgment on the applicant, and the service by sheriff on her also of the notice of set down, the Court could find that there was a reasonable explanation for her patent default.

Good cause

34. It is trite that under the common law, good cause must be shown for rescission and that an applicant must allege facts which, if proved would constitute a valid defence in law with some prospect of success.
35. The Applicant in this matter sought rescission of a judgment declaring that the customary marriage of the first respondent was the only valid and enforceable marriage of the deceased. While seemingly unfair to the applicant who may have spent the better part of a decade believing she was legally married to the deceased, this Court found it inconceivable that any Court would have found the customary marriage not to have been the only valid and enforceable marriage.

36. What the applicant sought is simply incompetent in law. The Court saw no prospect of the customary marriage being nullified, quite the contrary in fact. Both our Courts and the governing legislation are amply clear on this issue.
37. There appeared to be a disconnect between the injustice which the applicant sought to prevent, and the manner in which she sought to prevent it. In fact, she previously submitted that it would have been competent for this Court to recognize both the customary marriage of the first respondent as well as her civil marriage ¹⁹. This was and is, an impossibility in law.
38. Applicant also stated that the previous Court, but for the order granted by default on 10 October 2023, would have recognised that both the first respondent and her were married to the deceased ²⁰. Again, this is a legal impossibility and the Court could see no prospect of success in this regard.
39. There may have been, and may still be other avenues open to the applicant to address what would appear to be the injustice of her having invested many years in a marriage which had never existed to start with. The applicant could have considered the possibility of a claim against the estate of the deceased or possibly the declaration of a universal partnership ²¹.

¹⁹ CL 01-45

²⁰ CL1-49

²¹ L.M v R.K (9236/2014) [2022] ZAWCHC 1; [2022] 1 All SA 738

40. On the evidence presented to the Court in the papers however, and on the relief sought, the application could not succeed.
41. This Court recognised the inequity that could very well flow from the dismissal of applicant's application. The law as it stands can most certainly result in injustice. It was not in dispute that the first respondent and the deceased were long separated and appeared to have lived separate lives for decades. It was also not in dispute that the applicant and the deceased had lived as "man and wife" for the decade prior to his death. In these circumstances, this Court could not see its way to compounding the applicant's apparent injustice by enforcement of a costs order.

LEGAL PRINCIPLES

42. The Court considered *inter alia* the following legal principles in formulating its finding;
43. In relation to Rule 42, rescission or variation does not follow automatically upon proof of a mistake. The Rule gives the courts a discretion to order it, which must be exercised judicially ²². The Court considered this in the event that it had found service irregularities with regard to the summons. It did not find irregularities that would warrant the granting of a rescission of judgment.

²² Colyn v Tiger Foods Industries Ltd t/a Meadow Feeds Mills (Cape) 2003 (6) SA 1 (SCA).

44. Generally, a judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which would have precluded the granting of the judgment and which would have induced the Court, if aware of it, not to grant the judgment ²³. This Court did find that to be the case.
45. Whilst the Courts have consistently refrained from circumscribing a precise meaning of the term ‘good cause’, generally Courts expect an applicant to show ‘good cause’ (a) by giving a reasonable explanation of his default; (b) by showing that his application is bona fide; and (c) by showing that he has a bona fide defence to the plaintiff’s claim which, prima facie, has some prospect of success ²⁴. This Court could not find such good cause.
46. This Court recognised that the existence of a previous customary marriage whether within the knowledge of the applicant or not, could have significant financial and emotional ramifications for all involved. However, the Recognition of Customary Marriage Act 120 of 1998 provides *inter alia* that:
- 46.1 Save as provided for in Section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act 25 of 1961 during the subsistence of such customary marriage ²⁵;
- 46.2 Failure to register a customary marriage does not affect the validity of that marriage ²⁶;

²³ Nyingwa v Moolman NO 1993 (2) SA 508 (TK) at 510D-G; Naidoo and Another v Matlala NO and Others 2012 (1) SA 143 (GNP); Thomani and Another v Sobeka NO and Others 2017 (1) SA 51 (GP).

²⁴ Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O); Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 764I-765F

²⁵ Section 3(2)

²⁶ Section 4(9)

46.3 A customary marriage can only be dissolved by a court's decree of divorce ²⁷.

47. It is trite that no spouse in a customary marriage can legally enter into a civil marriage. This has been confirmed by our Courts too ²⁸.

48. Lastly, the issue of consent, which is raised merely for the sake of completeness becomes an issue in any second marriage ²⁹. Of course, this Constitutional Court decision related to customary marriages only. In the case before this Court, the existence of a civil marriage between the applicant and the deceased was a legal impossibility.

49. In accordance with the afore going, this Court dismissed the application of the applicant but, in the face of the injustice which would possibly follow, it could not see its way to compounding such with a costs order. No order as to costs was made.

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DE SOUZA-SPAGNOLETTI, AJ

For the applicant : Advocate T Matimbi
Instructed by Sonkosi Ngalonkulu Inc. Attorneys
For the first respondent: R Crisp, Attorney

²⁷ Section 8 of Act 120 of 1998

²⁸ Netshituka v Netshituka (426/10) ZASCA 120 ; Thembisile v Thembisile 2002 (2) SA 209)

²⁹ Mayelane v Ngwenyama and Another (CCT 57/12) [2013] ZACC

MOJEDZI V MTSHALI (REASONS)