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

**Reportable / Not reportable**

Case no: 2218/2024

In the matter between

**THOMAS LINDELO MKAZA**

**APPLICANT**

And

**THE MUNICIPAL WORKERS'  
RETIREMENT FUND**

**FIRST RESPONDENT**

**MAFUBE LOCAL MUNICIPALITY**

**SECOND RESPONDENT**

**MUNICIPAL MANAGER: MAFUBE LOCAL  
MUNICIPALITY**

**THIRD RESPONDENT**

**CHIEF FINANCIAL OFFICER**

**FOURTH RESPONDENT**

**EXECUTIVE MAYOR**

**FIFTH RESPONDENT**

**Coram:** Ramdeyal AJ

**Heard:** 19 September 2024

**Delivered:** 26 September 2024

**ORDER**

The application for condonation and rescission of judgment is dismissed with costs

including costs of two counsel (where employed) and to be taxed on scale B of rule 67A.

## **JUDGMENT**

**Ramdeyal AJ**

### **Introduction**

[1] On the 20<sup>th</sup> of June 2024, the Municipal Worker's Retirement Fund brought an application in terms of a notice of motion for an order for the respondents to furnish the applicant (the Fund) with a full accounting of each and every withdrawal or payment or transfer from Absa Bank accounts with numbers 405[...], 909[...], 922[...] and 923[...] and FNB Account no. 628[...] for the period 10 October 2023 to date.

[2] A further order requested was for the respondents to furnish the applicant within five days of the granting of the order the bank statements of all the bank accounts mentioned above for the period 10 October 2023 to date; the bank account number for the equitable shares they receive in terms of s 214 of the Constitution for the financial year 2024/25 and any subsequent bank account numbers should the receiving account details change during the course of this period and each date or period in respect of which the first respondent (Mafube Local Municipality, hereafter the Municipality) is expected to receive the equitable shares as well as costs.

[3] The applicant in this case was the fifth respondent in the above application. He did not oppose the application, and judgment was granted against him on the 20<sup>th</sup> of June 2024. Mr. Mkaza, the applicant in this case now seeks the following orders:

- i) Condoning the late filing of the application for rescission of judgment, insofar as it may be necessary

- ii) Rescinding and setting aside the default judgment granted by the court.

## **Condonation**

[4] The application in this case is an application for a rescission of judgment coupled with an application for condonation in respect of the late filing of the application for rescission. The applicant is required to give a full and honest explanation for failure to comply with the rules of court timeously. It is settled in our law that in considering applications for condonation, the court has a discretion, which discretion is to be exercised judicially upon a consideration of all facts and, in essence, is a question of fairness to both sides. The court may enquire into the reasons for the degree of non-compliance and the explanation tendered. Importantly, the court must consider avoiding any unnecessary delays in the administration of justice. A slight delay and a good explanation for non-compliance with the rules may assist the applicant for his condonation application to succeed. If there are no prospects of success then there is no point in granting condonation. Strong prospects of success may tend to compensate for a long delay.<sup>1</sup>

[5] The applicant must make out a proper case for condonation which includes the details of the entire period of his delay in a comprehensive explanation.

## **The Relevant Uniform Rules of Court Applicable to Rescission of a Judgment**

[6] Rule 31(2)(b) provides as follows:

‘A defendant may within 20 days after acquiring knowledge of such judgment apply to

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<sup>1</sup> See *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C and *United Plant Hire (Pty) Ltd v Hills* 1990 (1) SA 717 at 720E-G in respect of condonation applications.

court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.'

[7] Rule 42 holds:

'(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;

(b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.'

[8] Generally, a judgment would have been erroneously granted if there existed, at the time of its issuing, a fact of which the court was not aware of 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.

[9] In an excerpt from the founding affidavit,<sup>2</sup> the court appears to have been aware that the applicant's term of office was from 1 June 2022 to 31 May 2024. Annexure 'FA2' of the main application is the letter of appointment of the applicant Mr Mkaza by the Executive Head of the Free State and published in the Provincial Gazette. The judgment by Majosi AJ granted on 20 June 2024 against Mr. Mkaza was therefore not erroneously granted.

## Common Law

[10] An application for rescission on common law grounds must be brought within a reasonable period. For the applicant to succeed with such an application on common law grounds, the applicant must show good cause or sufficient cause by giving a reasonable explanation for delay and showing that the application for rescission was *bona fide* and showing a *bona fide* defence to the claim with a *prima facie* prospect of success. In *Chetty v Law Society, Transvaal*<sup>3</sup> Miller J dealing with the concept of 'sufficient cause' or 'good cause' stated that, 'these concepts defy precise or comprehensive definition, for many and various factors require to be considered.' The learned judge stated that 'it is clear that in principle the two essential elements of "sufficient cause" for rescission of a judgment by default are:

- i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
- ii) that on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success.'

[11] The applicant, Mr. Mkaza, contends that he is not the accounting officer referred to in s 60 of the Municipal Finance Management Act 56 of 2003 (MFMA) and has no

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<sup>2</sup> See annexure 'AA7' on page 125 of the rescission application para 27.

<sup>3</sup> *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765 A-E.

fiduciary responsibilities as set out in s 61 of the MFMA, and therefore, no legal authority upon which the court can order him to act as set out in the prayers of the notice of motion.

[12] The provincial government has ordered an intervention into the affairs of the municipality as a result of the crisis in its financial affairs under the provisions of Section 139(5) (c) of the Constitution and appointed him as the Lead Provincial EXCO representative at the Municipality with effect from 1<sup>st</sup> June 2022 to 31 May 2024. Due to the fact that his appointment ended on 31 May 2024, it had no legal authority to implement any order this court may grant. He avers that he has a *bona fide* defence and the judgment was granted in error.

[13] According to the return of service of the court bundle, the notice of motion was served on M.A Motaung, the records clerk, a responsible employee not less than 16 years of age and in control of the office of the Municipality at 64 JJ Hadebe Street, Frankfort on 9 April 2024. The court order was served at the same address on the personal assistant ostensibly responsible and not less than 16 years of age who was in control of the applicant's place of business (fifth respondent in that matter). Service was complied with in terms of Uniform rule 4(1)(a)(viii). He also received and opposed a separate application at the same address.<sup>4</sup> He opposed that application in case number 1653/2024 and participated in that hearing at this Court on 25 July 2024.

[14] According to the applicant he became aware of the court order in this main application on the 26<sup>th</sup> of June 2024. This is also the day of the service. However, he was not aware of the application as it was not served on him and not made aware of it. Yet, he was aware of the other application he chose to oppose.

[15] This contention of the applicant appears to me to be somewhat strange, to put it in simple terms. This is where he was stationed, yet during his effective term, he was

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<sup>4</sup> Annexure 'AA2' of the court bundles refers.

apparently not made aware of the application as per the notice of motion. It was only after his term as Lead Provincial EXCO representative (EXCO), which terminated on 31 May 2024, that he became aware of the court order and judgment against him. During his term and when the notice of motion was served at his office he was not aware of same. No judgment can be sought or taken against him, he avers, as he was cited as a party to the proceedings in terms of a lapsed appointment. Therefore, the judgment against him was erroneously sought and granted against him in his absence. A further contention is that the judgment is invalid because of the lapse of appointment of the applicant. Counsel for the applicant referred the court to an article by Mitchell Nold De Beer titled 'Invalid Court Orders' published in the *Constitutional Court Review*.<sup>5</sup> This article discusses whether courts are entitled to ignore decisions made in error and not challenged properly and whether the decisions should be regarded as valid and effective until challenged. It goes on to discuss decisions made in error and discusses various authorities pertaining to same.<sup>6</sup> Counsel for the applicant has argued that the judgment of the court of the 20<sup>th</sup> of June 2024 (annexure AA6) is not a valid judgment, that judges do make errors and that this judgment was granted in error. He referred to *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others*<sup>7</sup> where a court order was sought incorrectly and granted erroneously as well as *Eke v Parsons*<sup>8</sup> where orders that were granted were not granted in terms of the Constitution and the law.

[16] The judgment granted in this case against Mr. Mkaza may have been granted at the time when he was not a member of EXCO but that was included in the papers for the court's attention and therefore cannot be an error. More especially in my view Mr. Mkaza was served with the documents at the time he was a member of EXCO, and the Lead Provincial EXCO representative. The main point of contention is whether he knew about the service of documents or simply tried to evade the issue because he did not want to comply with providing the information of the bank accounts sought.

[17] The application was served on Mr. Mkaza at his place of employment during his

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<sup>5</sup> De Beer 'Invalid Court Orders' (2019) *Constitutional Court Review* Vol 9 at 283-315.

<sup>6</sup> Ibid at 285.

<sup>7</sup> *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* [2012] ZASCA 116; 2012 (6) SA 294 (SCA).

<sup>8</sup> *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC).

term. Even though he claims not to have been informed of same, he was nevertheless the Lead Provincial EXCO representative at the Municipality at the time the application was served. It appears improbable that he could not have known of the service. It is contended that the applicant did not and does not have the authority to exercise a power that he did not have. The other respondents, however, do. What appears probable is that Mr. Mkaza knew about the service of the notice of motion but chose not to defend same at the appropriate time and now seeks to defend it. His defence is that he does not have authority to give the information sought by the Fund but does not aver that he does not have the information. In any event, from his employment duties and term of office of two years, it is inevitable that he did not have access to the information. Clearly, he has no bona fide defence.

**DUTIES OF THE APPLICANT IN TERMS OF NOTICE IN TERMS OF SECTION 139(5) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ,1996 APPOINTMENT OF LEAD PROVINCIAL EXCO REPRESENTATIVE TO MAFUBE LOCAL MUNICIPALITY AND DETERMINATION OF HIS POWERS AND FUNCTIONS.**

[18] The Executive Head of the Free State Province appointed Mr. Nkaza as the Lead Provincial EXCO representative of the Municipality with effect from 1 June 2022 to 31 May 2024 to exercise and perform the powers and functions as set out in annexure 'FA2' of the court bundle. Some of the functions include: submitting a revised Financial Recovery Plan to the municipal council for inputs and consideration and to the MEC for Finance for approval, to ensure that funded budgets are prepared for the 2023/2024 financial year, ensuring daily management of cash and bank balances, providing strategic leadership and direction to implement the financial recovery plan, issuing directives and instructions to the accounting officer and relevant staff to implement the financial recovery plan, submitting monthly progress reports to the MEC for Finance / the Provincial EXCO / the Municipal Council and the Minister of Finance, maintaining a record of the decisions on Financial Recovery plan implementation and assisting in the preparation and implementation of the Financial Recovery Plan.

[19] The above powers and duties conferred on the applicant in itself is indicative of the applicant's involvement and information of the financial issues of the Municipality, which he does not deny, and could only obtain same by having access to the bank accounts and relevant bank statements as sought in the notice of motion for the main application. He is not the accounting officer as he avers and does not have fiduciary duties but his duty and power delegated to him to confer on the accounting officer is much higher. He has to issue directives and instructions to the accounting officer. He did have the necessary power, duties and obligations in the management of the Municipality's finances during his term of appointment and at the time the notice of motion application was served at his place of employment, and his involvement in same, cannot simply vanish 20 days later when the order against him was granted by a court of law. His defence of lapsed appointment is not a reasonable explanation, does not hold water for a *bona fide* defence and simply appears to be that Mr Mkaza 'was playing for time' by using specious excuses to gain time, hence causing unnecessary delays in the administration of justice. He had access to the relevant information sought and was in a position to furnish the required information.

[20] It is common cause that the Municipality is indebted to the Pension Fund for a large amount of money. The Pension Fund has brought several applications in this court to assist its members by retrieving the money from the Municipality, but to no avail. The applicant is appointed as an EXCO representative with authority and power to assist the Fund in obtaining the information it requires but contests that he has that power and authority to do so. In terms of the duties conferred upon him he does have the authority and power to provide the information the Fund so seeks. The plight for justice of the members of the Fund continues over the years, yet the applicant rather seeks to use technicalities and frivolous defences instead of assisting the members with this difficult task when he is able to do so.

## **CONCLUSION**

[21] In respect of condonation, I am not satisfied that the applicant has given a full and honest account of his failure to comply with the Rules timeously. I have also discussed the various rules brought under rules 31(2)(b) and 42 as well as the common

law. In my view, the applicant has failed to meet the requirements applicable in respect of all.

[22] In the circumstances I make the following order:

The application for condonation and rescission of judgment is dismissed with costs including costs of two counsel (where employed) and to be taxed on scale B of rule 67A.

T Ramdeyal

#### Appearances

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|---------------------------|-----------------------------------------|
| For the Applicant:        | LR Bomela                               |
| Instructed by:            | State Attorney Bloemfontein             |
| For the First Respondent: | Pieter van der Berg SC<br>Hannine Drake |
| Instructed by:            | McIntyre van der Post                   |