



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

CASE NO.: 2738/2021

Reportable	Yes / No

In the matter between:

MEC FOR DEPARTMENT OF EDUCATION, EC

Applicant

and

MELENG YOUNGSON NGXABI

Respondent

JUDGMENT

Cengani-Mbakaza AJ

[1] On 16 May 2024, the applicant approached this court seeking an order in terms of Rule 42 (1)(a) of the Uniform Rules of Court. The applicant is a member of the executive council for the Department of Education, Eastern Cape. It is entrusted with the business of learning in the province. The respondent is an adult male, an owner and proprietor of Tabankulu Bookshop.

[2] The application is predicated on paragraph 3 of the order that was granted by this court per Hinana AJ on 23 May 2023 (the impugned order). Paragraph 3 of the impugned order reads as follows:

“3. The respondents are ordered to pay interest in the sum of R1 385 119.26 from the date the payment was due and payable.”

[3] It is undisputed that, according to paragraph 2 of the impugned order, the capital amount owed was R495.894.37. The applicant asserts therefore that paragraph 3 of the order is not in accordance with the common law principle of in *duplum* rule.

[4] The respondent opposes the application on the basis that the calculations were made with the consent of the applicant’s attorney and there was no objection to the interest. Furthermore, the respondent asserts that the requirements of Rule 42 (1) of the Uniform Rules of Court have not been satisfied and therefore the application cannot stand.

[5] The brief background of the facts, which is presented in the parties’ papers, is set out as follows: Between 2010 and 2014, the respondent operating under the proprietorship of Tabankulu Bookshop, sold stationery to various schools in the Eastern Cape, resulting in the applicant owing R495,894.37. The respondent instituted action against the applicant under case number 2738/2021, which was settled through mediation. However, when it became apparent that the interest exceeded the capital, the applicant proposed applying the in *duplum* rule, but the respondent rejected this proposal, citing adherence to the court order.

[6] Rule 42 of the Uniform Rules of Court provides:

‘Variation and rescission of orders

(1) The court may in addition to any powers it may have, mero motu upon the application of any party affected, rescind or vary:

- (a) an order or judgment erroneously sought or granted in the absence of any party affected thereby;
- (b) ...
- (c) ...’

[7] It is common cause that in this instance the applicant seeks an order in terms of Rule 42(1)(a) of the Uniform Rules of Court. The Constitutional Court (CC) in *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 and Others*¹ (Zuma), a case that Mr Msiwa SC referred to me on behalf of the respondent, per Khampepe J (with Jafta J, Madlanga J, Majiedt J, Mhlantl J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring) held:

‘[54] ...It is trite that an applicant who invokes this rule must show that the order sought to be rescinded was granted in his or her absence and that it was erroneously granted or sought. Both grounds must be shown to exist.’

[8] In compliance with the requirements of Rule 42(1)(a) of the Uniform Rules of Court, the CC in *Zuma*² outlined the specific obligations and considerations that the court must adhere to. At paragraph 53, the CC held:

“[53] It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that a court “may”, not “must”, rescind or vary its order-the rule is merely an “empowering section and does not compel the court” to set aside or rescind anything. This discretion must be exercised judicially.” [Footnotes omitted]

[9] Considering the CC’s remarks, the key issue here is not the applicant’s entitlement to seek rescission, but rather whether the applicant can successfully

¹ [2021] JZACC 28.

² Ibid.

discharge the onus of proving that the grounds of rescission are met. Discharging the onus of proving the grounds for rescission is not a straightforward task.³

[10] In his oral argument, Mr Msiwa SC bemoaned the applicant's failure to give a reasonable and acceptable explanation for an alleged default. He further contested the applicant's failure to demonstrate a *bona fide* defence that carries a reasonable prospect of success. He argued that in terms of the rules, the application ought to have been brought within 20 days after the applicant had acquired knowledge of such judgment. Furthermore, so he argued, it was the applicant's election not to be present when the order was granted. In making this proposition, counsel referenced paragraph 56 of the *Zuma* matter, where the court held:

‘Mr Zuma alleges that this Court granted the order in his absence as he did not participate in the contempt proceedings. This cannot be disputed. Mr Zuma did not participate in the proceedings and was physically absent both when the matter was heard and when the judgment was handed down. However, the “granted in the absence of any party affected thereby”, as exists in rule 42(1)(a), exists to protect litigants whose presence was precluded, not those whose presence was elected. Those words do not create a ground of rescission of litigants who, afforded procedurally regular judicial process, opt to be absent.’

[11] I do not agree with the counsel's argument for two reasons: the applicant opted to proceed under Rule 42(1)(a), which allows for flexibility as long as the application is brought within a reasonable time, without strict compliance with timeframes. As a result, counsel mistakenly conflates this application with those made under Rule 31(2)(b) or common law. In my view, the application was brought within a reasonable time in that the applicant also attempted to resolve the dispute amicably outside of court, demonstrating a good-faith effort to avoid litigation. Furthermore, the *Zuma* case differs significantly from the matter under

³ Ibid para 54.

consideration. Unlike in *Zuma*, where the applicant deliberately failed to appear in court, in *casu* the applicant was absent because there was a common ground that the matter was properly mediated. The applicant's absence led to an error regarding the awarded interests. Although the applicant opted to be absent in court, it would not have anticipated that the interest charged would be contrary to the legal prescripts.

[12] In terms of the common law principle of the *in duplum* rule, the amount of unpaid interest may not exceed the principal. This rule was reiterated by the Full Court of this Division in *Blue Crane Route Municipality v Municipality Workers Retirement Fund and Another*⁴. In this matter, the court referenced *Palsen and Another v Slip Knot Investments 777 (Pty) Ltd*⁵ and held that the rule is:

“a common-law norm that regulates the accrual of interest on a debt that is due and payable. The overreaching purpose of the rule is to protect debtors from being crushed by the never-ending accumulation of interest on an outstanding debt.”⁶

[13] In this instance, it is common cause that the interest charged exceeds the capital amount. Therefore, the impugned order stands to be varied on the basis that it was erroneously granted.

Order

[14] In the result, I make the following order:

1. The application for variation of the order dated 23 May 2023 is granted.
2. The interest payable by the applicant to the respondent in terms of the order of this court dated 23 May 2023 is limited by the application of the *in duplum* rule.

⁴ (1827/3034) [2025] ZAECGHC 22 (18 March 2025).

⁵ [2015] ZACC 5.

⁶ *Leech v Absa Bank Ltd* [1997] 3 All SA 308 (W) at 313-314.

3. There shall be no order as to costs.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant : Adv Madubela
Instructed by : State Attorney
Mthatha

Counsel for the Respondent : Msiwa SC with Adv Talapile
Instructed by : Mjulelwa Inc. Attorneys
Mthatha

Heard on : 06 February 2025
Judgment Delivered on : 06 May 2025