

SOUTH AFRICA / JUDGMENT

B.M and Another v M.P and Another (78652/2015) [2024] ZAGPPHC 1243 (25 November 2024) [2024] ZAGPPHC 1243

COURT

North Gauteng High Court, Pretoria

BEFORE

GN Moshwana

CASE / FILE NUMBER

78652/2015

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REPUBLIC OF SOUTH
AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

Case

Number: 78652/2015

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER

JUDGES: NO

(3) REVISED: NO

DATE: 25/11/24

SIGNATURE

In the matter between:

B[...]
N[...] M[...]
First Applicant
K[...]
J[...] M[...]
Second Applicant
and
M[...]
B[...] P[...]
First Respondent
H[...]
S[...] P[...]
Second Respondent

Delivered:

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 25 November 2024.

Summary: Rescission of judgment. Attorney entered into a “compromise” without a knowledge and consent of the affected client. Such an agreement is invalid and unenforceable against the client. The unknown settlement agreement was made an order of Court. Had the Court known that the agreement is invalid and unenforceable as against the affected parties, it would not have made the said alleged agreement an order of Court. Accordingly, the impugned order was erroneously sought and granted within the contemplation of Rule 42(1)(a) of the Uniform Rules of Court. Held: (1) The order of Fourie J is hereby rescinded. Held: (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] Before me is an application in terms of which, Mr B[...] N[...] M[...] and his wife, Mrs K[...] J[...] M[...] (hereafter “the applicants”) seek to have an order obtained on 25 February 2020 in their absence rescinded. The application was launched on 27 July 2020. It is with considerable regret to acknowledge that the present application was heard in Court after four years of its launch. The impugned order made by Fourie J, which affects the applicants, was to the following effect: -

“As the parties have come to an agreement, the following order is made:

- i. The Applicants claim is dismissed;
 - ii. The Applicants are ordered to pay the Respondents an amount of R155 827.39 in full and final settlement of the counter claim as instituted by the Respondents;
 - iii. The Applicants will pay the amount of R155 827.39 within 90 days from the date of this order.
 - iv. The Respondents will vacate the property currently registered in the names of the Applicants within 7 days upon receiving payment of the capital amount of R155 827.39 together with the Respondents taxed and or agreed costs;
 - v. The Applicants is (sic) ordered to pay the Respondents taxed and or agreed costs.
- [2] The present application is opposed by the respondents. The legal representative of the applicants withdrew on 3 February 2023. Whereafter, the applicants were without legal representation. When the application emerged before me, after having been enrolled by respondents, the applicants appeared in person. The services of a Court interpreter were enlisted to ensure that they present their case to Court as dominis litis.

Relevant factual matrix

- [3] The engrossing feature of the factual matrix of the present application is that two families agreed to literally swop residential places. At the one residential place building improvements were to be effected. The improvements were not done in full. Failure to do so drove a wedge in the relationship of the two families. The applicants and the P[...]s (Mr M[...] B[...] P[...] and H[...] S[...] P[...]) are the involved families.
- [4] Owing to collapse of a relationship between the two families, the applicants demanded that the P[...]s must vacate their property occupied by them on account of the informal swop. The P[...]s contended that, having made improvements on the property, the applicants must pay them some money before they could vacate. A stalemate was reached, which prompted the applicants to launch eviction proceedings against the P[...]s. The P[...]s in return launched a counter-claim seeking to be recompensed for the improvements effected on the property registered in the name of the applicants. The eviction application was instituted on 13 October 2015.

- [5] Litigation over the eviction and the counterclaim proceeded on a snail's pace since 2015. Ultimately, pertinent to the present application, on or about 26 February 2018, one Mr M E Matolo of Matolo Makgele & Partners, purporting to act on the instructions of the applicants, wrote amongst others the following:

"3 For the sake of progress and a speedy closure of the matter, we choose to accept 99.9% of your counter proposal set out in your letter dated 5th February 2018. That is to say; payment of your preferred R52 490.30 for the roofing is accepted in order to bring the total amount due to R155 827.39 as set out on paragraph 8 of your letter of your 5 February 2018 letter.

4 We also accept

4.1 to pay for the fees to be incurred for reinstatement of the municipality's water and lights as suggested on paragraph 9 of your 5 February 2018; and

4.2 to clean the respondents' yard as suggested on paragraph 10 of your 5 February 2018 letter.

5 As a compromise on your clients' part, we plead with them, with your advice, to abandon any claim pertaining to the kitchen sink and water pump. The reasons being that those items do not feature on the pleadings and our clients had already stated that the items were not left with them.

6 In conclusion, we have made the compromises highlighted above as a 'negotiating in good faith gesture' that all the parties should demonstrate in order to reach finality. It is a 'give and take' type of scenario that all the parties should do for the matter to be resolved amicably. We will await your reply urgently so that a settlement agreement could be drafted and signed before the end of February 2018."

- [6] This Court interpose to remark that the letter is replete with the royal "we". This Court can only surmise that it references the applicants. However, it is unclear whether the royal "we" was the applicants. On 28 February 2018 at 12:40 PM, one Mr Jacques Viljoen (Mr Viljoen) of Bhika Calitz Inc, dispatched an email, to m[...] and recorded the following:

"Good day,

We refer to the abovementioned matter.

We confirm that it is our instruction to accept the settlement agreement.

Regards."

- [7] This Court must interpose again to remark that the letter of 26 February 2018 stated that a settlement agreement would be drafted and signed. The above email refers to accepting the settlement agreement. It is common cause that no settlement agreement was ever drafted and signed as proposed. There was a lull of over a period of two years. On 7 February 2020, Mr Viljoen forwarded an e mail to a[...] enclosing; a filing sheet; practice note; notice of set down, setting the matter on the roll for 24 February 2020. Of particular interest, the practice notice filed by Mr Kruger, counsel for the P[...]s, mentions nothing about an agreement to settle the matter. It only indicated that what will serve before the opposed motion Court is

the eviction and the counterclaim.

- [8] On 20 February 2020, Matolo Makgele & Partners withdrew as attorneys of record for the applicants. On 24 February 2020, the applicants were not present in Court. On the version of the P[...]s, the following transpired in the absence of the applicants:

“18.2 Counsel for the second respondent argued the matter and specifically pointed the settlement agreement (referred to above and constituted by “MBP1” and “MBP2”) out to his Honourable Justice Fourie J;

18.3 The Honourable Justice Fourie was not entirely satisfied with the letter from Matolo Makgele and Partners and requested a signed copy of the letter be handed up. For this purpose, the matter was stood down until 25 February 2020;

18.4 On 25 February 2020, a signed copy of the letter of Matolo Makgele and Partners, dated 26 February 2018 was handed up and the order made, which the applicants seek to set aside.”

- [9] This Court interposes to remark that, the P[...]s do not indicate whether an unsigned letter was handed up for Fourie J’s attention, hence a request for a signed copy. Nevertheless, when the letter was allegedly handed up on 25 February 2020, the applicants were not present in Court and clearly unaware of the date of 25 February 2020.

Evaluation

- [10] As the Court order indicates, it was allegedly taken by agreement between the parties. This is what Fourie J was told by counsel for the P[...]s. It is not an order granted by the Court upon consideration of the merits and the demerits of the eviction and the counter-application. Rule 42(1)(a) of the Uniform Rules of this Court empowers this Court, on application, to rescind an order that was erroneously sought and granted in the absence of the affected party.

- [11] It is common cause that on 24 and 25 February 2020, the applicants were absent. The attorney of record had withdrawn five days ago. There is no evidence that after the withdrawal, an attempt was made to notify the applicants of the date of 24 February and most importantly the 25 February 2020.

Had Fourie J been told that the order is not by agreement would the order have been made?

- [12] Certainly, had Fourie J been told that the order is not by agreement, he would not have made the impugned order. Thus, the order was firstly sought in error and secondly granted in error. Before this Court considers the question whether there was a settlement agreement or not, it is apposite to state that, on the assumption that the letter of 26 February 2018 was written with a mandate or consent of the applicants, nothing in that letter is stated that the applicants agreed that their claim be dismissed nor that they will bear the costs of litigation. What remains perturbing is that on the version of the P[...]s by 28 February 2018 the eviction and the counterclaim were settled. In law a compromise or settlement extinguishes a claim. That being the case, why would the P[...]s proceed to enrol an extinguished claim on the

opposed roll? Their own counsel does not in the practice note state that the claims were extinguished through a compromise. Where a claim is extinguished by a compromise, the only competent matter that may be brought to Court is to make such a compromise an order of Court if the settled lis was pending before Court.

[13] To my mind, the conduct of the P[...]s and their legal team is indicative of the fact that the lis was not settled. If it was, the practice note of counsel would have indicated that on 24 February 2020, what would be happening was to make the compromise an order of Court. These concerns makes the version of the P[...]s that the lis was settled far-fetched and this Court is in a position to reject it on the papers, this being motion proceedings.

Was Matolo Makgele and Partners (Matolo) mandated to settle?

[14] The applicants deny having mandated Matolo to settle the case on their behalf. It is strange for a party in a normal litigation to agree to have its claim dismissed. Ordinarily, a party may instead agree to withdraw a claim, in which event a notice of withdrawal accompanied by a tender of wasted costs is served and filed. As already indicated, nowhere is it indicated that Matolo was mandated to have the claim of the applicants dismissed better still to pay litigation costs. In MEC for Economic Affairs, Environment & Tourism, Eastern Cape v Kruizenga and Another (Kruizenga)[1], the learned Cachalia JA writing for the majority stated the following:

“[7] It is settled law that a client’s instruction to an attorney to sue or to defend a claim does not generally include the authority to settle or compromise a claim or defence without the client’s approval.

[15] It is common cause that the applicants did not approve the offers made on their behalf by Matolo on 26 February

2018. In the letter, Matolo expressly stated that a settlement agreement will still be drafted and signed. This clearly meant that the validity of offers made is dependent on a written and signed agreement. What Viljoen accepted as a settlement agreement must be referring to agreeing to have a settlement agreement drafted and signed by the parties. Since no written agreement was drafted and signed in law there is no valid agreement to settle.

[16] On 22 July 2020, Matolo in a letter addressed to Hedrik Grobblers Attorneys, who withdrew as an attorney of record for the applicants in 2023, only suggested that he informed the applicants about the date of 24 February 2020 and he says nothing about the mandate or authority for him to settle the matter one way or another. Instead he recorded the following:

“(f) The idea of selling the property was to do that in consultation with the respondent’s attorneys to circumvent a court process which will enable the clients to make settlement to the respondents.”

[17] Regard being had to the facts of this case, it cannot be said that Matolo had an ostensible authority from the applicants to settle the case. What he allegedly agreed to on their behalf, is clearly outside the “aura of authority”. An attorney does not act in the best interest of his or her client to agree that a client’s claim be dismissed and also be ordered to pay legal costs and money[2].

[18] Accordingly, this Court concludes that, as contended by the applicants, Matolo was not mandated and or authorised to settle on behalf of the applicants. As to what happened in Court on 25 February 2020 is not clear. It must be so, that counsel for the P[...]s informed Fourie J that the signed letter, produced later, represented that Matolo, as mandated, settled the case on behalf of the applicants. Regard being had to the facts of this case, as well as the contents of the letter in question, it cannot be so that Matolo was mandated or authorised to settle. In that letter, at various places Matolo uses the royal “we” when making offers. Nowhere, does the letter specifically state that the applicants mandated him to do what he was doing. In *Minister of Police v Van der Watt and Another (Van der Watt)*[3] the following was stated:

“[16] ...Here it is common cause that the Minister was legally represented by the State Attorney when the impugned orders were granted by Ledwaba DJP and Louw J...”

[19] In casu, when the order was obtained, Matolo was not even there to confirm that the letter was drafted and signed by him and most importantly

that he had the necessary authority to settle on behalf of the applicants. It can only follow that the order was made on the strength of the say-so of the P[...]s’ counsel

Conclusions

[20] As held in *Van der Watt*, Rule 42(1)(a) is available only to a party in whose absence the order sought to be rescinded was either erroneously sought or erroneously granted. In this matter, it is beyond question that the applicants were not present on 25 February 2020 when the order suggesting an agreement on their part was taken. Had Fourie J known that there is no agreement as alleged, an order would not have been made. Accordingly, the impugned order was sought and granted erroneously. As a result the application must succeed.

[21] With regard to costs, this Court retains a wide discretion. The appropriate order to make is that of each party paying its own costs.

[22] For all the above reasons, I make the following order:

Order

1. The order made by Fourie J on 25 February 2020 is hereby rescinded.
2. Each party must pay its own costs.

GN MOSHOANA

JUDGE OF THE HIGH COURT

APPEARANCES:

For the Applicants:

In Person

For the Respondents:

Mr JHF le Roux

Instructed by:

Bhika Calitz Inc, Randfontein.

Date of the hearing:

18 November 2024

Date of

judgment:

25 November 2024

[1] [2010] 4 All SA 23 (SCA) at para 7

[2] See Kunene and others v Minister of Police (260/2020) [2021] ZASCA 76 (10 June 2021)

[3] (1009/2021)

[2022] ZASCA 114 (21 July 2021)

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