

SOUTH AFRICA / JUDGMENT

Khunou v Sebesho and Another In re: Sebesho v Khunou and Another (24798/17) [2021] ZAGPJHC 429 (13 September 2021)

[2021] ZAGPJHC 429**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Mahomed AJ

CASE / FILE NUMBER

24798/17

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****REPORTABLE:**

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:**Date:**

13/9/2021

CASE

No 24798/17

In

the matter between:

KHUNOU,

JA

Known

as Mofedi,

Maki

Applicant

and

PK

SEBESHO

First Respondent

MASTER

OF THE HIGH COURT

(JOHANNESBURG)

Second Respondent

IN

RE: CASE
NO. 24798/17
PK
SEBESHO
Applicant
JN
KHUNOU,
Known
as MOFEDI,
MAKI
First Respondent
THE
MASTER OF THE HIGH COURT, JOHANNESBURG
Second Respondent

JUDGMENT

MAHOMED, AJ

This is an application for rescission of a judgment granted on 22 August 2019, by my brother, Matojane J. The applicant applied for a rescission of this judgment in terms of Rule 42(1) (a), on the basis that the order was erroneously sought and granted, and in her absence.

BACKGROUND

1. The applicant is an adult female who, lives in her home in the Meadowlands Township, which she inherited from her parent. It is alleged that she is the sole heir in the deceased estate.
2. The First Respondent is described as a pensioner, her papers do not set out her interest in this matter other than as applicant in two motions she launched in respect of the property in the deceased estate.
3. In her first motion issued in August 2017, the First Respondent, sought to declare the transfer and registration of the property which the applicant occupies, null and void. This motion is opposed, opposing papers were served in September 2017, a replying affidavit was filed in January 2018 and this matter is since pending.
4. On 7 December 2018 the first respondent served the second motion on the applicant wherein she sought a cancellation of the letters of authority granted in respect of this deceased estate. The property the applicant occupies is an asset in the estate. The applicant seeks a rescission of the order granted in this motion.
5. It is noteworthy that the two motions relate to procedures that are interrelated and are stages in the reporting of a deceased estate and its consequences.

6. Mr Backus appeared for the applicant and informed the court that the matter was previously before van Eerden AJ on an unopposed basis, when he attended court and advised the court that the matter was opposed.
- 6.1. On the day the matter was removed from the roll for the applicant to file her answering papers.
- 6.2. The applicant served a notice of exception to remove cause of complaint in this second motion and later an application to remove cause of complaint in terms of Rule 23.
- 6.3. This exception is opposed. On 15 August 2019 the first respondent served her answering affidavit to the exception.
- 6.4. It is not disputed that an exception is still to be argued.

THE EVIDENCE

7. Mr Backus informed this Court that he noted on 15 May 2020 only, upon perusal of an email from the first respondent's attorney, in which he was advised of an amendment, that an order was granted in this motion. He immediately contacted the applicant and noted she was not aware of the order, whereupon he took instructions to apply for a recession of the order.
- 7.1. During that period the national lockdown posed difficulties for all, particularly in the movement of people and the provision of services. In June 2020 the applicant finalised the papers in this application when they were duly served.
- 7.2. He submitted that the applicant acted within reasonable time of becoming aware of the order.
8. He further submitted that the applicant suffers prejudice in that the order granted has effectively placed her living in her home, which she inherited, in jeopardy. She was never afforded an opportunity to place her version before a court or even before the Master who granted the letters of authority.
9. Counsel for the first respondent, Mr Mokhabukhi, submitted that the applicant was, directed to file her answering papers, on the last occasion, by van Eerden AJ, when the matter was initially on the unopposed roll and failed to do so.
10. He alleged the applicant's attorney was negligent and that the first respondent should not be unduly prejudiced by the applicant's attorney's failure to file papers.
11. He submitted further, that it is not disputed that an electronic set down was served and that the applicant was aware of the date on the unopposed roll.
12. It is not disputed that a final notice of set down, in terms of the Rules, was not served. Counsel for the first respondent was unable to direct the court to the set down notice.

13. Mr Mokhabuki submitted that the order was properly sought and granted, as the applicant's attorney failed to file the answering papers, he knew of the date of set down on the unopposed roll and that the first respondent was entitled to obtain the order on an unopposed basis.

13.1. He submitted further that the letters of authority were fraudulently obtained. The second respondent would have to, in any event, review the issue of the same letters of authority and therefore the rescission would be futile, as parties would still have to traverse the same process of the proper reporting of the estate and consideration of issue of letters of authority.

13.2. In reply, Mr Backus submitted that there is no evidence to support the allegations of fraud, or any proof or confirmation of any investigation being conducted by the second respondent into such allegations.

13.3. He submitted that at this stage the facts are all anecdotal and a court is entitled to know the full facts upon granting of an order of court.

14. On 22 August 2017, my brother Matojane J, granted an order, to cancel the letters of authority on an unopposed basis.

THE LAW

Condonation

15. The applicant for condonation must show good cause for a court to condone noncompliance with the Rules of court. A "valid and justifiable reason must exist why compliance did not occur and why noncompliance must be condoned.", GENERAL ACCIDENT INSURANCE CO. SA LTD v ZAMPELI 1988 (4) SA 407 (C) AT 410 I-J.

16. A court has a wide discretion on good cause shown.

RESCISSION in terms of Rule 42(1)

17. Rule 42 (1) provides:

"the court, may ... , mero motu or upon 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;"

18. This is a procedural step to correct an obviously wrong judgment or order.

19. A court has a discretion to grant a rescission where the applicant through no fault on her part, was denied an opportunity to oppose the order granted against her.

20. The rule contemplates that the applicant must have a direct and substantial interest in the subject matter of the judgment or order granted to intervene in the original application to which the order was granted.

21. The crucial inquiry here is “whether a judicial officer, would have granted the order, had he/she been aware of the facts that would have precluded her/him from granting an order.

Exception

22. Rule 23 is described as,

“... a remedy... available when the objection goes to the root of the opponent’s claim or defence.” (Herbstein and van Winsen, vol 1 5th ed p 632)

23. The exception is a “pleading” ...

24. The rule is, “... designed to dispose of pleadings which are so vague and embarrassing that an intelligible cause of action or defence cannot be ascertained or to determine such issues between the parties as can be adjudicated upon without the leading of evidence. The aim of the exception procedure is thus to avoid the leading of unnecessary evidence and to dispose of a case in whole or in part in an expeditious and cost-effective manner.” (p630) (emphasis added).

25. A party may raise an exception instead of a special plea.

Judgment

26. The applicant has proffered a reasonable explanation for the delay in the launching of this application for rescission. The applicant has also demonstrated that she has a direct and substantial interest in this second motion, in which an order was granted in her absence.
27. The subject matter of the motion relates to the home she currently occupies and which she proffered she inherited as the sole heir to her mother’s estate.
28. Clearly, the applicant is desirous of a hearing on the matter as to her lawful possession and occupation of her home.
29. The issues of land and housing are highly sensitive matters in the lives of any individual, more particularly in the lives of vast numbers of the people of this country. The history of land and housing in this country is well document and a right protected in the Constitution of our land.
30. The area of law of deceased estates, has long been shrouded in mystery, and often an area of abuse, particularly in the reporting of small estates.
31. I am of the view that she has not unnecessarily delayed the launch of this application, she has demonstrated a direct interest in this matter and her desire to obtain clarity on her right to ownership and occupation. She must be afforded a hearing to fully ventilate issues, accordingly the application for condonation must succeed.
32. The applicant is in fact attempting to enforce her rights to a speedy trial, and clarity on her right to lawfully live in her home.

33. I inquired off counsel for the first respondent, whether the attorney ought not to have made a telephone call to inquire about the opposing papers which may have been overdue. He responded that they were not obliged to do so and entitled to the order if an electronic set down was served. Counsel was adamant that the attorney for applicant was negligent and should have followed the courts direction to file the applicant's answering papers.
34. This is indeed a disappointing response, given that the first respondent concedes that she filed a notice to oppose and her answering papers to the application in terms of Rule 23 of the Uniform Rules of Court.
35. In an application for the removal of a cause of complaint, the applicant is afforded an opportunity to dispense with the matter at an "early stage and cost effectively". If the cause of complaint goes to the root of the matter and she succeeds, that will be the end of the matter. Costs would have been limited and a finding made certain.
36. There can be no dispute to a party seeking a "quick resolution" of the matter, in fact it is the ideal, given the exorbitant costs of litigation today and the pressures on the court rolls.
- 36.1. At the hearing of this exception, the pleadings as they appear are fully considered, sometimes on points of law, affording the excipient his or right to a hearing at an early stage in the matter and a possible finalisation of matter.
- 36.2. The first respondent, obviously, refuses/does not see a reason to remove the cause of complaint, the applicant is still prejudiced by the pleadings and has therefore launched a formal application to determine the nature, extent, and impact of the offending pleading.
- 36.3. A litigant cannot be denied this right by any court, provided it has merit which will be determined by the court who will be seized with the matter, in the future.
- 36.4. The evidence is that the first respondent's answering papers, have been filed and the exception is to be argued and adjudicated upon. That is where this matter stands procedurally. The matter cannot be said to be unopposed.
37. I am therefore of the view that were my brother Matojane J, aware of the exception and its opposition thereto, the Honourable Judge would have understood the matter to be opposed and would never have granted the order.
38. Accordingly, I am of the view that the order was erroneously sought, as the exception is to still to be argued.
39. It is not disputed that the exception was taken and that it is opposed. Mr Mokhabuki is incorrect that the first respondent is entitled to the order as the matter is unopposed.
40. The first respondent's counsel has overlooked the opposed exception which is to be heard.
41. Accordingly, I find that the order was both erroneously sought and erroneously granted.

I make the following order:

1. The late filing of this application is condoned.
2. The order granted on 22 August 2019 is rescinded.
3. The first respondent is to pay the costs of this application.

MAHOMED AJ

Date of hearing : 26 August 2021

Date of Judgment: 13 September 2021

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Prepared on 10 October 2026 · Esheria