

SOUTH AFRICA / JUDGMENT

Mafuna v Lungwengwe and Another (1265/12) [2015]

ZAECMHC 69 (18 September 2015)

[2015] ZAECMHC 69

COURT

Eastern Cape High Court, Mthatha

BEFORE

Brooks

CASE / FILE NUMBER

1265/12

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Source record**IN THE HIGH COURT OF****SOUTH AFRICA****EASTERN CAPE LOCAL****DIVISION: MTHATHA****CASE NO: 1265/12****DATE: 18 SEPTEMBER 2015**

In the matter between:

SAMSON

MAFUNA.....Applicant

And

ZWELIBANZI

LUNGWENGWE.....1st

Respondent

MEC FOR LOCAL GOVERNMENT

& TRADITIONAL

AFFAIRS.....2nd

Respondent

JUDGMENT

BROOKS AJ

- [1] The applicant is a member of the Amajola Royal Family. He seeks the rescission of an order which was obtained against him by default on 12 December 2013 (“the order”) by the first respondent.
- [2] The first respondent has opposed the application for rescission.
- [3] It is apposite to record at this point that the second respondent was the first respondent in the matter which gave rise to the order. Notwithstanding notice to the second respondent, that party takes no part in present proceedings.
- [4] Although it is not specifically stated in the applicant’s founding affidavit, it is plain from the circumstances disclosed therein that the application for rescission of the order proceeds in terms of Rule 31(2) (b) of the Uniform Rules of Court, alternatively in terms of the common law.
- [5] It is appropriate to set out a number of legal principles applicable to an application of this nature before assessing the evidence contained in the affidavits.
- [6] In an application of this nature it is incumbent upon an applicant to place evidence before the court which demonstrates the following:
1. He or she must give a reasonable explanation for his or her default; if default is wilful or due to gross negligence, the court should not come to his or her assistance;
 2. The application must be bona fide and not made with the intention of merely delaying the plaintiff’s claim;
 3. The applicant must show that he or she has a bona fide defence. It is sufficient if he or she makes out a prima facie defence which does not deal fully with the merits or produce evidence that the probabilities favour the applicant.

(HDS Construction (Pty) Ltd v Wait 1979(2) SA 298(E) 300 F – 301 C; Grant v Plumbers 1949(2) SA 470(0) 476-477.)

- [7] In amplification of the first requirement of an application for rescission, it has been held that the explanation for the default must be sufficiently full to enable the court to understand how it really came about. (Silber v Ozen Wholesalers (Pty) Ltd 1954(2) SA 345(A) 353A.)
- [8] Whilst it is for the applicant to give a reasonable explanation for his or her default, the onus of proof to establish wilful default rests with the respondent. (Mahomed Abdulha v Chochan 1933 NPD 334).

- [9] The requirement that an applicant show the existence of a substantial defence does not mean that he or she must show a probability of success. It is sufficient if he or she shows a prima facie case, or the existence of an issue which is fit for trial. (*Sanderson Technitool (Pty) Ltd v Intermenua (Pty) Ltd* 1980(4) SA 573 (W)). In this regard, the following principles are useful:

“...judgment by default is inherently contrary to the provisions of s 34 of the Constitution. The section provides that everyone has a right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. Therefore, in my view, in weighing up facts for decision, the court must on the one hand balance the need for an individual who is entitled to have access to court, and to have his or her dispute resolved in a fair public hearing, against those facts which led to the default judgment being granted in the first place. In its deliberation the court will no doubt be mindful, especially when assessing the requirement of reasonable cause being shown, that while among others this requirement incorporates showing the existence of a bona fide defence, the court is not seized with the duty to evaluate the merits of such defence. The fact that the court may be in doubt about the prospects of the defence to be advanced, is not a good reason why the application should not be granted. That said however, the nature of

the defence advanced must not be such that it prima facie amounts to nothing more than a delaying tactic on the part of the applicant.”

(*RGS Properties (Pty) Ltd v Ethekwini Municipality* 2010(6) SA 572 (KZD) 575G-576C.)

- [10] In considering the proper approach to be adopted in the evaluation of the evidence set out in the affidavits, it is necessary to consider the nature of the relief sought. The effect of rescission would be to render the order a nullity. Neither advantage nor disadvantage can flow therefrom. The applicant is entitled to claim that the status quo ante be restored. (*Securiforce CC v Ruiters* 2012(4) SA 252 (NCK) 216D-E). In my view, the grant of rescission can be likened to the grant of interim relief and the proper approach is to take the facts set out by the applicant together with any facts set out by the respondent which the applicant

cannot dispute and to determine whether, on those facts, the applicant is entitled to relief. (*Spur Steak Ranches Ltd and Others*

v Saddles Steak Ranch, Claremont, and Another 1996(3) SA 706 (C) 714E.)

- [11] In evaluating the evidence placed before the court in the affidavits, it is useful to bear in mind the following two principles:
1. Firstly, the court has a wide discretion in evaluating “good cause” in order to ensure that justice is done. (*Wahl v Prinswil Beleggings (Edms) Bpk* 1984(1) SA 457 (T));
 2. Secondly, the object of rescinding a judgment is “to restore a chance to air a real dispute”. (*Lazarus v Nedcor Bank Ltd; Lazarus v ABSA Bank* 1999(2) SA 782(W)).

- [12] Against the background of these legal principles, I turn to an examination of the evidence placed before the court in the exchange of affidavits.
- [13] The applicant states in his founding affidavit that he was not served with the application which gave rise to the order. This is repeated in his replying affidavit. In disputing this allegation, the first respondent attaches a return of service completed by the sheriff. This document records that “on 21 June 2012 at 12h00 the applicant was served with a Notice of Motion by the delivery of a copy thereof at Mevana A/A, Libode to Samson Mafuna”. Although that is the name of the applicant, the return of service does not record that personal service occurred. Nor does it indicate whether the place of service was the applicant’s place of residence, employment or business and whether the full founding papers were served. It is a singularly unhelpful document. Realising the deficiencies in the return of service, as part of his answering papers the first respondent includes an affidavit deposed to by the sheriff on 10 April 2015, nearly three years later, in which the sheriff states that the service upon the applicant was personal service and occurred at his place of residence at Zele Location in the district of Libode.
- [14] In the circumstances, careful attention needs to be given to the reasons for the applicant’s default. It is alleged by the first respondent that the applicant gave notice of opposition in the matter. He files as an annexure to his answering affidavit a copy of a notice to oppose the application dated 4 July 2012 which was served on his attorney of record on 14 August 2012. The author of the notice is the state attorney. The content of the document states that “the respondents give their notice of intention to oppose the application and appoint the address of the state attorney for service of process”. In signing the notice, the author places his signature above the words “Defendant’s Attorney”.
- [15] Once again, the document relied upon by the first respondent is unhelpful. Nothing in its title claims that it was filed on behalf of both respondents. The detail underneath the author’s signature indicates that it is filed on behalf of a single defendant. The document is not covered by an explanatory affidavit deposed to by the author. Moreover, in my view the court is entitled to take judicial notice of the fact that the offices of the state attorney act exclusively on behalf of organs of state. In his capacity *nomine officio*, the second respondent, who was the first respondent in the application which gave rise to the order, would have had access to the Mthatha office of the state attorney, whereas the applicant, who was the second respondent in that application, would not.
- [16] However, even if there were some doubt cast upon the applicant’s allegations pertaining to a lack of effective service by the allegations made by the first respondent in his answering affidavits and the content of the annexures to which I have made reference, further and important information pertaining to the applicant’s default emerges from more detailed allegations made by the first respondent.

- [17] In an attempt to demonstrate that the present application for rescission amounts to no more than an attempt by the applicant to distort the truth and conceal the real facts, the first respondent states that subsequent to the filing of the notice of opposition to which I have referred, settlement negotiations resulted from telephonic exchanges between the attorneys. Full attendance by all involved could not be achieved on the first date nominated, which was 12 August 2012, but the first respondent states that the second meeting scheduled for 3 September 2012 was attended by the applicant. An attendance register, on which the applicant's name appears, is attached to the answering affidavit in support of this allegation. So too is a letter written by the present second respondent as an invitation for the whole royal family to attend a further meeting scheduled for 20 August 2013, almost a year later. The first respondent states that this meeting was also attended by the applicant.
- [18] In the replying affidavit the applicant states that he was approached by the office of the state attorney, Mthatha, with a request that he attend the meeting of 3 September 2013 held at the state attorney's office. He states that no settlement was reached on that day. He states further that he was not aware of a meeting being held on 20 August 2013 as he was not notified. He denies further that either he or the whole royal family were there.
- [19] It readily apparent from the facts which emerge in this matter that prior to obtaining the order the first respondent was engaged in settlement negotiations. It is also clear that, by whatever mechanism, the applicant was to some extent involved in the settlement negotiation process. It becomes irrelevant whether or not he had effective service of the initial application papers. It is plain that he had a direct interest in the outcome of the initial application and must have become aware of its existence during the settlement negotiation process even if he had not been served with the application initially.
- [20] There is no explanation in the answering affidavit for the obvious abandonment by the first respondent of the negotiations towards a settlement of the initial application. The answering affidavit is silent as to the decision which must have been taken at some point by the first respondent to proceed further with the initial application. It is plain from the order itself that the applicant was not present when the order was taken. In the absence of any information in the answering affidavit relating to steps taken to give the applicant notice of the matter being set down by the first respondent, one must accept on an examination of the common cause facts and the facts alleged by the first respondent in the answering affidavit that the applicant's absence at the time when the order was granted cannot be attributed to wilfulness or gross negligence on his part. That being the case,

I am satisfied that a reasonable explanation for the applicant's default emerges from the affidavits.

- [21] In evaluating the second requirement, it is evident from the application papers that on 19 January 2008 the Amajola Royal Family took a decision to identify the applicant as the Inkosana of the Mevana Administrative Area. A copy of their resolution is annexed to the founding papers. In his answering affidavit the first respondent admits that the Amajola

Royal Family took a resolution to identify the applicant as Inkosana, but alleges that the resultant appointment of the applicant as Inkosana was unlawful as it was in conflict with an earlier resolution taken by the Amajola Royal Family to identify the first respondent as Inkosana. The first respondent alleges that the earlier identification of himself was never reversed. His contentions formed the basis of the initial application brought by him and are, to some extent, reflected in the terms of the order.

[22] In the circumstances, I am of the view that the applicant is bona fide and has not made the present application with the intention of merely delaying the first respondent's claim. The effect of the order was the reinstatement of the first respondent as Inkosana of the Mevana Administrative Area displacing the applicant who had held the position for a number of years. I accept that the applicant is bona fide in wishing to challenge the first respondent's claim.

[23] The third requirement is that the applicant must demonstrate a bona fide defence. It is clear from the founding affidavit that the applicant raises a number of procedural difficulties with the initial application. In my view, those difficulties, if ventilated, may indeed be dispositive of the matter. However, the real defence emerges from the fact that the applicant held the position as Inkosana in Mevana Administrative Area for a number of years pursuant to his identification as Inkosana by the Amajola Royal Family. Understandably, this is a position which he wishes to defend. His reliance upon the objective factors set out in

his affidavit which, although challenged, are admitted by the first respondent, demonstrates the defence as bona fide.

[24] Accordingly, I am of the view that a rescission of the order would restore a chance to air a real dispute. There are competing claims to an important position within the Amajola Royal Family and within the broader community. It is in the interests of justice that the competing claims be expressed, explored and resolved. In the exercise of my wide judicial discretion in this matter, I am of the view that "good cause" exists for the rescission of the order to ensure that justice is done.

[25] In the result the following order will issue:

"1. The order granted by default in favour of the first respondent on 12 December 2013 under case no. 1265/2012 is hereby rescinded and set aside.

2. The first respondent is hereby directed to pay the costs of this application."

ACTING JUDGE OF THE HIGH COURT

Counsel for the Applicant: Adv Luzipho

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Applicant's Attorneys

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