

SOUTH AFRICA / JUDGMENT

Magano and Others v Kaps and Others (UM92/2020) [2024]

ZANWHC 80 (19 March 2024)

[2024] ZANWHC 80

COURT

North West High Court, Mafikeng

BEFORE

FMM Reid

CASE / FILE NUMBER

UM92/2020

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Policy

IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE NUMBER: UM92/2020

Reportable: NO

Circulate to Judges: NO

Circulate to Magistrates:

NO

Circulate to Regional

Magistrates: NO

18 March 2024

In the matter between:-

MAYIBONGWE

CAROLINE MAGANO

1st

Applicant

SAMUL

SELLO MAGANO

2nd

Applicant

MORAPEDI
DONALD SERIPE
3rd
Applicant
and
GERRIT
DEON KAPS
1st
Respondent
SOPHY
MAPHOSA
2nd
Respondent
MARLIEN
DE BONT
3rd
Respondent
MOSAIC
FUNERAL GROUP
4th
Respondent
MORWENG
ATTORNEYS
5th
Respondent
FIRST
NATIONAL BANK LIMITED
6th
Respondent
In re

In the matter between:

GERRIT
DEON KAPS
1st
Applicant
SOPHY
MAPHOSA
2nd
Applicant
MARLIEN
DE BONT
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MORAPEDI
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2nd

Respondent
SAMUEL
SELLO MAGANO
3rd
Respondent
MAYIBONGWE
CARLINE MAGANO
4th
Respondent
FIRST
NATIONAL BANK LIMITED
5th
Respondent
This
judgment is handed down electronically by email to the legal
representatives of the parties. The date and time of hand
down
is deemed to be 19 March 2024 at
10h00.

JUDGMENT

FMM REID J

Introduction:

- [1] This is an application for the rescission of a judgment in terms of Rule 42(1)(a) of the Uniform Rules of the High Court to rescind and set aside the court order issued by Lephadi AJ on 25 June 2020.

In addition, the applicants seek that the 6th respondent (First National Bank “FNB”) be ordered to reinstate and give effect to the court orders granted under case number UM72/2020 by Hendricks DJP (as he then was) on 15 and 18 May 2020. The order granted by Lephadi AJ on 25 June 2020 rescinded and set aside the order of Hendricks DJP dated 15 and 18 May 2020.

- [2] For the sake of clarity, I will refer to the applicants as “the current applicants” or to the individual applicant, to the 4th respondent Mosaic Funeral Group of Companies (Pty) Ltd as “the MFG Company”, to the 5th respondent as “Morweng Attorneys” and to the 6th respondent as FNB Bank.

- [3] The relief sought by the applicants is set out in the notice of motion as follows:

“1. That the court order issued by Lephadi AJ on 25 June 2020 be rescinded.

2. That the 6th respondent, being FNB, be ordered to reinstate and give effect to the court orders UM72/2020 granted by Hendricks DJP on the 15th and 18th May 2020.

3. That the 6th respondent be ordered to make available to the 1st applicant within 10 days of this court order, all bank statements since 25 June 2020 to the date when the 5th respondent prints the same after the granting of the order.
4. That the applicants be allowed to file the answering affidavit in the main application.
5. That the 1st – 3rd respondents be directed to pay the cost liable jointly and severally at attorney and client scale, such cost to include two counsels.
6. Further and alternative relief.”
- [4] The applicants seek to have Lephadi AJ order rescinded and set aside on the basis that they were not aware thereof that the order was granted, and that Morweng Attorneys did not have any mandate to act

on their behalf.

- [5] The applicants are represented by Adv Moisane and the respondents are represented by Adv Griesel.

Material factual background

- [6] On 7 May 2020 and under case number UM72/2020, the applicants, purportedly acting on behalf of MFG Company, approached the Court on an urgent basis for an order that the signatories of the bank accounts of MFG Company held at FNB be amended and replaced to be those of the 2nd and 3rd applicants and that of Mr Dippie Swart.
- [7] The deponent to the founding affidavit in the matter under UM72/2020 was the current 3rd applicant, MD Seripe acting as the Chief Executive Officer of MFG Company. The Notice of Motion was filed on 7 May 2020 and reflects that the application was to be heard on 15 May 2020. For ease of reference, I will refer to that application as the “UM72/2020” application.
- [8] In the founding affidavit of UM72/2020 deposed to on 7 May 2020, the current 3rd applicant states in paragraph 8 that “(t)here are currently six active directors of the applicant” (which was the MFG Company). Attached to the founding affidavit is a Certificate issued by the Commissioner of Companies and Intellectual Property Commission dated 18 February 2020 reflecting the directors of MFC Company to be the current 1st applicant MC Magano, the current 2nd applicant SS Magano, 3rd applicant MD Seripe, the current 1st respondent GD Kaps, the current 2nd respondent S Maphosa and the current 3rd respondent M de Bont.
- [9] The UM72/2020 application was based on a purported resolution by MFG’s board of directors that was allegedly passed at a board meeting on 5 May 2020. This resolution was signed by the present applicants and not by the 1st, 2nd and 3rd respondents, despite the fact that they were directors of the MFG Company at that time. The 1st, 2nd and 3rd respondents state that no resolution was ever presented to them for signature and that the resolution on which the application in UM72/2020 was founded, was a fraudulent fabrication.

[10] The 1st, 2nd and 3rd respondents were not joined as respondents in the application under UM72/2020 and the application was not served on them prior to it being heard. In the application under UM72/2020 the applicant was cited as “Mosaic Funeral Group of Companies (Pty) Ltd” as applicant and “First National Bank Limited” as respondent.

[11] In the application under UM72/2020 the following order was made on 15 May 2020 and varied on 18 May 2020 by Hendricks DJP (as he then was):

“1. That this application be heard as an Urgent Application in terms of Rule 6(12) of the Uniform Rules of Court and that the Court condone the non-compliance with the Rules specially pertaining to service, filing and time-periods;

2. That the Respondent be and is hereby mandated to:

2.1 Release bank statements of the applicant under savings account of the applicant held with the respondent for the past three (3) years;

2.2 Amend the list of signatories under savings account bearing number 6[...] and any other account of the applicant held with the respondent and further replace all such signatories with the following names of the individuals whose names appear herein under:

2.2.1 Morapedi Donald Seripe (ID No 8[...]) (the 3rd applicant in casu).

2.2.2 Samuel Sello Magano (ID No 4[...]) (the 1st applicant in casu).

2.2.3 Dippie Swart.”

[12] When the 1st, 2nd and 3rd respondents became aware of the order that was granted under UM72/2020 they immediately brought an urgent application under the case number in casu, being case number UM92/2020 to rescind and set aside paragraph 2.2 of the court order concerning the change of the signatories for MFG Company’s bank account (“the rescission application”). The current applicants were joined as respondents in the rescission application. The current applicants were represented by Morweng Attorneys, who is currently the 5th respondent. The applicants filed a notice of their intention to oppose the rescission application in UM92/2020, which was later withdrawn as indicated in paragraph

[15] below.

[13] The applicants in the rescission application under UM92/2020 filed notices in terms of Rule 35(12) and Rule 35(14), calling for the transcription of the board meeting held by MFG Company on 5 May

2020. The transcription was duly provided and proved that no change in the signing powers of MFG Company’s bank accounts was discussed at the board meeting of 5 May 2020.

[14] After the transcription was produced, the present applicants (who was the 2nd, 3rd and 4th respondents in the rescission application) withdrew their opposition to that rescission application. They also abandoned the part of the order under UM72/2020 that dealt with the change of the signatories of MFG Company's bank accounts.

[15] To that end, a formal notice was filed on 17 June 2020, signed by Morweng Attorneys and received by van Rooyen Thlapi Wessels Attorneys, which reads as follows:

“ _____

WITHDRAWAL OF OPPOSITION AND ABANDONMENT OF ORDER

KINDLY TAKE NOTICE THAT the first to fourth respondents hereby withdraw their intention to oppose this application and further abandon paragraph 2.2 of the order of this Honourable Court made under case number UM72/2020 including paragraphs 2.2.1 to 2.2.3 of the order.”

[16] E-mail correspondence attached to the answering affidavit supports the argument of the respondents that Morweng Attorneys acted on behalf of the current applicants and agreed to the Draft Order that was eventually made an order of Court in the rescission application. The wording of the order itself indicates that the order is made by agreement between the parties in the rescission application under case number UM92/2020 granted on 25 June 2020 by Lephadi AJ. It is this order that the applicants seek to have rescinded and set aside in this application.

[17] The following further supports the argument of the respondents that the order made by Lephadi AJ was made by agreement between the parties:

17.1. In the e-mail correspondence dated 17 June 2020 at 14h32 the attorney for the respondents, Mr Hein Beukes from VFV Attorneys, wrote to Eric Morweng from Morweng Attorneys to the following effect:

“SUBJECT: URGENT APPLICATION – UM92/2020: GERRIT DEON KAPS & 2 OTHERS // MOSAIC FUNERAL GROUP OF COMPANIES (PTY) LTD AND 4 OTHERS

Dear Sir,

Kindly find hereto attached the draft order for this matter that will be handed up and made an order of court herein.

Kindly provide us with a written undertaking that your clients give consent that this draft order may be made an order of court herein.

Kind regards,

Hein Beukes.”

17.2. In reply to the above e-mail dated 24 June 2020 at 16h19 from Eric Morweng addressed to Hein Beukes, the following e-mail was sent:

“Good day,

The draft order is fine.

Eric Kgosietsile Morweng

Morweng Attorneys

Director...”

- [18] The applicants deny that they mandated Morweng Attorneys to act on their behalf. They further deny that Morweng Attorneys brought the application for rescission, as well as the draft order which was made an order of court by Lephadi AJ on 25 June 2020, to their attention.
- [19] It is important to note that the applicants do not take this Court into their confidence in disclosing when the application for rescission and the Lephadi AJ judgment came to their attention. No date or time period is provided as to when the applicants became aware of the Lephadi AJ judgment. The applicants also state that they were only served with the notice of motion in the rescission application and not the complete application.
- [20] The parties have a turbulent history of litigation between themselves. Of importance, is litigation between the parties that has been instituted in the Western Cape Division of the High Court under case number 7344/2020 (“the Western Cape application”). A copy of the notice of motion and the relevant part of the founding affidavit of the Western Cape litigation has been attached to the answering affidavit. The litigation in the Western Cape is an application for an interdict against the MFG Company in which the current applicants apply to the High Court in the Western Cape Division to not be subjected to disciplinary hearings.
- [21] The 3rd applicant in the present application deposed to the founding affidavit in the Western Cape application and the 1st and 2nd applicants in the present application deposed to confirmatory affidavits. In paragraph 26 of the founding affidavit in the Western Cape application, the 3rd applicant stated under oath on 17 June 2020 as follows:

“On or about 5 June 2020, the 1st to 3rd respondents instituted an urgent application in the North West High Court to set aside the order in the same court on 15 March 2020. I attach hereto a cover page of the said application under case number UM92/2020 marked annexure “FA8”. This application as opposed by the applicants and our opposition was withdrawn simultaneously with the filing of a notice of abandonment

as stated above.”

- [22] This is in direct conflict with the founding affidavit of the applicants in which they claim they had no knowledge of the application being instituted, and that the attorney acting on their behalf had no mandate to act in filing a withdrawal of their opposition and notice of abandonment of the court order. This affidavit as filed in the Western Cape Division, the

actions in filing a notice of abandonment, the e-mail to Morweng Attorneys and the correspondence of Morweng Attorneys accepting the draft order, as well as the order that was made expressly “by agreement”, all lead to only one reasonable inference, and that is that Morweng Attorneys indeed had a mandate to act on behalf of the applicants.

- [23] This is furthermore a clear indication that the applicants indeed had due knowledge of the rescission application and order as granted by Lephadi AJ during June 2020. As mentioned, it is in direct contrast with the content of the applicant’s current founding affidavit in which they state that (a) Morweng Attorneys did not have a mandate to act on their behalf and (b) they were not aware of the rescission application.
- [24] The aforesaid is a material contradiction which is made by the applicants under oath. The basis on which the current rescission application is sought, namely that they did not provide Morweng Attorneys with any mandate to act on their behalf, and that they were not aware of the order of Lephadi AJ, has not been proven by the applicants.
- [25] As such, the applicants failed to make out a case for rescission and the application is bound to be dismissed.

Condonation

- [26] If regard is had to the content of the applicants’ case in the Western Cape Division, the applicants became aware of the order of Lephadi AJ on 5 June 2020. The applicants waited more than three (3) years to bring the present application, without any explanation for the delay.
- [27] The applicants do not apply for condonation for the late filing of the application.
- [28] The order that is sought to be rescinded was granted on 25 June
2020. Even on the applicant’s version where no time is indicated when the applicants became aware of the order, it cannot be said that the application was launched in a reasonable period. A period of approximately three (3) years after the order sought to be rescinded, warrants an explanation of the reasons why the application is brought after such a prolonged time.
- [29] In the absence of a condonation application, condonation cannot be granted to the applicants for the late filing of this rescission application.
- [30] In the result, the application is bound to be dismissed with costs.

Costs

- [31] The respondents ask for cost on a punitive scale, being that of the scale as between attorney and own client. Punitive cost orders are normally only granted where there is mala fide conduct or mala fide intentions in the conduct of a party during litigation.

[32] The content of the affidavit of the applicants in the matter in the Western Cape, refers directly to the order which the applicants now seek to set aside under the auspices that they did not mandate their attorney and were not aware of the order. The applicants state under oath in this application that they did not give their attorney a mandate and were not aware of the rescission application. The contrary was stated under oath by the same individuals in the

litigation in the Western Cape Division. This is nothing other than mala fide conduct, if not perjury.

[33] The conduct of the applicants is deserving of a punitive cost order.

[34] As such, I exercise my discretion and find that a cost order as between attorney and client is warranted.

Order:

[35] In the premise, I make the following order:

i) The application is dismissed with costs on a scale as between attorney and client.

FMM REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

DATE OF HEARING:

25 JANUARY 2024

DATE OF JUDGMENT: 19 MARCH 2024

APPEARANCES:

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