

SOUTH AFRICA / JUDGMENT

Phuluwa v Baloyi and Others (245/2009) [2017] ZALMPTHC 15 (30 June 2017)

[2017] ZALMPTHC 15**COURT**

Limpopo High Court, Thohoyandou

BEFORE

Makhafola

CASE / FILE NUMBER

245/2009

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(LIMPOPO****LOCAL DIVISION, THOHOYANDOU)****CASE****NO: 245/2009****DATE:**

30/06/2017

In

the matter between:

PHULUWA,
THANYANI
JUSTICE APPLICANT
AND
BALOYI,
HEBRON
TSENGELA
1 RESPONDENT
MIN.
OF JUSTICE &
CONSTITUTIONAL
2ND RESPONDENT
DEVELOPMENT
MEINTENANCE
COURT MAGISTRATE LEBESE M.M
3RD RESPONDENT
MAINTENANCE
OFFICER
4TH RESPONDENT
KIMBERLY
MAGISTRATE'S COURTMAINTENANCE

OFFICER
5TH RESPONDENT
THOHOYANDOU
MAGISTRATE'S COURT

JUDGMENT

MAKHAFOLA J:

INTRODUCTION

- [1] The applicant brings an application by way of review in terms of Rule 53 of the Uniform Rules of Court for: reviewing and/or correcting and/or setting aside the decision and/or order of the 03rd respondent taken on or about 16th day of August 2007 ordering the applicant to pay maintenance in favour of the 1st respondent in the amount of R2000.00.

REVIEW AND APPEAL

- [2] From the tone of the founding affidavit it is clear that the applicant wants the decision of the respondent set aside. Gleaned

from the facts in the founding affidavit it is the decision and not the procedures that are complained about.

- [3] Annexure "A" is a consent and maintenance order signed by the applicant. Annexures 8 and C are deposit slips into ABSA Bank by the applicant in compliance with the maintenance order.
- [4] In paragraph 19 of the founding affidavit the applicant avers that he was not aware that the 3rd respondent had made a maintenance order on 16th August 2007. He became aware of the order on 25th July 2008.
- [5] Annexure "B" which embodies deposit slips reflects that the applicant has complied with the court order by paying R2 000.00 on the following dates: 27/08/2007, 26/09/2007 and 26/10/2007.
- [6] Annexure "C" reflects deposit slips paid on 28/01/2008, 30 October 2008 and 09/12/2008 on the last two dates the applicant had paid only R300.00 in default of the maintenance order.
- [7] In the bundle filed by the 3rd respondent which are copies of mechanical recorded case as well as maintenance case records 14/03/2-288/08 is attached a letter by the applicant to the maintenance officer: Magistrate, Kimberly. In this letter signed by the applicant on 08/07/2008 he pledges, in paragraph 6 thereof, to continue to pay the 1st respondent's maintenance as long as it is necessary.

- [8] According to the paternity test document dated 26/06/2007 prepared by AB LANE who holds a PH.D degree and who is attached to the Department of Human Genetics at the National Health Laboratory service, the applicant is the biological father of the 1st respondent on the probabilities of 99.9999% .
- [9] In these circumstances, where the applicant is aggrieved by the order of the 3rd respondent the review route is a wrong forum.

EVALUATION AND FACT ANALYSIS

- [10] The respondents do not have much to answer to the allegations made by the applicant.
- [11] It is clear from the records at the maintenance court that the applicant is the biological father of the 1st respondent; that the maintenance order was given in the presence of the applicant; that he has signed the consent form that the maintenance order be operative; that subsequent to the order he had paid R2000.00 as maintenance of his son and that he had pledged to maintain the 1st respondent until he becomes independent.

THE LAW

- [12] RULES 53: is of application where there are irregularities and not in a case where an applicant is not satisfied by the outcome of a court.
- [13] APPEAL: This matter should have been brought by way of appeal if the applicant had any valid grounds to challenge the 3rd respondent's judgment.
- [14] RULE 42 of Superior Courts: deals with variation and rescission of orders.

See also: Rule 49 of the Magistrates' Courts Rules of Court

- [15] This judgment sought to be rescinded was not granted by default.

Vide: DE WET AND OTHERS V WESTERN BANK Ltd 1979(2) SA 1031 (AD)

CHETTY V LAW SOCIETY; TRANSVAAL 1985(2) SA 756 (A) at 765 8-C

- [16] MAKINGS V MAKINGS 1958(1) SA 338 (A) AT 344H-345A which deals with a successful litigant being a party to fraud. There is no allegation of fraud by the applicant against the 1st or 3rd respondents.
- [17] A judgment given by consent may be set aside on good and sufficient cause shown.
- Vide: GEORGIAS V STANDARD CHARTERED FINANCE ZIMBABWE Ltd 2000(1) SA 126 (Z) at 132G.
- [18] In this application the applicant has failed to show good and sufficient cause to have the judgment rescinded because it was given by consent.
- [19] Ex facie the record of proceedings the judgment was not erroneously sought or granted to justify rescission in terms of Rule 42(1)(a).

[20] MUTEBWA v MUTEBWA 2001(2) SA 193 (TK) at 201 B-C deals with a situation where the court has before it the record of proceedings

supported by facts canvassed in the affidavit in support of the application. In casu, the applicant's affidavit lacks such facts that support the erroneously granted judgment.

FINDINGS

[21] The above having been said I find as follows:

- 1) that the applicant did not make a case for the relief he seeks;
- 2) that the judgment by the 3rd respondent was given by consent of the applicant as reflected in annexure "A" of the founding papers;
- 3) that the maintenance order given by the 3rd respondent is valid to all intents and purposes and cannot be varied or rescinded in any manner;
- 4) that the maintenance order is binding on the applicant and that he must comply with it.

CONCLUSION

[22] In the result, I am of the view that the application falls to be dismissed with costs.

ORDER

1. The application is dismissed with costs.

MAKHAFOLA, J

JUDGE: LIMPOPO HIGH COURT

Adv. Sikhwari

: Philemon Siliga Attorneys for Applicant

Mr. Nange

: Anton Ramaano Attorneys for 1st Respondent

Mr. Mashau

: State Attorney for 2nd, 3rd, 4th & 5th Respondents

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