

SOUTH AFRICA / JUDGMENT

State Attorney Pretoria and Others v Sampson (14785/22) [2024] ZAGPPHC 1276 (5 December 2024) [2024] ZAGPPHC 1276

COURT

North Gauteng High Court, Pretoria

BEFORE

N V Khumalo

CASE / FILE NUMBER

14785/22

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE

NO: 14785/22

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

DATE:

12/05/2024

SIGNATURE

N V KHUMALO J

In

the matter between:

THE
STATE ATTORNEY PRETORIA
1st
APPLICANT
SOLICITER
GENERAL
2nd
APPLICANT
MINISTER
OF JUSTICE AND CORRECTIONAL SERVICES
3rd
APPLICANT
and
DARREN
SAMPSON
RESPONDENT
This
judgment was handed down electronically by circulation to the
parties’ representatives by email. The date and time of
hand-down is deemed to be 5 December 2024
This judgment
highlights the importance of having an opportunity to read the file
and familiarise oneself with the issues that are
to come before court
prior to hearing the matter, even at an instance when one of the
parties is or may be in default of an appearance,
so as to be able to
properly determine/consider if the order sought by the party in
attendance is justified and accords with the
issues that are before
court, more so if the order sought is proposed to be in a form of a
Draft Order. The matter also highlights
the importance of compliance
with the applicable Directives requiring the filing of the Draft
Order and Practice Note within a
reasonable time before the hearing
of a matter, to assist the court to familiarize itself in the short
space of time with the issues
to be decided upon.

JUDGMENT
N V KHUMALO J

Introduction

1. The Applicants in this Application seek the court order granted in their absence by Kubushi J on 1 September 2022, upholding an Exception and or Special Plea raised by the Respondent, a Mr Darren Simpson, in motion proceedings the Applicants launched to declare the Respondent a vexatious litigant in terms of s 2 (1) of the Vexatious Proceedings Act 53 of 1956 ('vexatious motion'), to be rescinded, set aside and or varied.
2. The order was presented in a form of a Draft Order by the Respondent, that Kubushi J made an order of court and reads:
 - 2.1 Exception and or Special Plea of the Respondent is upheld;
 - 2.2 The Applicants are provided Ten (10) court days to amend their pleadings;
 - 2.3 Respondent is awarded costs on an attorney and client scale;
 - 2.4 Costs on an attorney and client scale are to be awarded within 10 calendar days of being presented to the Taxing Master;
 - 2.5 Directing this matter be referred to the Legal Practice Council for investigation into professional misconduct in terms of paragraph 48 and gross dishonesty;
 - 2.6 Further and alternative relief.
3. The order sought by the Applicant in the vexatious litigant motion proceedings is as follows:
 - 3.1 declaring the Respondent to be a vexatious litigant;
 - 3.2 That the Respondent shall not institute any legal proceedings against any person in any court or any inferior court without the leave of the court or any judge thereof or that inferior court;
 - 3.3 That the relief referred to in paragraph 2 shall not be granted unless the court or judge or the inferior court is satisfied that the proceedings are not an abuse of the processes of the court and there is prima facie ground for the proceedings;
 - 3.4 That any legal proceedings instituted by the Respondent under case numbers: 89791/18; 89797/18; 21047/19; 210471/2020; 99775/19; 2556/21, constitutes vexatious litigation.
4. The 1st Applicant is the State Attorney, Pretoria, appointed in terms of s 2 (3) (a) of the State Attorney Act No 56 of 1957. The Solicitor General, cited herein in his capacity as the executive officer who exercises control, direction and supervision of all offices of the State Attorney and appointed in terms of s 2 (1) and (2) of the State Attorney Act, is the 2nd Applicant.

5. The Minister of Justice and Correctional Services, cited in his capacity as the executive authority for the Department of Justice and Correctional Services (“the Department”), whose employment of the Respondent is in issue, is the 3rd Applicant. The Respondent has been in the employment of the Department, at the State Attorney’s Office in Bloemfontein when the issue of his employment became a matter of contention.

Background

facts:

6. The Applicants and the Respondent have been involved in a litany of litigation related to the cessation of his employment with the 3rd Applicant. The Applicants, alleging to be weary and weighed down by what they perceive as ongoing legal harassment by the Respondent against them on baseless cases, launched the vexatious motion proceedings in casu, seeking to have the Respondent declared a vexatious litigant in the numerous matters he instigated against 1st and 2nd Applicant. The vexatious motion Application on its own consists of 1069 pages that includes exemplary litigation between the parties, initiated in the different provinces by the Respondent.
7. In response to the vexatious litigant Application, the Respondent filed a Rule 41A mediation Notice in which he makes a heap of allegations against the Applicants for avoiding mediation. He also raised 14 of what he refers to as Special Pleas headed as “A Special Plea and Exception” notwithstanding that the proceedings challenged were in motion. These included, inter alia, a point of Res judicata, Lis pendens, Contravention of the Promotion of Access to Information Act, Fraudulent representations and Perjury, Ambiguity, Obfuscation, Failure by the Legal Practice Council to act and to disclose a cause of action, Estoppel, Infringement of his Constitutional Rights, Request for security for costs, Contravention of the Protected Disclosure Act, and costs de bonis propriis.
8. The Respondent proceeded to set down his Special Plea and Exception for hearing on 1 September 2022, seemingly due to the fact that the Applicants were not taking their Application any further. The notice of set down for the Exceptions was served by email and there is no complaint that the Respondent followed an incorrect procedure in doing so. The Applicants did not attend the proceedings, which resulted in the order being granted by default. As it is clear, the order granted, prima facie is an all-encompassing order, which in effect upheld all 14 Special Pleas and the Exceptions. The order afforded the Applicants a 10-day period to amend their Pleadings which in this instance would mean the Founding Affidavit in support of their Application. However, some of the Special Pleas were legally fatal to the Applicants’ Application. It is not possible to get a gist of what motivated the court to uphold each or any of the Special Pleas and or Exceptions due to not having a benefit of a

judgment

or reasons. However will have to conclude that the court must have been persuaded by what is constituted in the documents on record and arguments submitted, to uphold the Special Pleas.

9. The Applicants are now seeking the rescission or variation of the order relying on Rule 42 (1) (b) of the Uniform Rules of the High Court and or the common law, on the basis that the orders were improperly granted, therefore fall to be rescinded or if the Court is not persuaded by this, that they are unable to comply with the order in its current form and seek a variation order.

10. The Respondent on the other hand points out that there are no grounds

for the delay or non-appearance of Counsel. Further that the Applicants proffer no sufficient cause why the order ought to be rescinded other than to frustrate him at every turn.

Issues

arising

11. The question that arises is whether sufficient cause has been proffered by the Applicants for the granting of the relief sought and or whether the fact that the order upholding the Special Pleas in question an interlocutory order is material?

12. If it is not material, is the order still rescindable or variable,

since it failed to identify which Special Plea does it refer to?

Legal framework

13. The general rule is that once a Court has finally pronounced on a matter, it is functus officio and not free to reconsider that position.[1] However, in Firestone, the court also empathetically pointed out that the general rule that “once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it’ is subject to certain exceptions. [2]

14. Rule 42 whose application is consequently intended for final orders, has been recognized by the Constitutional Court to create such exceptions to the general principle. The Rule permits a court in addition to any other powers it may have, mero motu or upon the 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;

(b) an order or judgment in which there is an ambiguity, a patent error or omission, but only to the extent of such ambiguity, error or omission.

(c) an order or judgment granted as a result of a mistake;

15. Interlocutory orders are an exception to this general rule. The principle is correctly reflected in the headnote of *Bell v Bell*[3] as follows:-

“A purely interlocutory order, that is, one not having the effect of a final decree, may at any time before final judgment in the suit be varied or set aside by the the same jurisdiction.”

16. The simple interlocutory orders, stand on a different footing, being open to reconsideration, variation or rescission on good cause shown.[4] Courts have exercised the power to vary simple interlocutory orders when the facts on which the orders were based have changed[5] or where the orders were based on an incorrect interpretation of a statute which only became apparent later.¹³ The rationale for holding interlocutory orders to be subject to variation seems to be their very nature. They do not dispose of any issue or any portion of the issue in the main action.[6]

17. It is therefore accepted that at common law interlocutory orders may. at any time before final judgment in the action/suit be varied or set aside by a judge who granted the order or any other judge sitting in the same Court exercising the same jurisdiction.

18. “*Van Dijkhorst J* distilled the methodology for determining when an order was interlocutory as,

“Concisely put, the question is: does the order bear directly upon and in any way affect the decision in the main suit.”.[7]

19. The order in *casu* is seemingly an interlocutory order. This is because it is not meant to resolve the questions in issue but rather deal with procedural

matters.[8] This is evidenced by the time periods allowed or granted to resolve the perceived issues in the matter. Further the order/s are supposed clearly not to resolve any question fully or in part, therefore not definitive of the rights of the parties. This section will consider whether it is material to the rescission or variation applications that this order is intended to be interlocutory. [9]

20. It has been held that a mistake in the morning of a statute may be corrected in this way.[10] Of course, the order being interlocutory is not in itself license to vary or rescind orders on a whim.[11] Thus, the fact that a Court will more readily rescind or vary an interlocutory order, is not to say that it does not remain an

exceptional procedure.

21. Describing when such rescission or variation was appropriate, the

Court in *Duncan NO* stated the following:

“A sound reason for rescinding a purely interlocutory order would in my view be the fact that it is based on an incorrect interpretation of a statute, the more so when that misconception was caused by a consensus between counsel on the meaning of that enactment, which later appears to be wrong.”[12]

22. There is no reason why this does not apply equally when the Court has given an incorrect order on the interlocutory procedure to be followed in terms of the rules.
23. In this case, the Applicant complains of a number of incorrect applications of the rules which were upheld by the Court. The Court Order simply says that ‘the Special Plea and/or Exception is upheld’. The first problem is that an Exception and a Special Plea are two different processes intended for two different outcomes even though they both are processes in an action. Unlike the Exception, a Special Plea does not raise a defence on the merits but sets up some special defence which has the objective either to –
- delay the proceedings (dilatory plea); or
 - object to the jurisdiction of the court (declinatory plea); or
 - quash the action rendering it permanently unenforceable altogether (peremptory plea).
24. A Special plea is appropriate when it is necessary to place facts before the court to show that there is a defect in the particulars of claim, which can be new facts or evidence of the defect. The Exception on the other hand, raises a defect that appears ex facie the particulars of claim (on the face thereof). It challenges the manner in which the plaintiff’s case is pleaded. The

Excipient cannot introduce new facts or evidence of the defect. It is also not applicable in motion proceedings, that being a serious conundrum.

25. Given that it is not clear what the Respondent actually intended by embarking on this procedure, since sum of the points raised cannot exist side by side, that is, be effected simultaneously, or be raised in motion proceedings and that the order is all encompassing, it is necessary to discuss each of them in turn. They are henceforth dealt with in relation to their misnomer not in any particular order:

Res judicata

25.1 The Respondent alleges that the case is res judicata as the matters referred to have been decided in the Court. At the same time complains about the Applicants not wanting to have trials commencing in the matters mentioned. The Applicants argue that it is not clear what is alleged by the Respondents as the papers before the Court provide no clarity on this. However, it is safe to state at this point that even if that was the case, the matter was res judicata, the Court would have erred in its order by granting 10 days to remedy the supposed defect. This is because this Court could not adjudicate over a matter that is res judicata. As a peremptory plea, it quashes the action altogether and, it must be dismissed. In addition, there is no record or reference to other vexatious proceedings, the Court deciding so would have needed to show that there appears no change since then warranting another application. At the very least, it would have needed to have been pleaded in much more sufficient terms than what currently exists in the paper to warrant an order. There appears no reasonable ground for upholding of the special plea.

Lis pendens

25.2 He further raised the defence of the matter being currently lis pendens between the parties, that is a suit between the parties on the same cause of action pending in another court. This was vacillated on the exact same basis as the res judicata special plea. No other vexatious application indicated to be pending. It is also not clear how the matter could be both res judicata and lis pendens. The Applicants correctly point out that the causes of action differ from the current matter. There is no ground for upholding of this special plea.

Refusal to disclose information

25.3 The Respondent complains of a refusal to disclose information. It is not clear why this is a competent special plea or a cause for an Exception to raise. It seems to have been stated without much thought.

Fraudulent misrepresentation

25.4 The special plea of fraudulent misrepresentation, which is supposedly a point in limine, should have been countered with the truth. There is no indication how that would form a special plea to the order sought. This is not before the Court and is not a competent point in limine.

Perjury

25.5 Fifth is the perjury, similarly there is no valid cause shown for upholding a special plea on this ground. The Respondent seems to confirm as well the many litigation processes he has been involved in.

Exceptions

25.6 Two exceptions are raised. Suffice it to say that Rule 23 makes no room for exceptions in motion proceedings, these should have been dismissed. The Respondent fails to tender the particulars upon which the exceptions are based, and the allegations made are irrelevant.

Obfuscation

25.7 The Respondent complains about the conduct of the other employees and of the Applicants to be trying to avoid the matters going to court. The obfuscation referred to not mentioned.

Failure to act by the Legal Practice Council

25.8 There are questions raised over the failure of the Legal Practice

Council to act. Neither of those constitute competent special pleas. The legal Practice Council is also not a party to these proceedings.

Costs de bonis propriis and Security for costs

25.9 The costs concerned raised by the Respondent similarly do not constitute reasonable grounds upon which any special plea could be upheld.

Direct Contravention of the Protected Disclosures Act

25.10 Similarly, there is no question of law raised and therefore there was no justification for upholding the Special Plea.

Estoppel

25.11 The allegations made lack any averments that relate to a question of law, therefore no justification for its upholding.

Infringement of his Constitutional Rights

25.12 The Respondent's refers to another matter that is subject to litigation which cannot be the basis of a Special Plea or Exception in casu.

26. It appears that none of any of the Special Pleas or Exceptions raised

by the Applicant are eligible for the order that was granted. The order as it is, is not implementable and falls to be rescinded or varied.

Rescission:

27. In considering the balance of the matters raised, the Applicant had

primarily sought rescission of the order. This is predicated upon a belief that the order was erroneously sought and granted. The

Applicant proffers, as an explanation for their failure to file answering papers to the points in limine raised by the Respondent, that there was an IT systems failure at the Department of Justice which prevented the attorney from receiving the notices timeously. Further that, the Applicant submits that the Respondent is a vexatious litigator and it can sometimes be difficult to keep track of the many matters that the Applicant has proceeded to oppose. This rescission application is sought both in terms of Rule 42 (1) (b) and the common law. In the alternative, an order is sought for variation on the basis that the order is impossible to implement in its current form.

Common law

28. The common law position was described in *Firestone South Africa (Pty) Ltd v Genticuro AG*[13] as follows:

"provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following cases: (i) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, that the court overlooked or inadvertently omitted to grant. (ii) The court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order. (iii) The court may correct a clerical, arithmetical, or other error in its judgment or order so as to give effect to its true intention. This

exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance. (iv) Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order.”[14]

29. The starting point is that orders are final, the Court functus officio as the case was over with the Court’s final exercise of jurisdiction.[15] This cannot be altered except in exceptional circumstances.
30. At common law, a defaulting party could seek rescission where there were good grounds for default such as illness.[16] The consideration of whether to grant this order depended upon whether the judge, exercising their discretion, was off the view that the circumstances required the granting of such an order.[17]
31. The Court in *De Wet* explained this as follows:

“Thus, under the common law, the Courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient case shown. This power was entrusted to the discretion of the Courts. Although no rigid limits were set as to the circumstances which constituted sufficient cause (cf examples quoted by Kersteman (op cit sv defaillant) the Courts nevertheless laid down certain general principles, for themselves, to guide them in the exercise of their discretion. Broadly speaking, the exercise of the Court's discretionary power appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case. The onus of showing the existence of sufficient cause for relief was on the applicant in each case, and he had to satisfy the Court, inter alia, that there was some reasonably satisfactory explanation why the judgment was allowed to go by default.”[18]

32. In *Colyn*,[19] the Court summarised the test that an applicant for rescission under common law must show good cause for their default as follows:

“With that as the underlying approach the Courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and

- (c) by showing that he has a bona fide defence to the plaintiff's claim which prima facie has some prospect of success (*Grant v Plumbers (Pty) Ltd, HDS Construction (Pty) Ltd v Wait supra, Chetty v Law Society, Transvaal*).” (footnotes omitted)
33. The Constitutional Court in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*[20], restated the two requirements that need to be satisfied under the common law as being the following:

"First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that it has a bona fide defence which prima facie carries some prospect of success on the merits. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind."

Rule 42 variation

33. The case of *West Rand Estates Ltd v New Zealand Insurance Co Ltd*[21] where Innes CJ traced the Roman-Dutch law foundations of the ability to alter judgments in exceptional circumstances. In particular, the following is provided:

"No correction of a judgment once given was permissible for the simple reason that the judex had ceased to function. In the same title, however, there is another lex which shows that a relaxation of the strict rule was allowed under special circumstances."

"Paulus respondit rescindere quidem sententiam suam praecedentem Praetorem non posse; reliqua autem quae ad consequentiam quidem jam statutorum pertinent, priori tamen sententiae desunt, circa condemnandum reum vel absolvendum debere supplere, scil, eodem die." (Dig, 42.1.42.) The note of Gothofredus on the word *reliqua* in the above passage is "ut taxationes expensarum." So that although the main judgment could not be altered it might be timeously supplemented in respect of consequential matters, such as the award of costs, for which no provision had been made. And Roman-Dutch practice was based on that principle. Voet (ad Pand. 42.1 par. 27) adopts the language of Paulus, but adds that the judge may explain obscurities, and may for that purpose amend the language of his decree while preserving its effect. Van der Linden (Jud. Pract. III, par. 10) also lays stress upon the power of interpretation as distinct from alteration."[22]

34. It would seem that the Court had considered the power it was called

on to exercise to be a narrow exercise, to supplement or amend an order in order to ensure that its effect of an order was preserved.

This was not viewed as an interpretive exercise.

35. The Court in *De Wet and Others v Westbank Ltd*[23] held : under the common law, a judgment could be altered or set aside only under limited circumstances.
36. Rescission and variation as mentioned are now governed by the Uniform Rules of Court upon which the Applicant seek to rely, in particular Rule 42(1)(b).[24]. ...
37. Dealing with the failure of Applicants for a rescission to appear before the Court to prevent the order they then sought to rescind, in *Colyn v Tiger Food Industries LTD t/a Meadow Feed Mills (Cape)*[25] the Court had been confronted with an instance where an attorney who held multiple offices had failed to see a notice which was properly served on them. This is a case where it was accepted that their client wanted to defend the case and would have, had the notice come to theirs and their attorney's attention. The Court was unmoved by the

explanation and held that an attorney's administrative failure did not afford the client any reprieve. The judgment put this as follows:

"That is not a mistake in the proceedings. However, one describes what occurred at the defendant's attorneys' offices which resulted in the defendant's failure to oppose summary judgment, it was not a procedural irregularity or mistake in respect of the issue of the order. It is not possible to conclude that the order was erroneously sought by the plaintiff or erroneously granted by the Judge. In the absence of an opposing affidavit from the defendant there was no good reason for Desai J not to order summary judgment against him."[26]

38. The Court is exercising a discretion in all of these elements. So how then should such a discretion be exercised? In dealing with sufficient cause shown, sufficient cause is both about the internal validity of the cause shown and its relation to the other relevant material. It has been referred as primarily as a matter of fairness.[27] The Court in *Melanie v Santam Insurance Co Ltd* described the process as follows:

"Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits."[28]

39. What is clear from the case above is that an adjudicator is not involved in a sequential test in which a failure to provide proper explanation for the delay is fatal. There is no in depth inquiry into the case the party intends to put forward should the order they complain of be removed. Rather, one is involved in a balancing exercise overall. There is still no real guide provided for one goes about that balancing exercise. In *Chetty v Law Society, Transvaal*, [29] the Court had the opportunity to consider what constitutes an unreasonable and unexplained delay in opposing a case, and held as

follows:

*"As I have pointed out, however, the circumstance that there may be reasonable or even good prospects of success on the merits would satisfy only one of the essential requirements for rescission of a default judgment. It may be that in certain circumstances, when the question of the sufficiency or otherwise of a defendant's explanation for his being in default is finely balanced, the circumstance that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission. (Cf *Melane v Santam Insurance Co Ltd* 1962*

(4) SA 531 (A) at 532.) But this is not to say that the stronger the prospects of success the more indulgently will the Court regard the explanation of the default. An unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits. In the light of the finding that appellant's explanation is unsatisfactory and unacceptable it is therefore, strictly speaking, unnecessary to make findings or to consider the arguments relating to the appellant's prospects of success.”[30]

40. The most important feature of this case is that while a Court is

involved in a balancing exercise, it cannot allow a party with absolutely no prospects on one of the requirements to obtain rescission simply because they are strong on the other ground. A party is still required, at least to some extent, to meet both grounds.

41. In dealing with absence of a party justifying rescission, the Constitutional Court in Zuma set out the interest sought to be protected as follows:

“Accordingly, this Court found that the irregularity committed by the High Court, insofar as it prevented the parties’ participation in the proceedings, satisfied the requirement of an error in rule 42(1)(a), rendering the order rescindable.[27] Whilst that matter correctly emphasises the importance of a party’s presence, the extent to which it emphasises actual presence must not be mischaracterised. As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed. I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, ipso facto (by that same act), plead the “absent victim”. If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing absentia (absence).”[31]

42. So what then constitutes a reasonable explanation on delay? The applicant provides the following reasons for the default:

42.1 The respondent has numerous cases against the applicants and it is not always easy to respond to the applicant’s correspondence in time due to the sheer volume; and

42.2 The Department of Justice and Constitutional Development’s

emails are periodically not operating and this was the case during the time the notice of set down was uploaded on caselines. This meant that the date of set down could not be communicated with counsel. The applicant insists that they would have otherwise opposed the matter.

43. There are a few things to say about this explanation. The first is

that the two reasons are at odds with each other. Is the reason for the default that correspondence from the respondent is not given priority because he is a vexatious litigant or was it not received? It does not appear that the two situations can mutually co-exist.

44. Furthermore, having numerous cases against a single party is not an explanation for not attending to Court processes timeously. There must still be deference to the rules and practice directives. The fact is that the Applicant had not at that stage been declared a vexatious litigant and as such, they were entitled to advance the case towards a resolution.

45. Similarly, the explanation that there was no access to emails seems

lacking in any real detail. A party cannot simply say their emails were not working. The Court needs to be taken into the circumstances

and some information from a party capable of providing the facts around that. To simply say my emails were not working seems to fall short of the obligation to take the Court into one's confidence.

46. The prudent thing for an attorney with numerous matters running on

caselines who had no access to their emails would have been to regularly keep check on caselines to ensure that none of their matters were in this position. Caselines also provides an update when there are changes to the case which counsel and the attorney could have monitored. There appears to be a professional failure here of the kind described in Colyn discussed above., which is not acceptable

47. Lastly, it is well established that failure of a party to participate in a matter justifies rescission only where there has been some procedural failure on the part of the Court granting the order and not merely an absence of the party.[32] or at least on the part of the opponent in bringing notice of the proceedings to the attention of the Applicant.

48. Once both these requirements are met in favour of granting the rescission, then the word "may" in Rule 42 denotes a discretion that the Court may exercise within the acceptable norms on whether to grant rescission.[33] As eloquently stated by the Applicant's counsel in the hearing, the necessary papers in this matter had been exchanged and they were not required to file a replying affidavit, they elected not to. A proper procedure had been followed by the Respondent to secure their attendance. The issue is their absence at the hearing. Their incidental failures cannot be considered good reasons.

49. Turning to the bona fides defence. The Applicants' raise valid arguments. The order granted by Kubushi J has all the difficulties complained of and the points in limine that were relied on by the respondent were without merit. The difficulty herein is that the Applicant had the opportunity to oppose these, at least on the papers. For that reason alone, rescission would be inappropriate. A second difficulty is that it is not possible to vary the order to make it applicable. This is because variation exists to correct an error of the Court or to clarify its intention. However, it is not possible to obtain the intention of the Court from the order. Any variation would amount to retrying the matter and making a decision. Taking all these circumstances together, the balance is in rescinding the order. The court cannot simply leave an order that is impossible to implement to stand.

Conclusion:

50. This is a complex matter in that the reasons for the default are

insufficient on the one hand while the bona fide defence on the other is incredibly strong. If the Court considers what was granted to be an interlocutory order, it obviates the need to resolve this as interlocutory orders are rescindable for any good reason. The difficulties both with what the Court upheld and the problems in implementing such an order are such good reasons.

51. As illustrated, simple interlocutory orders stand on a different footing, open to reconsideration, variation or rescission on good

cause shown. Courts have exercised the power to vary simple interlocutory orders when the facts on which the orders were based

have changed¹² or where the orders were based on an incorrect interpretation of a statute which only became apparent later. The rationale for holding interlocutory orders to be subject to variation seems to be their very nature. They do not dispose of any issue or any portion of the issue in the main action.¹⁴

52. However, if the orders are considered final and recourse must be had to rule 42 and the common law, then the balance must be maintained. The order being allowed to stand is a greater threat to the operation of the justice system than the applicants failure to appear. Not only does it grant orders that are not competent, but it is not possible to implement and fails the standards of a proper Court Order.^[34] Rescission seemingly being the only appropriate recourse.

53. Under the circumstances the following order is made:

1. The order of Kubushe J granted on 1 September 2022, inter alia, upholding the Special Pleas and Exceptions raised by the Respondent is rescinded and set aside.
2. No order as to costs.

N V Khumalo

Judge of the High Court

Gauteng Division, Pretoria

For the Applicants: L PUSELETSO Instructed by: Office of the State Attorney

FMokgale@justice.gov.za For the Respondent: Darren Simpson Instructed by: in person Darren s@polka.co.za

[1] West Rand Estates Ltd v New Zealand Insurance Co Ltd 1926 AD 173 at 177; Firestone South Africa (Pty) Ltd v Genticuro AG 1977

(4) SA 298 (A) at page 306F – G and 309A; Minister of Justice v Ntuli [1997] ZACC 7; 1997

-
- (3) SA 772 (CC) at para 22 and 29;
- [2] Daniel v President of the Republic of South Africa and Another 2013
- (11) BCLR 1241 (CC),
- [3] Bell v Bell 1908 TS 887; Duncan NO v Minister of Law and Order 1985
- (4) SA 1 (T) at page 2E-F; Also in Brown and Others v Yebba CC t/a Remax Tricolor 2009
- (1) SA 519 (D) at page 524 I – 525C; Zondi v MEC, Traditional and Local Government Affairs, and Others 2006
- (3) SA 1 (CC) at page 13A - E
- [4] South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977
- (3) SA 534 (A) at 550H; Duncan at 3A; Bell supra n 3 at 891-3
- [5] Sandell and Others v Jacobs and Another 1970
- (4) SA 630 (SWA); Meyer v Meyer 1948
- (1) SA 484 (T)
- [6] South supra n 4 at 552G.
- [7] Duncan NO n 1 above at page 2G
- [8] Pretoria Racing Club v Pietersen 1907 TS 694; South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977
- (3) SA 534 (A) at 549 D - E
- [9] Bell v Bell 1908 TS 887 at page 891
- [10] Duncan NO n 2 above at page 3C-D
- [11] Bell v Bell n 3 above at page 897
- [12] Id at page 3E-F
- [13] 1977 (4) SA 298 (A)
- [14] Id at 306 H – 307 H
- [15] West Rand Estates Ltd v New Zealand Insurance Co Ltd 1926 AD 173 at 177
- [16] De Wet v Western Bank Ltd 1976
- (2) SA 1031 (A) 1041 G – H; Voet 2.11.9
- [17] De Wet v Western Bank Ltd at 1042 C - F; Manieren van Procederen 4.33.11; Wassenaar Pratyk Judicieel 1.5.6

-
- [18] De Wet v Western Bank Ltd at 1042F - H
- [19] De Wet at 1042F – 1043 C
- [20] 2021] ZACC 28.
- [21] 1926 AD 173
- [22] Id at 176
- [23] 1979
- (2) SA 1031 (A)
- [24] See paragraph 14 supra
- [25] 2003
- (6) SA 1 (SCA)
- [26] Id at 9 F - H
- [27] Melanie v Santam Insurance Co Ltd 1962
- (4) SA 531 (A) 532 C
- [28] Id at 531C - E
- [29] 1985 (2) SA 298 (A)
- [30] Id at 767J – 768C
- [31] Id at para 60
- [32] Zuma supra n 20 at para 60
- [33] Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others 2021
- (11) BCLR 1263 (CC) at para 53
- [34] Eke v Parsons 2016
- (3) SA 37 (CC)

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2024/1276.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/state-attorney-pretoria-and-others-v-sampson-unknown-topic-agpphc-2024>

Prepared on 10 October 2026 · Esheria