REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
DATE: 06 May 2024
SIGNATURE: …… [redacted]

CASE NUMBER: 75038/2019

In the matter between:

MINISTER OF POLICE	**First Applicant**
DIRECTOR OF PUBLIC PROSECUTIONS	**Second Applicant**
And	
NTONE SERAME KENNETH	**Respondent**

***In Re*:**

KENNETH SERAME NTONE **Applicant**

And

MINISTER OF POLICE **First Respondent**

DIRECTOR OF PUBLIC PROSECUTIONS **Second Respondent**

Delivery: *This judgment is issued by the Judge whose name appears herein and is submitted electronically to the parties /legal representatives by email. It is also uploaded on CaseLines and its date of delivery is deemed 06 May 2024*.

Summary: *Rescission application – Rule 42 of the Uniform Rules of the Court and common law requirements. Relief erroneously sought and granted. Rationality for instituting proceedings – Rule 42 and or common law requirements not satisfied-no legal foundation. Application dismissed – costs - attorney and client scale.*

JUDGMENT

NTLAMA-MAKHANYA AJ

[1] The applicants applied for a rescission of the order granted by Strydom AJ on 11 July 2022 and a variation of the order granted by Davis J on 14 January 2022 in terms of Rule 42(1)(a) of the Uniform Rules of the Court. The application was grounded on a premise that the relief sought was mistakenly sought with the consequent result of the orders erroneously granted by the Judges.

[2] The application is comprised of *TWO PARTS*. In Part A, the applicants applied for the postponement of the trial in the main action *sine die* which was scheduled and ripe to be held on 25 July 2022 pending the relief sought in Part B as envisaged in the notice of motion. In Part B, the applicants sought an order to rescind the order granted by Strydom AJ on 11 July 2022 which reads as follows:

'By having read the papers filled (*sic*) on record and having Counsel for Plaintiff the Court makes the following ordered (*sic*):

(i) The Respondent's (*sic*) defence is struck out.
(ii) The applicant is granted leave to apply for default judgment.
(iii) Ordering the first (*sic*) and second respondents to pay the costs of this application.

[3] In this matter, the applicants applied for an order:

[3.1] rescinding an order granted on 11 July 2022.
[3.2] varying the order granted on 14 January 2022.
[3.3] that the respondents pay the wasted costs of 25 July 2022.

[4] The subject of contention is traceable to an order granted by Davis J on 14 January 2022 which became the subject of *PART B* action for the rescission of the 11 July 2022 order granted by Strydom AJ.

[5] Davis J order reads as follows:

[5.1] The Minister and DPP are ordered to deliver their discovery affidavits in terms of Rule 35(1) of the Uniform Rules of the Court and to furnish their responses as per the [respondents] Rule 35(9) Notices (sic) within 10 (ten) days of delivery of this order upon the [Applicant's] attorneys of record.

[6] The applicants sought an order for the variation of Davis J judgment to read as follows:

[6.1] Paragraph one (1) of the order granted by Davis J on 14 January 2022 is varied to read as follows:

[6.1.1] The First and Second Respondents are ordered to deliver their discovery affidavits in terms of Rule 35(1) of the Uniform Rules of the Court within ten

(10) days of delivery of this order upon the Respondent's attorneys of record.

[6.1.2] The order granted by Strydom J on 11 July is rescinded and set aside.

[6.1.3 The plea of the Minister and DPP in the main action be reinstated.

[6.1.4] The wasted costs of 25 July 2022 are unreserved.

[6.1.5] There is no order as to costs on the wasted costs oof 25 July 2022.

[6.1.6] The respondent is ordered to pay the costs of the rescission application.

[7] It is deduced herein that the Davis J order became a stimulus to the rescission application in that the applicants (respondents in the main action) were ordered to file their discovery affidavits in terms of Rule 35 of the Uniform Rules of the Court in which they failed to defend or comply with it. The failure prompted the respondent (applicant in the main action) to file an application for striking out of the applicant's defences on 27 May 2022. The latter application was heard by Strydom AJ on 11 July 2022 which was granted in favour of the respondent.

[8] For the purpose of this application, I will focus on *PART B* with the intended objective of determining whether the applicants have made a *prima facie* case for the granting of the rescission order. It then raises a question whether the order granted by Strydom AJ entailed the prejudicial application of the law against the applicants? Simply, the crux of this application is to determine whether the applicants have fulfilled Rule 42(1)(a) or common law requirements to satisfy the granting of a rescission order.

Law on rescission applications

[9] Let me move from a premise articulated by Theron AJ in ***Molaudzi v S* 2015 (8) BCLR 904 (CC)** in that:

> *the rule of law and legal certainty will be compromised if the finality of a court order is in doubt and can be revisited in a substantive way. The administration of justice will also be adversely affected if parties are free to continuously approach courts on multiple occasions in the same matter. However, legitimacy and confidence in a legal system demands that an effective remedy be provided in situations where the interests of justice cry out for one. There can be no legitimacy in a legal system*

where final judgments, which would result in substantial hardship or injustice, are allowed to stand merely for the sake of rigidly adhering to the principle of res judicata*, (paras 37-39).*

[10] Followed by Khampepe J 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*** **2021 (11) BCLR 1263 (CC):**

*like all things in life, like the best of times and the worst of times, litigation must, at some point, come to an end. The Constitutional Court, as the highest court in the Republic, is constitutionally enjoined to act as the final arbiter in litigation. This role must not be misunderstood, mischaracterised, nor taken lightly, for the principles of legal certainty and finality of judgments are the oxygen without which the rule of law languishes, suffocates and perishes, (**Zuma v State Capture Commissio**n **para 1**).*

[11] The essence of the rule of law and the quest for finality of judgments finds its way into the application of Rule 42 of the Uniform Rules of the Court regarding the rescission of court judgments, which reads as follows:

(1) The court may, 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.

[12] The substance of this rule (Rule 42) entails justified proof by the applicant that, first, an order was erroneously sought and secondly, was also erroneously granted in his or her absence. I must also state that reading from the implications of Rule 42 (1)(a) the judicial discretion in granting or not of the rescission order is of importance, particularly for the applicant's rights or interests that are affected by the judgment. Hence, I consider the satisfaction of Rule 42 as '*double-edged*' in that the applicant must satisfy the prescribed requirements in the Rule itself and or those prescribed by common law. It is my considered view that the requirements are not separated from each other in that their purpose is to

determine the legitimacy and reasonableness of the grounds upon which the applicant relies for a successful rescission application. This simply means that the Rule 42(1)(a) requirements alongside of the common law are sides of the '*same coin*' in that they are designed for a common purpose. They seek to establish a justified reliance on the mistakenly granted order alongside a *bona fide* explanation regarding the non-appearance in court with the consequent result of the order being granted against the applicant. As stated by Khampepe J in ***Zuma v State Capture Commission*** with reference to the discretion to be exercised by courts in applications of this nature held:

> *[once] an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule, after all, postulates that a court "may", not "must", rescind or vary its order – the rule is merely an "empowering section and does not compel the court" to set aside or rescind anything. This discretion must be exercised judicially*, (***para 53***).

The overall implications of the exercise of judicial discretion means that as expressed by Strydom J in ***SecureBT (Pty) Ltd v Norris*** **(21699/2021) [2023] ZAGPJHC 1037** ***'****it is a fundamental principle of our law that a court order must be effective and enforceable and must be formulated in a language that leaves no doubt of what the order requires to be done. Not only must the order be couched in clear terms, but its purpose must also be readily ascertainably from the language used. … [and] the general principle is that once the court has duly pronounced a final judgment or order it has itself no authority to correct, alter or supplement it … as its jurisdiction over the matter has ceased*', (***paras 18-20***). It means that the court has to be satisfied of the (i) reasonableness of the explanation proffered by the applicant on the non-appearance in court to defend the matter; (ii) the application was also not meant to delay the respondent's claim and (iii) there are legitimate reasons why the matter was not defended such as in the Strydom AJ order. The satisfaction entails the fulfilment of the principles of the doctrine of precedent wherein a final order granted by the court is not binding on the parties themselves but carry a long-life span in the area of the law until set aside by another court through an appeal or a review process. It is in this context that this court seeks to establish the rationality of reasons proffered that will also enable the justification of the granting or not of a rescission order.

[13] The core content of this application as learnt from the ***State Capture*** rescission judgment is whether the applicant satisfied the grounds in terms of Rule 42 or common law. Drawing from that judgment, it is evident that for a successful application, the order must have been mistakenly granted or sought or in the absence of the applicant. The situation is different in the ***State Capture*** judgment from this case in that Mr Zuma vehemently refused to appear before the Constitutional Court and was found guilty of contempt of court. Thus, in this case the applicant pleads the lack of awareness of the order granted by Davis J in para 6 above which granted the respondent (applicant in the main action) an order for the applicants to file their discovery affidavits in terms of Rule 35(1) of the Uniform Rules of the Court. Davis J order became a subject of contention in the Strydom AJ order with the consequent result of the striking out of the applicant's defences, setting the stage for a default judgment against the applicants.

[14] I reiterate, this matter captures the content of the prescripts of Rule 42(1)(a) and those of common law in that the operative framework is grounded on a legal question whether the applicants in the circumstances of this case have legitimate and reasonable grounds upon which an existing court order may be rescinded? At face value, this application is '*double-edged*' in that the satisfaction of the 42(1(a) and or common law requirements has a potential to influence the Davis J order.

Analysis

[15] This application was triggered by the order granted by Strydom AJ which was issued on 11 July 2022 as noted in paragraph 2 above. It is grounded on a premise that it was erroneously sought and granted by the Court, hence it finds its application in the provisions of Rule 42(1)(a) or common law. As noted, I will narrow the focus of this analysis only on *PART B* to the exclusion of *PART A* that is subject to the outcome of this application.

[16] In this case, after having read its facts, the Deponent for the applicants, (Senior Assistant State Attorney) made a case for being unaware of the lack of compliance with the court order (Davis J order) with the subsequent result of the Strydom AJ order that was now being sought to be rescinded. At the sight of factors presented in the founding affidavit, the explanation given on behalf of the applicants gave an insight on the poor handling of the case from its inception. I am puzzled with the way in which the applicants sought to

rescind the Strydom AJ order whilst they are the author's of their own misfortune. The shocking observation is confirmed in the affidavit as the Deponent contends:

> *to the extent that the Minister and DPP was in default for complying timeously with notices served on them during the period July 2021 to November 2021,* ***I am unable to explain why the Minister and DPP did not comply*** … ***as far as I have been able to determine, this matter was not allocated to another State Attorney's Office since the retirement of Mr Olwage***', (*paras 5 – 5.3*), (author's emphasis).

[17] It is my view that the applicants did not have any rational basis upon which reliance may be placed towards the satisfaction of Rule 42 (1)(a) or common law requirements. In essence, the application shamefully lacks any justifiable reasons for the inaction of the applicants in, first, complying with the Davis J order. The Deponent, by his own endorsement, was also unable to determine why the matter was not acted upon before his joining the office of the State Attorney.

[18] There is no legal foundation to determine the legitimacy of the '*not being aware*' approach in matters that fall within the scope of authority in the workplace environment of the applicants. This application falls flat on this ground alone which I found to be unreasonable. I must state that the archives of the applicants regarding urgent matters and lack of appropriate succession plans for hand-over to new incumbents in office cannot be at the prejudice of the respondent. The application is the showing of unequal legal power authority in litigation where the arm of government displays its power over an ordinary citizen.

[19] In a country such as ours recovering from the historic ills of the past, particularly against the quality of access to justice, which is today envisaged in section 34 of the Constitution of the Republic of South Africa, 1996 (Constitution) and the value of remedial actions in section 172 to be provided as such by the courts, the applicant's conduct amounts to travesty of justice in using its power and authority to silence the beneficiaries of South Africa's democratic gains. Section 34 provides that 'everyone has a right to have their disputes resolved in a fair public hearing' whilst section 172 provides for entitlement to just and equitable remedies. The core content of these latter sections (34 and 172) is the

crucial role that is played by the principle of the interests of justice in the exercise of the judicial discretion by this court as envisaged in section 173 of the Constitution against which to determine the reasonableness of the explanation proffered by the applicants. The applicants did not give these sections their own constitutional space to ensure the flourishing of the jurisprudence on rescission principles. The applicants hindered the evolution of these principles by the 'lens' of unawareness of the existing court order or as to the reasons why the said order was not complied with. The significance of section 7(2) of the Constitution was not even tested as the state is required not only to protect, promote and respect the rights but *fulfil* them in line with broader democratic ideals of the new dispensation and not for such rights to be couched under the 'lens' of being unaware, (Mogoeng CJ in ***Law Society of South Africa v President of the Republic of South Africa* 2019 (3) BCLR 329 (CC)**, ***paras 75-78***).

[20] "Unawareness" is not law which could have formed the basis upon which an order was sought and granted erroneously. In this case, the applicants have not made out a case about a legal issue or fact that could have in the first place, persuaded the Judge (Davis J) not to grant the discovery order on 14 January 2022. Secondly, it is also conspicuous that an application for striking out the defences was lodged on 27 May 2022 whilst the Deponent emphasised that they were not aware of the struck-out application until 20 July 2022. The Deponent argues, he deposed an affidavit on 06 June 2022 relating to the documents that were in his possession whilst the order was granted on 11 July 2022, they only became aware of it on 20 July 2022. Let me pause, the Deponent states that the 06 June affidavit was followed by discovery affidavit which was deposed on 20 June 2022 by way of an electronic e-mail communication which, as the applicant alleged, complied with the file discovery and was therefore erroneous for the respondent to have proceeded with the application to have the defences struck out as envisaged in Rule 35(6) of the Uniform Rules of the Court. I am finding it difficult to connect the link between unawareness and the sequence of events that the Deponents places before this court. I am of the considered opinion that this application was meant to delay the determination of the merits of the main action and served as a mere distraction of this Court to the evolution of the rescission principles.

[21] The applicants have failed to satisfy this court of the common law requirements regarding the existence of a *bona fide* defence in not defending the matter when the order was

granted. The Office of the State Attorney, within the sphere of governance is not individualistic in nature and it is not for this court to determine how it should have structured and catered for the retirement of the predecessors of the Deponent to ensure urgent matters were brought to his immediate attention as the latter could not even explain before this Court the circumstances of not defending the Davis J order which is the basis of the Strydom AJ order.

[22] The lack of awareness touches on the core content of the constitutional responsibility of this Court to pronounce without any hesitation the abuse of the court processes that have a negative impact of the fulfilment of the rights of the respondent. This application was more of a frivolous exercise that was meant to delay the gist of the main application under the framework of being 'unaware'. I restate, unawareness is not law that could have formed the root cause upon which to determine the rationality of the reasons proffered by the applicants. It does not qualify with what I would refer to as 'ignorance of the law' which was settled in ***S v De Blom* 1977 (3) SA 513 (A)** which could be excusable whilst in this instance, the issue was not about knowing the content of the law itself but the general lack of awareness why the order was not complied with. Lack of awareness about the existence of the law cannot be equated with the lack of knowledge regarding the content of the law itself. This was a complete disregard of the law and court processes which would not qualify as a lack of knowledge about the law.

[23] It is inexcusable that the applicants would lodge this application based on the lack of 'awareness' which was a glaring breach of the basic and fundamental principles of the law in litigation, particularly with compliance with court orders. I am not finding any reasonable and justifiable reasons by the applicants that could have enabled this court to determine any *bona fide* defences based on common law and Rule 42(1)(a), (Notyesi AJ in ***Minister of Police v Lulwane* (429/2020) [2023] ZAECMHC 21 (09 May 2023**). As expressly stated by Theron AJ in ***Molaudzi*** and Khampepe J in ***Zuma v State Capture*** above, which remain persuasive in this judgment, the finality of a matter is of essence and the parties may not come to court for a simple delay or its deferral. In this case, the applicants' motivation in bringing this matter was nothing more than to preserve what they fear would have been the fruitless expenditure of the public purse if the matter goes on trial. I am fortified by this reasoning in that the applicants fail to acknowledge the impact of their conduct on the fulfilment of the rights of the respondent. Equally, to give effect in upholding

the integrity of this Court, particularly with its orders. The applicants, falling within the branches of the state, with equal responsibility to ensure the independence of the courts and for the latter to apply the law without fear or favour, it is discomforting that financial resources of the state may be used as a bait against which to deny the enforcement and fulfilment of the fundamental rights of ordinary citizens. This Court, as the upper guardian in the resolution of disputes between the state and citizens or *vice versa* should not be limited in fulfilling this role through vexatious litigation with no prospects of success.

[24] As noted above, the focus herein was only on *PART B* of this application and the applicant's case does not come near the satisfaction of Rule 42(1)(a) requirement of fulfilling the erroneously sought and granted order. Even at common law, the two-tier test was not satisfied in that there was no *bona fide* defence and reasonable explanation for rescission of the order that could have served as a yardstick against which to exercise a judicial discretion that could have resulted in the granting of the rescission application. Therefore, it is my view that the applicants have not satisfied the Rule 42(1)(a) and or common law requirements that the order was mistakenly granted. I find no legitimate reasons not to dismiss the claim for a rescission of the Strydom AJ order.

[25] Further, in exercising my discretion on the allocation of costs in this application, with reasons articulated herein, it is evident that the applicants did not have the legal basis in instituting these proceedings. In the premises, the applicants are ordered to pay the costs of this application as they appear in the order below.

[26] Accordingly, the following order is made:

[26.1] The application for the rescission of the Strydom AJ order is dismissed.

[26.2] The applicants are ordered to pay the respondent the costs of this application on an attorney and client scale.

[redacted]

NTLAMA-MAKHANYA
ACTING JUDGE, THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Dates Heard: 02 November 2023

Date Delivered: 06 May 2024

Appearances:

Plaintiff:	State Attorney Office (per: M Morena) 316 Thabo Sehume Street Pretoria
Defendant:	Nemukongwe Attorneys 255 Pretorius Street Pretoria