REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

Signature .....

Date 25/08/2020

CASE NO: 1361/2020

In the matter between:

UNIVERSITY OF LIMPOPO	**APPLICANT**
and	
QUEEN NTOMBIKAYISE AMBE	**FIRST RESPONDENT**
MINISTER OF HIGHER EDUCATION AND TRAINING	**SECOND RESPONDENT**

JUDGMENT

MAKGOBA JP

[1] This is an application for rescission of an order granted by this Court (per Semenya J) on 22 October 2019 under case number 2172/2019 ("the impugned order"). The impugned order in effect conferred a Doctor of Commerce Degree to the First Respondent. The order was granted in the absence of the Applicant.

According to the Applicant, it was unaware that the matter had been set down for 22 October 2019. As a result the Applicant seeks rescission of the order in terms of Uniform Rule 31(2) of the Rules of this Court and / or in terms of Rule 42(1) (a).

[2] In the main application, the First Respondent sought and obtained the impugned order which ordered as follows:

2.1. the first respondent's decision to terminate the applicant's enrolment for Doctor of Commerce study at the first respondent on 5 October 2018 is declared unconstitutional, unlawful and invalid and is reviewed and set aside;

2.2. the applicant has satisfied all the requirements for the completion of the degree of Doctor of Commerce at the first respondent;

2.3. the first respondent's decision not to confer the Doctor of Commerce ("D.Comm") degree upon the applicant is declared unconstitutional, unlawful and invalid and is reviewed and set aside;

2.4. the first respondent is ordered to confer to the applicant the degree of Doctor of Commerce at the first graduation ceremony held by the respondent from the date of the order.

[3] The aforesaid impugned order relates to the review application ("main application") issued by the First Respondent and sought to review and set aside the Applicant's decision to terminate the First Respondent's enrolment for Doctor of Commerce study at the applicant, University of Limpopo, and to not confer the Doctor of Commerce degree upon the First Respondent. According to the Applicant, the decision was taken because the First Respondent neither satisfied the admission requirement nor the requirement for the completion of the degree.

[4] The Applicant failed to file an answering affidavit timeously in the main application and this led to the default judgment being obtained by the First Respondent. The default judgment would not have been obtained if the answering affidavit had been filed as the matter would have been fully opposed. It is against this backdrop that the present application is brought by the Applicant.

The Legal Principles

[5] The requirements that an application for rescission of judgment or order must satisfy in terms of Rule 31(2)(b) are well established in the leading case of

Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)[1] where it was decided that 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.

The principle set out above entails that the Court will refuse an application for rescission where there has been an intentional disregard of the Rules[2].

[6] A judgment of the High Court granted in default can only be rescinded through the provisions of Rule 31(2)(b) or 42(1) or on the common law. The provisions of Rule 42(1) are applicable where the judgment or order was erroneously granted. An order is erroneously granted if it is legally incompetent for the Court to have made such order, if there was an irregularity in the proceedings or if the Court was unaware of facts that, if known to it, would have precluded it from a procedural and substantial point of view, from making the order[3].

[7] For purposes of the present case I shall resort to applying the provisions of Rule 31(2)(b).

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[1] [2003] 2 All SA 113 (SCA) 2003 (6) SA 1 (SCA)

[2] See Smith NO v Brummer NO 1954 (3) SA 352 (O) at 358
Burton v Barlow Rand 1978 (4) SA 794 (D) at 797

[3] National Pride Trading 452 (Pty) Ltd v Media 24 Ltd 2010 (6) SA 587 (ECP)

Reasonable explanation of the Default

[8] It is trite that the explanation for the default must be sufficiently full to enable the Court to understand how it really came about, and to assess the applicant's conduct and motives. An application which fails to set out these reasons is not proper, but where the reasons appear clearly, the fact that they are not set out in so many words will not disentitle the applicant to the relief sought.

See **Silber v Ozen Wholesalers (Pty) Ltd**[4].

[9] The Applicant set out hereunder the explanation and reasons for its failure to file the answering affidavit and the failure to attend Court to oppose the granting of the order on 22 October 2019.

9.1 On the 17 July 2019 the answering affidavit was settled by the Applicant's lead counsel and transmitted to the Applicant's attorney, Mr Philane Khumalo ("Khumalo") of Motalane Inc, the present Applicant's attorneys of record. Khumalo had to ensure that the answering affidavit would reach the attention of the deponent for signature, the deponent being the vice-chancellor and principal of the University of Limpopo.

The Answering affidavit required confirmation affidavits and for that reason it was sent to the Chairperson of the Investigation Committee, who was willing to give input into the opposing affidavit.

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[4] 1954 (2) SA 345 (A) at 353 A

This Investigation Committee had investigated the irregularity of the admission and completion of *inter alia* the First Respondent's degree.

9.2 Between the 17 July 2019 and the date when the First Respondent filed a notice of set down, there were various interactions between Khumalo and the Chairperson of the investigating team. These interactions appear to have delayed the finalization of the answering affidavit.

9.3 The period of these interactions coincided with the time when Khumalo was cited for misconduct that necessitated that he be subjected to disciplinary hearing within Motalane Inc Attorneys. The interactions between Khumalo and the Chairperson of the investigating team did not culminate into finalization and delivering of the answering affidavit. Unfortunately Khumalo kept this state of affairs and information to himself. No member of the Motalane Inc had knowledge of the progress in the matter. Worse, this state of affairs transcended to Khumalo's failure to bring the notice of set down of the application by the First Respondent on the unopposed roll to the Applicant's attorneys and Counsel.

9.4 The notice of set down was served on the Applicant's correspondent and e-mailed to Khumalo on 12 August 2019, being the date when Khumalo had already been cited for a disciplinary process. Khumalo tendered his resignation from the Applicant's attorneys employ with immediate effect from the end of August 2019. Under these circumstances the Applicant's answering affidavit was not filed and the notice of set down (known by

Khumalo only) was not brought to the attention of any of the directors or members of the Applicant's attorneys of record.

9.5 The Applicant's attorneys of record were, after Khumalo's departure, not aware that the matter had been set down for 22 October 2019 and that the Court order had been taken in default against the Applicant. They only became aware of the order on 22 January 2020 when someone produced the said order at a hearing at the CCMA.

The discovery of the Order required an investigation to be conducted as to how the default order was taken. This required a search into Khumalo's e-mail inbox which revealed the service of the notice of set down on 12 August 2019. This explained how the order was obtained. It also explained how the notice of set down was not brought to the Applicant's attorney, Mr Motalane's and Counsel's attention as it was not forwarded to them.

9.6 The e-mails that have been traced back to Khumalo's e-mail inbox by the director of Motalane Inc (Mr Motalane) demonstrated that the delays in the finalisation of the answering affidavits were the comments obtained from the Chairperson of the Investigating Team. Due to some novel issues in the comments received from the Chairperson of the Investigating Team and Khumalo's conduct the affidavit was not transmitted to the deponent.

[10] In the light of the above explanation furnished by the Applicant, I make a finding that the Applicant was not in willful default. There is an explanation for the Applicant's failure to deliver the answering affidavit and the reasons why the Applicant was not aware of the notice of set down, and of the order that was subsequently granted by default on 22 October 2019.

[11] Whatever inefficiency or negligence might have been there on the part of the Applicant's erstwhile attorney (Khumalo) such inefficiency or negligence cannot be imputed to the applicant in the circumstances of the case.

In **Colyn v Tiger Foods Industries** supra it was held that the defendant intended to defend the action, and that it was not his fault that summary judgment application was not brought to his attention, as there was an inefficiency on the part of his attorney. The Court further stated the following in respect of penalising a litigant for his attorney's inept conduct of litigation:

> *"...Even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant's being able to put up a bona fide defence which has not merely some prospect, but a good prospect of success*[5]*".*

[5] Opcit footnote 1 at para 12

Bona fide Defence

[12] The Applicant in its founding affidavit has succinctly set out facts upon which a bona fide defence in the main application is established. On the basis of the report of the Investigating Committee, the Applicant has been able to show that the defence raised has a prospect of success.

There is a basis on which the Applicant has good prospects of success in the main application, which is the Applicant's bona fide defence outline below.

12.1 The First respondent ought not to have been enrolled for the Doctor of Commerce ("D.Comm") study as she did not meet the prerequisites for admission, which is what led her being deregistered. The First Respondent did not comply with the Applicant's general academic Rules promulgated in terms of the Higher Education Act, as well as the institutional statute for the Applicant.

12.2 The Master's in Business Administration ("MBA") degree that was obtained by the first respondent was not at the level required by the Rules for entrance into the D.Comm degree. It was a level lower than what is required by the Rules as it is not an academic qualification but a professional one.

12.3 A Master's degree, or equivalent, is an NQF level 9 degree in terms of the South African Qualifications Authority and the first respondent's MBA is an NQF level 8. This was clarified by the

Council on Higher Education through a communique and directive issued on 22 January 2016.

12.4 The admission of the first respondent was irregular. An independent and objective investigation has confirmed that the first respondent ought to not have been admitted. As evidenced by the investigation report, a reputable team of academics, including the erstwhile vice-chancellor of the applicant, have investigated the registration of, inter alia, the first respondent, and their findings are that the first respondent's enrolment flouted the applicable Rules for admission into the D.Comm program.

12.5 The first respondent's admission involved her husband who was the head of the faculty which purported to admit her into the D.Comm degree. This is on the face of it irregular and constitutes a conflict of interest. It was as a result of this conflict of interest that the first respondent was mistakenly admitted into the D.Comm program. The first respondent's husband sat and assessed the purported admissions of the first respondent when he should have recused himself. He was also involved in the submission of the first respondent's purported thesis.

12.6 The first respondent was not registered for the required number of years for her to obtain the D.Comm degree. The minimum number of years that the first respondent was enrolled for is one and a half

(1.5) years which is inconsistent with Rule G10 of the Rules of doctoral degree of study that requires a minimum enrolment of two (2) years for the completion of the D.Comm degree.

12.7 Finally, the relief sought by the first respondent was incompetent ab initio. In the main application, the first respondent had not placed expert evidence before the Court confirming that Rule G.60 of the Rules of doctoral degree of study, which deals with the requirements for the conferment of the degree, had been satisfied. More so, this Court is not vested with the knowledge of assessing the quality or lack thereof of a thesis and evaluating whether the academic rules have been complied with. Prior to the conferral of the D.Comm degree, the thesis has to be accepted by an assessment panel and senate, which will confirm whether the candidate has fulfilled the requirements.

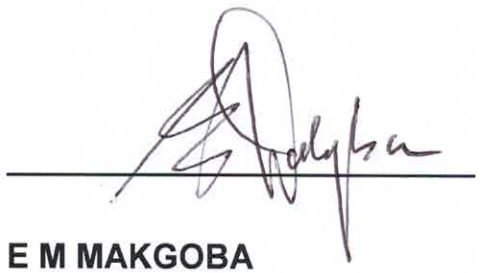
12.8 Therefore, the impugned order is incompetent on the basis of, inter alia, the first respondent having not met the prerequisites for admission into the D.Comm, the irregularities surrounding her admission including the conflict of interest that her husband as head of the faculty which admitted her into the program posed, and the fact that the Court was not competent to have made such an order.

[13] In my view the nature of the Applicant's defence as outline in paragraph 12 above, is such that it establishes a prima facie basis upon which the Applicant must be found to have shown good cause for the order to be rescinded. The First Respondent will not suffer any prejudice if the Applicant is permitted to enter the fray an explain itself as to what let to the first respondent being deregistered for the D.Comm program.

I agree with the Applicant's submission that the incongruity of awarding such a prestigious degree to a person that does not even qualify for its enrolment manifestly justifies the rescission of the impugned order.

[14] In the result I grant the following order:

1. The Order granted by this Court under case number 2172/2019 on 22 October 2019 per Semenya J is rescinded.
2. The Applicant is ordered to file an answering affidavit to the application brought by the First Respondent under case number 2172/2019 within 15 days from date of this order.
3. The costs of this application shall be costs in the main application.



E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on	**: 18 August 2020**
Judgment delivered on	**: 25 August 2020**
For the Applicant	**: Adv. M Majozi**
	Adv. K Raganya
Instructed by	**: Motalane Inc**
	c/o Dikgati Mphahlele Attorneys
For the Respondents	**: Adv. S S Tebeila**
Instructed by	**: M P Makwela Inc Attorneys**