IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – EAST LONDON CIRCUIT LOCAL DIVISION)

Case No. EL 282/14

ECD 582/14

THE MINISTER OF POLICE	First Applicant
THE INFORMATION OFFICER, DUNCAN VILLAGE POLICE STATION	Second Applicant

and

SIYABONGA SOGAXA	Respondent

JUDGMENT

HARTLE J

[1] The applicants seek an order rescinding a judgment which was granted by this court on 30 April 2015 in the following terms:

> "1. It is recorded that there is no representation for the respondents, despite the notice in terms of directive 15A, advising the respondents that the matter will be proceeding, having been acknowledged by the State Attorney (the respondents attorney) on 9 April 2015.

2. The second respondent's failure to furnish the applicant with the requested information (that is copies of the contents of docket MAS no. 252/01/2013 required for the exercise of the applicants rights) is reviewed.
3. The second respondent is directed to furnish the applicant with the aforesaid information within fifteen (15) days from the date of the granting of this order.
4. The respondents are directed to pay the costs of this application (jointly and severally the one paying the other to be absolved) on the scale as between attorney and client."

[2] The relief was principally in line with that prayed for by the respondent in the main application issued out of this court on 12 March 2014, which self evidently sought to compel the furnishing of a criminal docket on the basis provided for in the Promotion of Access to Information Act, No. 2 of 2000 ("PAIA").

[3] The State Attorney who was seized of the said application, Ms Sakasa, explains on behalf of the applicants in the present application that she had been instructed to "vehemently" oppose the matter on the basis that the information sought to be compelled concerned an ongoing investigation, a "closed docket" in respect of robbery, rape, kidnapping and murder charges, as a result of which the respondent was not entitled to have access to the docket.

[4] Pleadings were closed and heads of argument exchanged.

[5] The matter was alleged to have first been enrolled for hearing on 5 March 2015. Although this date suited the applicants, the respondent's attorneys advised

Ms Sakasa that the matter would not proceed because it had incorrectly been set down for hearing.[1]

[6] The respondent's attorneys evidently approached the registrar on the same day to allocate an alternative date for the hearing. Ms Sakasa was apprised of the new date only on 9 April 2014. How the date came to her knowledge is that the respondent's attorneys served a copy of a registrar's "Provisional Opposed Motion Court Date" form on their offices together with a notice in terms of rule 15A. I will shortly deal with the significance of this.

[7] Ms Sakasa informed the respondent's attorneys on 20 April 2015 in a letter – a copy of which was attached to the present application marked "SA 3", that the provisional date indicated in the form was not suitable to the applicants because counsel on brief would not be available. The hope expressed in the letter that this intimation was "in order" met with no contrary indication, and Ms Sakasa simply assumed that an alternative date would be obtained which equally suited all the parties and their counsel. She became aware only on 7 May 2015 that the order referred to in paragraph 1 above had been made.

[8] I interpose to emphasize Ms Sakasa's observation that no communication or correspondence had been exchanged between the parties' legal representatives regarding the suitability of the date. Neither was there any discussion or agreement reached in this regard despite the intimation reflected on the registrar's

[1] It is not clear, at least not without an explanation – which was not forthcoming from either of the parties, why it was contended that the matter had been incorrectly set down for hearing on 5 March 2015. I will assume for present purposes that nothing turns on this although the respondent's attorneys appear to have a lack of appreciation of the proper procedure to enrol an opposed application for hearing. I say so because the incorrect method was again adopted by the respondent in setting the present application down for hearing.

form that "the party requesting the date warrants that the other party/parties involved in the matter agree(s) to the proposed date".

[9] The applicants rely in the present application on the irregularity which arose by virtue of the respondent's non-compliance with the set down procedure which they submit "caused and/or exacerbated the applicant's inability to attend at the hearing of the matter on 30 April 2015". Equally responsible for the unfortunate outcome however is the fact that the respondent's legal representatives, who themselves attended the hearing, did nothing to allay the court's obviously mistaken assumption that the applicants were not interested in pursuing their opposition to the main application. Indeed, so says Ms Sakasa, a duty existed on them to bring the contents of annexure "SA3" to the attention of the presiding judge because this reflected the applicants' legal representative's understanding that: (a) the proposed date for the hearing of the matter was provisional and understood to be so by them; (2) the date suggested did not suit them; and (3) they assumed their intimation that the suggested date did not suit their purposes to be "in order".

[10] Concerning the merits of the applicants' defence to the main application, simply stated Ms Sakasa contends that the provisions of the PAIA are not of application to a record of criminal proceedings requested after the commencement of same since alternative avenues exist for the production of such documentation. Because the criminal matter was pending, the respondent was advised by the National Deputy Information Officer that the case was still an "open case". He was invited to rather access the contents of the docket through the National Prosecuting Authority, more specifically the relevant public prosecutor, or to

request the investigating officer to refer the docket to the prosecutor to make a decision for him to access it.

[11] The respondent opposes the present application essentially on two preliminary bases. Firstly it is submitted that the matter is *res judicata* and secondly, that the applicants are not entitled to bring the application or at least that the court should refuse to hear it until the applicants pay the respondent's taxed bill of costs (generated pursuant to the order granted in paragraph 1 above), or tenders security in respect thereof.

[12] Both objections are simply without any merit.

[13] When the first ground was articulated in argument by Mr Kalamashe, who appeared on behalf of the respondent, it was evident that the doctrine of *res judicata* proper was not being relied upon by the respondent. Certainly if it was, it finds no application here on the simple basis that we are here concerned with a procedural measure provided for by Uniform Rule 42(1)(a), peculiarly fashioned to correct an irregularity and to restore the parties to the position they were in before the order was granted.[2] This is entirely different from the cause of action in the main application, being one of review.

[14] What Mr Kalamashe appeared to want to bring home however was rather a contention that, instead of proceeding with an application for rescission, the applicants were limited to the remedy of appeal because, despite the absence of their legal representatives at the hearing, the court applied its mind on the papers filed of record and the argument advanced by him on behalf of the respondent at

[2] Theron N.O. v United Democratic Front (Western Cape Region) & Others 1984 (2) SA 532 (C) at 536 E.

the hearing and pointedly made a decision which was final.[3] This argument too however loses sight of the fact that, despite the expectation that the court is *functus officio*, the specific remedy avails a litigant in terms of the sub-rule to redress a procedural error which renders the judgment sought and granted erroneous within the meaning of rule 42(1)(a).[4] Of course the court *a quo* would have applied its mind on the merits, but that is not an aspect which precludes another court from considering the matter afresh once the order is rescinded. What is effectively being rescinded is the procedure in terms of which the judgment was granted and therefore, by necessary implication, also the judgment.[5] The bone of contention is that the respondent was procedurally not entitled to press for judgment in the peculiar circumstances of the matter.

[15] As for the second objection, it was open to the respondent to file a request for security, if so advised, but what is being sought *in casu* is the setting aside of exactly the same order following which the bill of costs was taxed. Once rescinded the natural consequences of the judgment, including taxation and

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[3] Mr Kalamashe referred me to the unreported judgment of Mnisi & Another v First Rand Bank Ltd (51839/2009) [2015] ZAGPPHC 499 (19 May 2015) at paragraph [17] thereof. An obiter remark is made therein to the effect that:

> *"In this application the summary judgment order was given in default, in that the respondents (current applicants) did not 'oppose' the application. The Judge merely had an affidavit of one side to consider and the applicants' (respondents in summary judgment application) opposition was not available. Had the respondents affidavit been available and been considered by the court then I am inclined to conclude it would have been a final decision and would have been appealable*."

For the reasons stated in my judgment however I do not believe that the 'principle' sought to be deduced from it by counsel is appropriate or relevant in the circumstances. A High Court has the right to interfere with the principle of finality in judgments in the specific circumstances provided for in rule 42(1). We are here concerned with judgments which are final in effect by their very nature. While appeal is a remedy notionally available to the applicants (See section 19(d) of the Superior Courts Act, No. 10 of 2013) in *casu* the applicable jurisdictional facts classically lend themselves to the invocation of rule 42(1)(a).

[4] In Stander and Another v Absa Bank 1997 (4) SA 873 (E) at 882 D the court observed that the purpose of the sub-rule was to provide an inexpensive, quicker and less cumbersome procedure than that which would have to follow if the matter were taken on appeal.

[5] National Pride Trading 452 v Media 24 Ltd 2010 (6) SA 587 (ECP) at [para 27].

execution, also fall to be set aside. The respondent appears to overlook in any event that an application for rescission of a judgment stays the execution thereof.[6]

[16] With regard to Ms Sakasa's letter (Annexure "SA3") advising that counsel on brief was not available, the respondent simply asserts that he presumed that she would fix her dilemma as it were "by acquiring a vacant counsel to argue their case". The respondent appears to concede however - despite maintaining that the matter had been "rightfully set down", that there was a "lack of consensus (with) regards thereto between the parties which is attributable to the ambiguous correspondence … (being) Annexure "SA3".

[17] As indicated aforesaid, the present application is premised in the main on the provisions of rule 42(1)(a) of the uniform rules of court, alternatively at common law.

[18] Rule 42(1)(a) provides as follows:

> "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;"

[19] There can be no doubt on anyone's showing that the applicants were absent when the order was granted. Mr Kalamashe's argument that the applicants were not absent because their version were made known to the court in their affidavit is simply without any basis and flies in the face of the clear objective of rule 42(1)(a) to remedy a wrong judgment or order granted in the absence of a party. Evidently

[6] See rule 49(11).

the applicants have been affected by the order which leaves only the first requisite in contention. The question then is whether the order was erroneously sought or granted.

[20] An order is erroneously granted if there was no proper notice to the absent party irrespective of whether the order or judgment is otherwise correct.[7]

[21] An order is also erroneously granted or sought or there is an irregularity in the proceedings, if the court was unaware of facts which, if known to it, would have precluded it from a procedural point of view from making the order.[8]

[22] Rule 6(5)(f) provides the basis upon which a litigant sets an opposed application down for hearing as follows:

> *"(f)* Where no answering affidavit, or notice in terms of sub-paragraph (iii) of paragraph *(d)*, is delivered within the period referred to in sub-paragraph (ii) of paragraph *(d)* the applicant may within five days of the expiry thereof apply to the registrar to allocate a date for the hearing of the application. Where an answering affidavit is delivered the applicant may apply for such allocation within five days of the delivery of his replying affidavit or, if no replying affidavit is delivered, within five days of the expiry of the period referred to in paragraph *(e)* and where such notice is delivered the applicant may apply for such allocation within five days after delivery of such notice. If the applicant fails so to apply within the appropriate period aforesaid, the respondent may do so immediately upon the expiry thereof. Notice in writing of the date allocated by the

[7] Custom Credit Corporation Ltd v Bruwer 1969 (4) SA 564 (D); Theron v United Democratic Front (Western Cape Region) supra; Topol v LS Group Management Services (Pty) Ltd 1988 (1) SA 639 (W); Clegg v Priestly 1985 (3) SA 950 (W); Athmaram v Singh 1989 (3) SA 953 (D); Fraind v Nothmann 1991 (3) SA 837 (W); Kili v Msindwana [2001] 1 All SA 339 (Tk); Brangus Ranching (Pty) Ltd v Plaaschem (Pty) Ltd [2008] 4 All SA 542 (N).

[8] Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz 1996 (4) SA 411 (C); National Pride Trading 452 (Pty) Ltd v Media 24 Ltd supra and Van der Merwe v Firstrand Bank Ltd t/a Wesbank and Barloworld Equipment Finance 2012 (1) SA 480 (ECG).

registrar shall forthwith be given by applicant or respondent, as the case may be, to the opposite party."

[23] We are presently concerned here with the manner in which a litigant obtains a place on the roll and what the obligation is on the parties once the registrar allocates a date.

[24] A litigant is not entitled to place a matter on the opposed roll for hearing unless the registrar has on application to him in terms of the sub-rule allocated a date for the hearing of the application.[9]

[25] A simple application on notice suffices. In *casu* there is such an application on file, but it is dated 29 July 2014 and was served on the State Attorney on 26 February 2015, that is on a date which preceded the prior set down on 5 March 2015. Oddly however it bears the registrar's date stamp only on 5 March 2015. I assume the notice was filed with the registrar (or presented to her afresh as a new application) on that date, but self evidently it was not served on the State Attorney again. It ought to be delivered in terms of the rules, but it was not.[10]

[26] The matter was thereafter complicated by the registrar providing a provisional date on the roll instead of properly allocating a firm date.

[27] When a date is allocated by the registrar in terms of rule 6(5)(f) a notice of set down is generated which indicates formally that the matter has been placed on the roll for hearing on the designated date. This notice is then served on both parties by the registrar. It used to be served by registered mail, or by the attorneys

[9] Nordberg Inc. v AQTN Services CC 1998 (3) SA 531 (T).

[10] See definition of "deliver" in rule 1.

uplifting and signing for the notice, but I am informed that presently such a notice is dispatched by email to the relevant parties. The original is attached to the inside cover of the court file. I emphasize the further aspect of rule 6(5)(f) which obliges the applicant who applied for the date to be allocated in peremptory terms to *forthwith* give notice in writing of the date allocated by the registrar to the opposite party.

[28] Since opposed motions after set down are often postponed, a practice has evolved in this court by which the parties approach the registrar to obtain a further date on the opposed roll to which the matter is to be postponed by the court, provided the registrar issues a certificate (which is headed "Provisional Opposed Motion Court Date") confirming that she has been consulted with regard to the set down and that the parties can be accommodated on the roll on the agreed upon date. The need for such a practice arose because matters were being postponed in court to random dates on the opposed roll without consultation with the registrar, who is under obligation to limit the number of opposed matters to no more than eight on opposed motion court days.[11]

[29] At the foot of the form the proviso is expressed that the date is provisional only and will be allocated by the registrar only once she receives the order of court confirming that the matter has been postponed to that date. The parties are further encouraged to agree on the date, hence the further warranty noted at the foot of the form to the effect that "the party requesting the date warrants that the other party/parties involved in the matter agree(s) to the proposed date". The form is seen by the court postponing the matter and is maintained on the file merely as a record that the parties were given the specific date by the registrar prior to the court

[11] See paragraph 15(b) of the Joint Rules of Practice for the Eastern Cape Division.

postponing the matter to the relevant date. The form is not required to be served on the parties by the registrar, neither is it done so in practice because the order stands as confirmation of the allocation in this manner.

[30] In the result the contention that the respondent complied with the provisions of rule 6(5)(f) in setting the matter down rings hollow because his attorneys instead followed the practice referred to above which is meant to cater for an entirely different situation. It is so that the applicants were "served" with a copy of the registrar's certificate, but that is merely co-incidental and does not render the set down proper in my view.

[31] Where the registrar allocates a date in terms of rule 6(5)(f) pursuant to a proper application for set down, the application is *dominus litis* and, in selecting a date, need not consult the respondent.[12] But in respect of the practice referred to above (assuming the circumstances lend themselves to such a need), the expectation is that the date to which the court will postpone the matter is a product of the parties' agreement. In this instance it does not appear from the court file that on 5 March 2015 the matter was postponed to 30 April 2015 after such an agreement was reached. The applicants were therefore justified in holding out for a date which suited their purposes since they had not been consulted in respect of the proposed provisional date.

[32] The court which made the order sought to be rescinded evidently placed emphasis on the rule 15A notice as providing proof of set down when the matter was called on 30 April 2015 in the absence of the applicants. Rule 15A of the Eastern Cape Joint Rules of Practice provides as follows in this regard:

[12] Seton Co v Silveroak Industries Ltd 2000 (2) SA 215 (T).

> *(a)* By no later than noon two court days before the day of hearing the applicant, excipient or plaintiff shall notify the registrar in writing whether the matter will be argued, and if not what alternative relief (for example postponement, referral to evidence, etc.) will be sought.
> *(b)* Failure on the part of the applicant, excipient or plaintiff to comply with the provisions of the previous subparagraph will result in the matter being struck from the roll with an appropriate order as to costs.

[33] Evidently the notice is intended for the registrar only and informs the duty judge that the matter will be argued on the basis provided for in the applicant's notice of motion, alternatively what other relief will be focused on at the hearing. By no stretch of the imagination can such a notice serve as proof of set down in the formal context provided for in rule 6(5)(f).

[34] The second document which was seemingly relied upon to strengthen the inference that the applicants were aware of the set down was the provisional certificate aforesaid, which as I have explained above has a peculiar utility not relevant to the circumstances of this matter, but this too cannot stand as proof of set down in the proper sense. The order was therefore erroneously granted.

[35] It is so that the applicants' attorneys were nonetheless aware of the purported set down, but that does not render a process which was irregular regular in all the circumstances.

[36] The fact of the matter is that the State Attorney had indicated quite unequivocally in my view that the date reflected on the form as a provisional date did not suit their counsel. The respondent failed to bring this correspondence to

the attention of the court at all, which would obviously have satisfied it that the applicants' lack of appearance was not deliberate.

[37] Had the court been made aware of Ms Sakasa's stance in the matter, it must be so that procedurally it would not have allowed the respondent to insist that an order be made in Ms Sakasa and the applicants' absence. In the premises the order was also erroneously sought.

[38] It is trite that once the facts point to an error in the proceedings, the judgment ought to be rescinded.[13] It is therefore unnecessary for the applicants to go further and to establish good/sufficient cause where reliance is placed squarely on the jurisdictional facts envisaged by rule 42(1)(a).

[39] In any event I am satisfied that the applicants have given a reasonable and obviously acceptable explanation for their default, have shown that the application was made *bona fide*; and on the merits have demonstrated that they have a *bona fide* defence which *prima facie* carries some prospect of success. Indeed the respondent did not seriously seek to controvert the applicants' contention that good and sufficient cause exists to rescind the judgment.

[40] As for costs, the respondent sought to oppose the matter on the basis of his *in limine* objections which were without any merit and in my view obstructive particularly in the light of his concession (on his slanted understanding of anything being wrong with the proceedings) that there was at least misunderstanding on the part of the applicants' attorneys concerning the purported hearing date. The respondent has further not taken the court into his confidence concerning why he did not bring the contents of annexure "SA3" to the court's attention, even in the

[13] Mutebwa v Mutebwa 2001 (2) SA 193 (Tk) at 199 I – J.

present application. In all the circumstances a punitive costs order is in my view entirely justified.

[41] I issue the following order:

1. The order granted by this court on 30 April 2015 is rescinded; and
2. The respondent is ordered to pay the costs of the application for rescission on the scale of attorney and client.

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B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 29 October 2015

DATE OF JUDGMENT : 10 November 2015

APPEARANCES:

For the applicants : Mr Young instructed by The State Attorney, East London.

For the respondent : Mr Kalamashe instructed by Sipunzi Attorneys, East London.