REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 20235/2006

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

....
DATE SIGNATURE

In the matter between:

MUTHUMWA DZIVA MAWERE Applicant

And

S M M HOLDINGS (PRIVATE) LTD Respondent

In re:

S M M HOLDINGS (PRIVATE) LTD Plaintiff

and

MUTHUMWA DZIVA MAWERE First Defendant

PARMANATHAN MARIEMUTHU Second Defendant

J U D G M E N T

MAKUME, J:

[1] The applicant in this matter seeks the following orders against the respondent:

1.1 That the judgment granted against the applicant by His Lordship Willis J as he then was on the 11th October 2012 be rescinded and set aside.

1.2 Directing that a trial be held for the consideration of new evidence.

1.3 Alternatively that the trial between the parties be commenced *de novo*.

1.4 Granting the request for a submission and hearing of new evidence at a trial between the parties.

1.5 Staying any execution of a warrant of execution against the applicant's property pending the finalisation of this application.

1.6 To the extent necessary condoning the late filing of the rescission application.

1.7 That any party who opposes the granting of the relief sought be ordered to pay the costs.

1.8 That such further and/or alternative relief as the court may deem appropriate be granted.

[2] The application was argued over three days. The notice of motion, answering and replying affidavits besides annexures stretches over 300 pages. The applicant generated a mass of paper in this application in an effort to show that he has a case worthy of reconsideration. I have no hesitation to say right at the beginning that the applicant's case was misconceived right from the outset and was doomed for failure.

[3] A reading of the papers indicates that this matter has gone a full circle. It commenced in this Court with a full hearing in the presence of the applicant during October 2012 before Willis J as he then was. It proceeded to the Supreme Court of Appeal wherein that court refused application for leave to appeal. Then it next stopped at the Constitutional Court where once more leave to appeal directly to that court was refused. It is now back where it started.

[4] Besides the route covered in this matter there was a number of interlocutory applications leading up to the date of hearing in October 2012. These interlocutory applications brought at the instance of the applicant all cumulatively sought to exonerate the applicant from liability. Some of the applications were in the Zimbabwean High Court and others in South Africa. I mention hereunder such applications as they appear from the document titled "*Chronology of relevant events in regard to the rescission application*".

[5] It is common knowledge that during September 2004 the respondent's company was placed under reconstruction in terms of Zimbabwe Government Gazette General Notice 450A of 2004. This resulted in an administrator being appointed by the Zimbabwean Government to oversee the companies activities in Zimbabwe.

[6] The reconstruction order was confirmed by the High Court of Zimbabwe on the 15th December 2004. On the 1st February 2011 the applicant failed in his application to the Supreme Court of Zimbabwe where he attacked the constitutionality of the reconstruction order. In February 2008 he launched a similar attack in South Africa. Judge Campbell dismissed that application.

[7] The action instituted against the applicant and a certain Marimuthu is in terms of section 424 of the Companies Act No 61 of 1973. The Honourable Willis J found in favour of the respondent and ordered the applicant and the

said Marimuthu to pay to the respondent an amount of R18 million. It is that judgment granted on 12 October 2012 which he seeks that it be rescinded.

[8] The record establishes that prior to the final date of hearing the action had been postponed on at least four occasions all at the instance of the applicant. On the day of the hearing itself there was no less than three applications all by the applicant directed at an attempt that the trial should not proceed. This included an application that Willis J recuse himself.

[9] His Lordship Willis in his judgment at paragraph [15] says the following in relation to the strategies adopted by the applicant then:

> "*Mr Kyle then proceeded to apply for my recusal. He claimed that the issues in the special plea had been predetermined and that there was a clear bias in favour of the plaintiff. After argument the application for recusal was dismissed with costs. At that stage I had not even read any of the documents in the nine lever arch files before me, I had not even heard an opening address. I had no idea of the history of the matter and had merely read the practice notes and annexures which had been filed. There appeared to me to be no legitimate grounds for my recusal. At that stage I had no sense of the basket full of mambas with which I would be presented during this case. The application for my recusal was the mere beginning of a strategy of intimidation of the bench.*"

[10] It is against this background that I now turn to the merits of the application itself.

CONDONATION

[11] It is a fact that this application was launched on the 13th August 2013 a period of ten months since the judgment was granted. That judgment was neither by default nor was it in error. The application can accordingly not be in terms of Rule 42. It can only be dealt with under the common law. Such application should be brought timeously and proceed expeditiously. See the matter of *Firestone SA (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306, *First National Bank of South Africa Ltd v Van Rensburg NO* 1994 (1) SA 677 at 681.

[12] However, I will accept that the applicant did not just sit and do nothing. He spent the time with attempts to appeal the judgment which decision was a right one and only when this was unsuccessful he returned to base. It is because of that only that I have decided to grant condonation.

AD PRAYERS 1.1, 1.2, 1.3 AND 1.5

[13] In his notice of motion the applicant seeks rescission of judgment to enable him to lead new evidence at a trial that will ensue should I set aside the judgment as applied for.

[14] In terms of the common law and in principle it has been a long-standing practice of our courts that two essential elements must exist to enable a court to set aside its own judgment namely:

14.1 that the party seeking relief must present a reasonable explanation;

14.2 that on the merits that party has a *bona fide* defence which *prima facie* carries some prospect or probability of success.

[15] In the matter of *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764J the learned Miller JA said the following:

> "*The appellant's claim for rescission of the judgment confirming the rule nisi cannot be brought under Rule 31(2)(b) or Rule 42(1) but must be considered in terms of the common law which empowers the court to rescind a judgment obtained on default of appearance provided sufficient cause therefor has been shown.*"

[16] The main reason the applicant says constitutes sufficient cause appears on paragraph 6 of his founding affidavit which reads as follows:

> "*6. This application for rescission of a judgment is brought in terms of the common law on the following grounds:*
>
> *6.1 The applicant has since obtained material evidence which was not available before the trial court, which evidence would have shed light on the matter and consequent decision thereto by the honourable court.*
>
> *6.2 There is also a good and just cause as well as to why such material evidence was not available before the court a quo nor was it available to the applicant at the time in order to allow the applicant to fully and appropriate vindicate its defence in the action against it in the trial court.*
>
> *6.3 Further to the abovementioned grounds there is a causal link between the circumstances that gave rise to the*

> *original judgment and the material evidence now sought to be introduced to the court and the consequent relief sought in this application.*"

[17] Of significance is paragraph 6.2 of the applicant's founding affidavit. The applicant having said that he is expected to set out in detail when such new material or evidence came to his knowledge, in what manner and the reason why he could not have access to it earlier than now.

[18] The applicant says his concerted efforts and attempts to secure the records of payments between SAS and PETTER was unsuccessful prior to the conclusion of the trial. What the applicant does not tell us is why he did not issue a subpoena or proceed in terms of Rule 35 to compel discovery and the production of that information which seems crucial for his defence.

[19] At paragraph 23 he says that he eventually was provided with record of transactions by the liquidator on the 25th May 2013. Once more he does not tell the court what method he used to get the record which he had been trying to get since 2011. In the absence of any explanation I have to accept that the liquidators readily made the information available to him without any difficulty.

[20] The next question that arises out of the applicant's information that he received the record the new evidence on the 23rd May 2013 is why he did not bring this to the attention of the Supreme Court of Appeal and/or the Constitutional Court.

[21] The Supreme Court of Appeal dismissed his application for leave to appeal on the 18th May 2013. He has given no reason why he did not bring this to the attention of the court (SCA) before judgment was passed.

[22] In a recent decision by the Supreme Court of Appeal the matter of *AllPay Consolidated Investments v CEO SASSA* 2013 (4) SA 557 Nugent JA writing for the majority states the following at page 559 paragraph [7]:

> "*[7] It is the practice of this court that parties may not file new material after the hearing of an appeal without the leave of the court. There must be finality in litigation and finality comes for the litigants once the appeal has been heard. That was conveyed to the attorneys of all the parties and they were directed to refrain from doing so. The response from AllPay's attorneys was to ask our leave to file the application formally. After reading the application we refused the request because even on its face, without hearing the other parties, there is no possibility that the application could succeed.*"

[23] Further in the same judgment the learned judge continued as follows at page 560 paragraphs [13] and [14]:

> "*[13] It has been said many times that new evidence will be admitted on appeal only where the circumstances are exceptional. There would need at least to be an acceptable explanation for why the evidence was not placed before the court below …*
>
> *[14] … It is also trite that the evidence would need to be 'weighty and material'. (See Dormell Properties 282 CC v Renasa Insurance Co Ltd and Others NNO 2011 (1) SA 70 (SCA). In S v N 1988 (3) SA 450 (A) at 458I-459A Corbett JA pointed out that in the vast majority of cases new evidence has not been allowed, and where it has been allowed the evidence has related to a single critical issue. In this case, if the evidence were to be admitted, the parties might just as well start the case over again. What is now sought to be introduced is a new case entirely at odds with the case that was presented. What is more, far*

from being weighty, the evidence carries no weight at all, and would not be admissible."

[24] The principle expounded in the cases referred to above establish that new evidence is allowed not only before an appeal is heard but thereafter but before judgment as long as that evidence is exceptional and there is an acceptable reason given why such evidence was not made available at the court *a quo*.

[25] The litigation involving all the companies wherein the applicant has a direct or indirect interest was placed before me and were dealt with by other judges. Amongst them is the application brought by the respondent for the liquidation of Southern Asbestos Sales (Pty) Ltd ("*SAS*"). This application was heard in this Division during the year 2005. The cause of the liquidation was the failure by SAS to pay to the respondent the amount of US $18 464 595,27 the same amount which is the basis of the cause of action against the applicant. In the liquidation application which was opposed by Mr Mawere the applicant SAS raised all such defences including the constitutionality of the order placing SMM under reconstruction by the Zimbabwean Government.

[27] The learned Epstein AJ referred to the two companies SAS and PETTER as the Mawera companies. The applicant clearly controls both companies directly and indirectly. In dismissing the defence that SAS was not indebted to the respondent in the liquidation application the judge said the following at paragraph [31] of the matter *SMM Holding (Pvt) (Pty) Ltd v*

Southern Asbestos Sales (Pty) Ltd 2005 (4) All SA 584 (W) at page 594 paragraph [31]:

> "*There is, however, telling evidence against SAS in regard to the indebtedness. I have already referred to the judgment obtained by PETTER pursuant to the alleged cession. The facts are that on 6 May 2004 PETTER obtained an Order against SAS for payment of the amount R74 872 468,49. The cause of action relied on by PETTER was based upon an allegation that SMM had ceded this part of its claim against SAS to PETTER. The Order was rescinded on 29 November 2004. PETTER has, I was informed, not pursued its case against SAS. There is however no explanation by SAS as to why it was prepared to consent to a judgment in favour of PETTER in the amount of R74 872 468,49 which claim arose by virtue of an alleged cession to PETTER of part of SAS's indebtedness to SMM in the current matter. One would have expected SAS which disputes the indebtedness relied upon by an applicant in winding-up proceedings to be candid and forthcoming, which has not been the case in this matter. It bears mention, of course, that both PETTER and SAS are what can be referred to as 'Mawere Companies'.*"

[28] The reasoning referred to by Epstein AJ was further strengthened by the finding of Willis J when he went on to find that the applicant Mr Mawere did not plead that SAS had paid the R18 million to PETTER before Van Oosten J issued the order of 6 May 2004. Willis J went on to find that:

> "*Taken in context the first defendant's plea contains a clear admission that the payment of some R18 million by SAS to PETTER was effected consequent upon judgment obtained per Van Oosten J on 6 May 2004.*"

[29] The applicant never had a valid nor *bona fide* defence to the claim by the respondent. It has failed dismally to create a new defence and has in the process abused the legal system. This matter should have ended when the

Supreme Court of Appeal pronounced on his prospects of success on appeal. In saying so my conclusion rests upon not only my experience but also on the experience of other judges who dealt with this matter before me.

[30] The arguments advanced in support of the applicant's contentions are so far-fetched and legally untenable that they require no further consideration. The applicant generated a mass of paper which serves little or no purpose save to envelope the real issues in the fog which hides or distorts reality. The application to rescind as well as the application to stay the writ of execution including all the prayers in the Notice of Motion must accordingly fail.

COSTS

[31] In the application the applicant raised several issues which had been decided upon in previous judgments for example the authority of Mr Gwaradzimba as well as the power of the Administrator under the Reconstruction Act of Zimbabwe. These matters had been ventilated in previous applications involving the same parties and finality reached yet the applicant saw it fit to raise them afresh .

[32] The application itself served before two judges on which instances all sorts of new material was sought to be introduced for instance after my Brother Francis J had postponed the matter during October 2013 it served before Vilakazi AJ on the 15th November 2013. It was on that day that the

applicant sought to introduce a supplementary affidavit which effort was correctly opposed by the respondent. This was yet another act of adding more meaningless paper work. It is this conduct that I have come to the conclusion that it should be visited by a punitive costs order as applied for by the respondent.

[33] I accordingly make the following order:

1. The application for rescission of the judgment by Willis J dated the 12th October 2012 is dismissed.

2. The application to stay execution of the writ of execution including all the other prayers in the Notice of motion are dismissed.

3. The applicant is ordered to pay taxed costs of the application on an attorney and client scale.

4. It is further ordered that the costs of the proceedings before Vilakazi AJ be paid jointly and severally by the applicant Mr Muthumwaziwa Mawere, his attorney Masewawatla Attorneys and his counsel Adv N S Petla *de bonis propriis* the one paying the other to be absolved.

M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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