



HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

20/4/16

CASE NO: A1044/13

In the matter between:

TRYPHENA MOLETE

First Appellant

TRYPHENA MOLETE NO

Second Appellant

and

DANIEL MOLETE

First Respondent

DANIEL MOLETE NO

Second Respondent

JOSEPH MOLETE

Third Respondent

MOHAYABO MOSES MOLETE

Fourth Respondent

WILLIAM MOLETE

Fifth Respondent

JOY MPHELE RAPHESU

Sixth Respondent

EVA MOLETE

Seventh Respondent

AGNES MOLETE

Eighth Respondent

J U D G M E N T

MAKGOKA, J

[1] I have read the judgment prepared by my colleague, Tuchten J. I agree with the reasoning and the conclusion that the appeal should be dismissed with no order as to the costs of the appeal. I disagree, however, with the orders proposed in

respect of the sheriff's fees and the attorney's fees. I am also concerned about certain *obiter* remarks in the judgment. I therefore write separately to express my views on these aspects. I deal with aspects, *seriatim*.

Sheriff's right of retention

[2] The sheriff who attached the vehicles which form the subject matter of the appeal did so on the instructions of the appellants' attorneys following an order of this Court granted on an *ex parte* basis. The sheriff, naturally, has hinted the obvious, that he would only release the vehicles upon payment of his storage fees. He looks to the attorney who has instructed him for his fees. My colleague says that the sheriff is not entitled to refuse to release the vehicles pending payment of his storage fees. The respondents were throughout, represented by an attorney and counsel. They were aware of the sheriff's stance, and in fact, mentioned it in their papers. Nevertheless, they did nothing about it. They did not seek an order that in the event the appeal is dismissed, the sheriff be ordered to release the vehicles to them without the sheriff insisting on prior payment.

[3] For the above reasons, I am of the view that it is not our place to interfere with what is a contractual relationship between the sheriff and the attorney for the appellants. My colleague effectively proposes that the sheriff be ordered to forfeit his contractual entitlement fees unless the sheriff shows cause otherwise by approaching this Court. I am of the view that this is an unnecessary burden on the sheriff who is legitimately and contractually entitled to hold on to the vehicles unless his fees are settled. My colleague does not state as to who is to be responsible for the costs of the sheriff approaching this Court. As stated earlier, it is not in our place to make the proposed order.

The attorney's fees

[4] The circumstances under which the respondent's appeal was handled on the day of the hearing are these. When the matter was mentioned, there was no appearance on behalf of the respondents. An unidentified person in the public gallery (presumably one of the respondents) informally conveyed to us that the respondents had given the respondents' attorneys full instructions in respect of the appeal,

including payment. After the matter had stood down, counsel who had earlier been instructed in the discharging of the order granted ex parte, appeared and conveyed to us that he had received instructions from the respondents very late, whilst he had already accepted a brief in another matter. Fortunately, that matter did not proceed, which enabled him to attend to the appeal and make certain submissions on behalf of the respondents, from his recollection in the earlier application.

[5] Under those circumstances, my colleague concludes that the respondents' attorney was derelict in his duties for which he should forfeit his fees, unless, like the sheriff, he shows cause why that should not be the case. Similarly, I do not think it is the court's place to make the type of order proposed by my colleague, even on a provisional basis. The attorney is obviously not entitled to the attendance at court on the day of the hearing because he did not attend court. But the attorney would have undertaken work for the respondents before the date of hearing, for which he is entitled to be remunerated. Part of that would include obtaining the record of proceedings, for which he would have had to disburse funds. Counsel who appeared on behalf of the respondents, albeit briefly late, has to be paid.

[6] If it is suggested that the attorney must refund all the money he had received from the respondents, who is to be responsible for the above disbursements? My colleague does not proffer any directives in this regard. The order has costs implications, too, as the attorney has to prepare papers and (possibly) instruct counsel to appear. That is at a practical level. As a matter of policy, the order proposed by my colleague, constitutes, in my view, an unnecessary, impermissible and inappropriate, intrusion into a very confidential relationship between attorney and client.

Obiter remarks

[7] In paragraph 22 of his judgment, my colleague remarks that:
'An order granted in the absence of a party to whom notice should have been given should, at the instance of the aggrieved party, be set aside as one erroneously granted as contemplated by rule 42 (1)(a), unless, possibly, there are weighty

considerations such as the interests of any parties other than the litigants which may be affected by the rescission.'

[8] The respondents elected to challenge the *ex parte* order granted against them in their absence, by way of reconsideration, and not by rescission. For this reason, rule 42 does not find application in the present case. But more fundamentally, I would have difficulty if what is stated above is meant to suggest that an order granted *ex parte* is, as a matter of course, always susceptible for rescission as being erroneously granted. I think this is an unnecessary conflation of the requisites for rescission in terms of rule 42, on the one hand, and those for reconsideration in terms of rule 6(12)(d), on the other. This being a Full Court judgment, it is binding on our colleagues in this Division, as well as the lower courts. In my view, it unnecessary and has the potential to lead to some confusion.

[9] For the above reasons, I would simply dismiss the appeal with no order as to costs, without all other orders proposed by my colleague.



T.M. Makgoka
Judge of the High Court