REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NUMBER: 5948/2018

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

DATE..... SIGNATURE:.....

In the matter between:

MDUNGAZI JOSEPH MALULEKE	**APPLICANT**
and	
HASANI THOMAS MULAMULA	**FIRST RESPONDENT**
MULAMULA ROYAL FAMILY	**SECOND RESPONDENT**
MULAMULA TRADITIONAL COUNCIL	**THIRD RESPONDENT**
PREMIER OF THE PROVINCE OF LIMPOPO	**FOURTH RESPONDENT**
LIMPOPO PROVINCIAL COMMITTEE ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	**FIFTH RESPONDENT**
COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	**SIXTH RESPONDENT**
LIMPOPO PROVINCIAL HOUSE OF TRADITIONAL LEADER	**SEVENTH RESPONDENT**

in re:-

HASANI THOMAS MULAMULA	**FIRST APPLICANT**

MULAMULA ROYAL FAMILY	**SECOND APPLICANT**
MULAMULA TRADITIONAL COUNCIL	**THIRD APPLICANT**

and

PREMIER OF THE PROVINCE OF LIMPOPO	**FIRST RESPONDENT**
LIMPOPO PROVINCIAL COMMITTEE ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	**SECOND RESPONDENT**
MDUNGAZI JOSEPH MALULEKE	**THIRD RESPONDENT**
COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	**FOURTH RESPONDENT**
LIMPOPO PROVINCIAL HOUSE OF TRADITIONAL LEADERS	**FIFTH RESPONDENT**

JUDGEMENT

KGANYAGO J

[1] The applicant who is the third respondent in the main application has brought an application for rescission of the judgment that was granted on 6th September 2019 by Makgoba JP (JP). He is also seeking an order that he be granted 15 days within which to file his answering affidavit. The first, second and third respondents (Respondents) who are applicants' in the main application are opposing the applicant's rescission application.

[2] The background facts are as follows. On 4th October 2018 the respondents issued an application seeking a declaratory order and review of the Premier's decision to accept the applicant's claim for restoration/recognition as a Senior Traditional Leader of the Mulamula community; and to dissolve the senior

traditional leadership in the lineage of Risimati John Mulamula with immediate effect. The respondents were further seeking an order to review the decision of Limpopo Provincial Committee on Traditional Leadership Disputes and Claims which the Premier had relied on in taking a decision to accept the applicant's claim. The respondents were further seeking an order that Hasani Thomas Mulamula (first respondent) be reinstated as the Senior Traditional Leader of the Mulamula community.

[3] The applicant was duly served with the review application in the main application. The applicant did not serve and file any opposing papers. The application was opposed by the first respondent (Premier of the Province of Limpopo), second respondent (Limpopo Provincial Committee on Traditional Leadership Disputes and Claims) and fourth respondent (Commission on Traditional Leadership Disputes and Claims). The applicant was not present or represented in court when the application was argued. The judgment of JP was delivered on 6th September 2019 wherein the respondents were successful in their application.

[4] In his founding affidavit for rescission of judgment, the applicant avers that the reasons for his default are that on 5th October 2018 he was served with the review application. On receipt of the application, he gave instructions to Mr Cedrick Baloyi of MC Baloyi attorneys on 17th October 2018 to oppose the respondents review application. After paying the necessary deposit and consulting with counsel on 3rd November 2018, he was assured that the opposing papers were settled and filed. He made some follow-up by phoning and also visiting his attorneys' offices wherein he was assured that everything was on track.

[5] The applicant was surprised in the evening of the 6th September 2019 when he learned that judgment was delivered that day and that it went against him. According to the applicant the matter went to court without his knowledge. He tried to contact Mr MC Baloyi without success. He then instructed his present attorneys of record to investigate the matter. It was found that MC Baloyi attorneys never filed any opposing papers.

[6] He again approached MC Baloyi attorneys to find out what transpired. MC Baloyi attorneys gave him copy of a covering letter dated 17th October 2018 addressed to Musa Baloyi Attorneys in Polokwane to act as their correspondents. He was also given copy of unsigned notice to oppose. Mr MC Baloyi insisted that the opposing papers inclusive of the answering affidavit were signed and served. Unfortunately, those documents were nowhere to be found. He was never served with the set down for the hearing of the respondents' review application.

[7] It is the applicant's contention that had his version been placed before the court, it would not have granted the orders sought. He denied that Mr Nzamani Maxwell Mingayimani was the chairperson of Mulamula Royal Council and also a member of the Mulamula Royal Family. The applicant avers that Mr Mingayimani is a commoner and he is also not of royal blood. According to the applicant on 17th October 1996 Mr Minyayimani facilitated a meeting of one of the contested issues. From the inception of Mulamula Royal Council, Mr Mingayimani never attended any Royal Council or Royal Family meetings.

[8] According to the applicant, the first chairperson of Mulamula Royal Family was Mr Thomas Magezi Mulamula who was succeeded by Mr Risimati Elias

Mulamula who is still the current chairperson. The secretary of the Royal Family from date of inception to date is Khazamula Robert Maluleke. That the alleged resolutions of the Royal Council attached to the review application were false as they were not done by the relevant and authorized persons. That the attendance register of Mulamula Royal Council and Royal Family does not reflect the names of Mr Mingayimani.

[9] The applicant avers that the current chairperson of Mulamula Royal Council, Mr Risimati Elias Maluleke, on 29th April 2019 wrote a letter as the chairperson to the Department of Co-operative Governance, Human Settlement and Traditions Affairs ("COGHSTA") requesting it to intervene in the confrontations between the group supporting him (applicant), and the one supporting Hasani Thomas Mulamula (first respondent).

[10] These disputes about chieftaincy were referred to the Commission of Inquiry, where evidence was led, assessed and evaluated. The Commission recommended that the chieftainship be restored to the first house of Gezani Johannes Maluleke. He (applicant) is the one who lodged the claim on behalf of the family with the support of the elder brother George Maluleke the son of Samuel Maluleke. George has even deposed an affidavit on16th May 2017 in support for the claim of chieftainship. George had since passed away. Prior to deposing the affidavit, George had written a letter requesting the applicant to act as a Senior Traditional Leader until he (George) assumes the position.

[11] On 25th April 2018, the Premier communicated the outcome of the Commission to them. The Royal Family held a meeting on 23rd June 2018 wherein they agreed to appoint him (applicant) as an Acting Senior Traditional Leader of Mulamula Traditional Authority. On 25th June 2018 the secretary of

the Royal Family wrote a letter to the MEC of COGHSTA notifying the MEC of the Royal Family's resolutions. He submitted that the decision of the Commission to restore the chieftaincy to the right house cannot be faulted.

[12] The respondents in their answering affidavit have submitted that the applicant's explanation for his default is unsatisfactory, because it is improbable, and contains too many inaccuracies and gaps like failing to file confirmatory affidavits by his former attorneys and/or their correspondents; he failed to explain how he could have expected answering papers to be filed in circumstances where he does not even allege that he deposed any answering affidavit before a commissioner of oath; and further does not explain why he expected an answering affidavit to be filed before receipt of the supplementary founding affidavit and/or amended notice of motion.

[13] The respondents avers that the applicant's defence appears to be based on Mr Mingayimani who signed the resolution of the Mulamula Royal Council dated 4th September 2018 and a confirmatory affidavit and alleges that Mingayimani was not a member of the Mulamula Royal Family; the resolution of the Mulamula Traditional Council dated 23rd September 2018 as not done by the relevant and authorised persons; that his claim for chieftainship was not personal, but was rather for the chieftainship to be restored in the first house of Gezani Johannes Maluleke; that the Limpopo Provincial Committee on Traditional Leadership Disputes and Claims ("the Committee") came to the correct conclusion; that on 29th October 2014 George Maluleke penned a letter requesting that the applicant act as Senior Traditional Leader until he assumed the position; that on 16 May 2017, George Maluleke deposed an affidavit in which he recorded his support for the claim of chieftainship; that

newly-obtained affidavits supports the narrative that Gezani Johannes Maluleke was Mkhachani Jim Maluleke's biological son; and that the Mulamula Royal Family had met to discuss the implementation of the Premier's decision, and had decided that the applicant be appointed as Acting Senior Traditional Leader.

[14] It is the respondents' contention that the applicant does not explain how these allegations support his defence, and also does not set out the nature and grounds of his defence. Further that these allegations are either wholly unsubstantiated or irrelevant.

[15] The applicant argued that the issues in the main application were not challenged not as a results that he did not want or neglected to do so, but largely because the attorneys he so trusted as officers of court misled him severely to his detriment. He submits that it was his earliest desire and wish to have the review application opposed so that the chieftainship dispute can be settled by the court once and for all.

[16] The respondents argued that the JP's judgment cannot be characterised as a default judgment, as it was heard in the opposed roll, and decided on the merits after consideration of the applicant's and State respondents' oral and written submissions. The respondents have submitted that the applicant did not explain how his evidence, if acceptable, would make any difference.

[17] The applicant has brought his rescission application under both Rule 42(1) and common law. Under common law, in order to succeed, an applicant for rescission of a judgment taken against him/her must show good cause. Rule 42(1) provides that the High Court may, in addition to any other power it may

have, *mero motu* or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of a party affected thereby. (**See Colyn v Tiger Food Industries LTD t/a Meadow Feed Mills (Cape)**[1]

[18] In **Chetty v Law Society, Transvaal**[2] Miller JA said:

> "But it is clear that in principle and in the long standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:
>
> (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
>
> (ii) that on the merits such a party has a bona fide defence, which prima facie carries some prospect of success."

[19] It is common cause that the applicant was properly served with the respondent's review application. On been served with the application, the applicant instructed his previous attorneys MC Baloyi attorneys to oppose the application. His previous attorneys never filed any opposing papers. When the applicant made follow ups about the progress of the matter, he was assured that everything was under control, whilst that was not the case. It is clear that his previous attorneys were grossly negligent in handling the applicant's matter. The question is whether negligence by a legal practitioner is a good ground for granting of a rescission application.

[20] In **Webster and Another v Sanlam Insurance Co Ltd**[3] Kotze JA said:

---

[1] 2003 (6) SA 1 (SCA)
[2] 1985 (2) SA 756 (A) at 765 B-C
[3] 1977 (2) SA 874 (A) at 883 G-884 A

> "A lay client, like each of the appellants, is ordinarily entitled to regard an attorney duly admitted to the practice of the law as a skilled professional practitioner. Ordinarily he places considerable reliance upon the competence, skill and knowledge of an attorney and he trusts that he will fulfil his professional responsibility. It is, of course, not unknown for an attorney or his firm to be negligent in carrying out professional duties, but that is not usual, and *a fortiori* to the lay client it would be a most unusual and unexpected occurrence. Consequently, in considering whether the neglect of an attorney constitutes a special circumstance within the meaning of that phrase in sec. 24 (2) (a) of the Act, the correct approach should always be to regard it as a relevant factor and to recognize that such neglect by an attorney may frequently be a special circumstance on its own vis-à-vis his client. To hold, without qualification, as was done in Snyman's case, supra at p194 A-B, that the client is bound by the negligence of his legal adviser is, in my respectful view, wrong"

[21] The applicant when he instructed his previous attorneys, he expected them to execute his mandate with the necessary diligence, skill and care required of a reasonable attorney under the circumstances. His mandate to his previous attorneys, was clear and was to oppose the respondents review application. The mandate was given on time. Even after giving the mandate to his previous attorneys he made follow ups about the progress of his case but was misled that everything was under control. He would not have known that his previous attorneys were misleading him as he had put his trust in them, and also as a lay person, when told that everything is under control, he was bound to take their word.

[22] Whilst courts are slow to penalize a litigant for his legal practitioner's inept conduct of how he handled his litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys. **(See Salojee and Another NNO v Minister of Community**

Development[4]). In the case at hand, the applicant after giving his previous attorneys mandate to oppose the respondents' review application, made some follow ups to be updated about the progress of his case but unfortunately was misled into believing that everything was under control. He trusted his previous attorneys to act professionally and in a responsible manner, and was also relying on their competence, skill and knowledge as admitted legal practitioners. In my view, in this case, the negligence of the applicant's previous attorneys cannot be imputed on him. He would not have foreseen that his previous attorneys would have acted in the manner in which they did.

[23] However, that is not the end of the matter, the other respondents have opposed the respondents review application, and they argued it in court. The judgment of the JP was based on the application which was argued in the opposed roll by the applicants (respondents in the rescission application) and some of the respondents been present. The question is whether the judgment of the JP can be classified as a default judgment which will entitle the applicant to bring an application for rescission under Rule 42(1) or common law. The applicant avers that since he was not part of the proceedings, there are certain evidence which the court was unaware of, which could have precluded the granting of the judgment and orders had the court been made aware of them.

[24] In **Rossitter and Others v Nedbank Ltd[5] Mbha** JA said:

"The law governing an application for rescission under Uniform Rule 42(1)(a) is trite. The applicant must show that the default judgment or order had been erroneously sought or

[4] 1965 (2) SA 135 (A)
[5] [2015] ZASCA 196 (1 December 2015) at para 16

erroneously granted. If the default judgment was erroneously sought or granted, a court should, without more, grant the order for rescission. It is not necessary for a party to show good cause under the sub-rule. Generally, a judgment is erroneously granted if there existed at the time of its issue a fact which the court was unaware of, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment"

[25] The applicant in the respondents' review application was the main "subject matter" as the whole dispute was centred around him. In his judgment the JP has stated "the third respondent Mr Maluleke, who is the subject matter in the traditional leadership dispute and claim that served before the Committee did not oppose this application." The third respondent in the main application who is Mr Maluleke is the applicant in this rescission application. The JP has acknowledged that the applicant is the main role player in the whole dispute. The JP was unaware that the applicant had given instructions to his previous attorneys to oppose the review application and that his previous attorneys had failed him. Had these facts been brought to the JP's attention, I doubt whether he would have proceeded hearing the application without affording the applicant an opportunity to be present and be heard. This application proceeded on the basis that the applicant was not opposing it, whilst that was not the case.

[26] The JP has accepted the uncontested version of the respondents that the applicant's father Gezani was not the biological son of Hosi Jim and concluded that he had no right to inherit the traditional leadership from Hosi Jim. The JP also accepted that the respondents' version was confirmed by an affidavit by Mzamani Maxwell Mingayimani a member of the Royal Family.

[27] The applicant dispute that Mingayimani is a member of the Royal Family, but that he is a commoner who served as a secretary and his role was to record the minutes. The applicant avers that from inception of the Mulamula Royal Council, Mr Mingayimani never attended any of the Royal Council or Royal Family meetings. The applicant's version that his father Gezani was the biological son of Jim Maluleke is confirmed in an affidavit by Gezani Daniel Maluleke who has stated that in the Royal Family, they do not marry women who already bore children from other men and disputes allegations that Gezani was not the biological son of Mkachani Jim Maluleke (Hosi Jim). The two versions of the applicant and the respondents creates a material dispute of facts which could not be resolved on papers. Had the JP been made aware of this material dispute of facts, he would have either dismissed the application or referred it for oral evidence.

[28] In setting aside the Premier's decision the JP found that the applicant has lodged the chieftaincy claim for himself or for his own whilst he had no capacity to do so, and that Gezani Johannes Maluleke could have been the person to lodge the claim. The JP concluded that the committee erred in making a recommendation that the applicant lodged the claim on behalf of the other house of Gezani Johannes Maluleke.

[29] The applicant avers that he had lodged the chieftaincy dispute on behalf of the house of Gezani Johannes Maluleke and not for himself. In his founding affidavit the applicant has attached a letter dated 29th October 2014 written by Mkhachani George Maluleke in which he gave permission to the applicant to act as Senior Traditional Leader of Mulamula community on his behalf as he was still employed somewhere and not yet ready to occupy that position. The

applicant has also attached an affidavit dated 16th May 2017 deposed by George in which he confirms his consent and support of the claim lodged by the applicant for the chieftainship to be restored to the first house from the third house. George further stated that he is unable to avail himself to the Commission as his child was sick and hospitalised. In that affidavit he had stated that he was residing in Chiawelo and the affidavit was deposed at Moroka SAPS. George has since passed away. It does not seem that the JP was made aware of the letter dated 29th October 2014 and affidavit deposed on the 16th May 2017. Had the JP been made aware of the two documents I doubt whether he would have arrived at the same conclusion that the applicant was lodging the claim for himself.

[30] The JP found that the Committee did not have the mandate to investigate the claim any further since the applicant was not the rightful heir of Gezani Johannes Maluleke and that his claim ought to have been dismissed. This conclusion was on the basis that he did not have the version of the applicant and was under the impression that the applicant was not opposing the review application. He was therefore unaware of material evidence which were in possession of the applicant which might have persuaded him otherwise.

[31] The JP has found that the Premier has appointed the applicant as an Acting Senior Traditional Leader of Mulamula Traditional Community with effect from 13th January 2019, and that such appointment was made without consultation and approval of the Royal Family. The applicant in his founding affidavit has attached the minutes of the 23rd June 2018 by Mulamula Royal Family in which the outcome of their successful claim was deliberated and it was resolved that the applicant be appointed as an Acting Senior Traditional

Leader of Mulamula Traditional Authority. The outcome of meeting was communicated to the Premier per their letter dated 25th June 2018 which is attached to the applicant's founding affidavit. It does not seem that the JP was made aware of these documents.

[32] The applicant in the whole dispute is the main role player, however, the dispute was finalized without his input as the court was under the impression that he was not opposing the respondents review application. The court did not have an opportunity to hear his version before the matter was finalized.

[33] In **Occupies, Berea v De Wet**[6] Mojapelo AJ said:

> "…the High Court did not discharge its duty to enquire into all of the relevant circumstances. This resulted in the Court being unaware of essential issues of fact when granting the order. The Court was for instance not aware that there were 180 occupants who were absent when it granted the eviction order. The Court was further not aware that those who purported to confirm the agreement on the side of the applicants had no mandate to bind the absent 180 applicants. The basis for granting the eviction order was that all the parties had consented thereto. The 180 absent applicants had however not consented thereto and were not bound by anybody present in Court. The eviction order was thus erroneously granted in the absence of the 180 applicants."

[34] This matter affects the whole community of Mulamula. It is not just about the applicant. It will be in the best interest of all the parties involved for their version to be heard in order to properly dispose the whole matter and in that case there will finality and certainty. As the court was under the impression that the applicant was not opposing the review application, that resulted in the court being unaware of all the essential issues of fact before delivering the

[6] 2017 (5) SA 346 (CC) at 366 F to 367 A

judgment and order. In my view, the judgment and order was erroneously granted in the absence of the applicant.

[35] In the result, I make the following order:

35.1. The judgment and order against the applicant delivered on the 6th September 2019 is hereby rescinded.

35.2 The first, second and third respondents jointly and severally to pay the applicant's costs on party and party scale.

35.2 The applicant to file his answering affidavit within 15 days of this order.

MF. KGANYAGO J

JUDGE OF HIGH COURT OF SOUTH AFRICA,

LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

COUNSEL FOR APPLICANT : ADV LA NKOANA

INSTRUCTED BY : MABOKO MANGENA ATTORNEYS

COUNSEL FOR 1ST,2ND AND 3RD RESPONDENTS : ADV NAUDE

INSTRUCTED BY : JONATHAN SNYMAN DIAMOND INC

DATE OF HEARING : 28 MAY 2020

DATE OF JUDGEMENT : 7TH JULY 2020