IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE PROVINCIAL DIVISION, CAPE TOWN)

CASE NO: 15314/2020

DATE: 2020.10.28

In the matter between

B XULU & PARTNERS INCORPORATED	First Applicant
INCOVISION (PTY) LTD	Second Applicant
SETLACORP	Third Applicant
BARNABUS XULU	Fourth Applicant

and

THE DEPARMENT OF AGRICULTURE, FORESTRY AND FISHERIES	First Respondent
THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS, FORESTRY AND FISHERIES	Second Respondent
THE SHERIFF OF THE HIGH COURT OF PRETORIA CENTRAL, MR T F SEBOKA NO	Third Respondent
STANDARD BANK OF SOUTH AFRICA	Fourth Respondent
FIRST NATIONAL BANK OF SOUTH AFRICA	Fifth Respondent
INVESTEC BANK	Sixth Respondent
REGISTRAR OF DEEDS,	

PIETERMARITZBURG Seventh Respondent

EX TEMPORE JUDGMENT

SLINGERS, J:

This matter was argued as an urgent before me earlier today. This is the *Ex Tempore* Judgment in respect of the matter.

This is an urgent application brought in terms of Rule 6(8) and/or Rule 6(12)(c) of the Uniform Rules of Court.

Rule 6(8) applies to the order granted on 5 October 2020 which was obtained on an urgent but not *ex parte* basis. The orders of 12 and 15 October was obtained on an *ex parte* basis.

The applicant states that the application is brought simply on the basis that Smith, J lacked jurisdiction to grant the orders. Similarly, in the replying affidavit the applicant states that the relief is based on the ground that Smith, J lacked the authority and/or jurisdiction to grant the orders.

The applicant seeks to have the orders reconsidered and set aside, alternatively declared unlawful and invalid.

This court sitting as a single judge cannot declare an order of another single judge as unlawful or invalid.

During the hearing of the matter a question was posed to Advocate Khoza whether or not a court sitting as a single judge could declare orders of another judge as unlawful or invalid in that it would be akin to this court sitting as an appeal court in respect of those orders.

The question was posed whether or not the declaratory relief should not have been placed before a full court. Advocate Khoza was unable to refer me to any authority which would allow me to grant the declaratory relief. He mentioned that he thought it was done in this particular case where Rogers, J declared the order of Steyn, J invalid. In paragraph 144(c) of Rogers, J's order he rescinds the order granted by Steyn, J. Rescission is not the same as the declaratory relief which the applicant seeks in this matter.

In the circumstances I have not been persuaded that this court sitting as a single judge may competently grant the declaratory relief which the applicant seeks in this matter.

Furthermore the application in respect of whether or not Smith, J had authority to grant the orders was also based on the fact that the verification of the invoices was not done in the manner envisaged by Rogers, J in his judgment on 30 January 2020 and therefore Smith, J ought not to have granted the orders which he did.

However, the argument pertaining to the verification of the invoices presupposes that steps could not be taken to execute on the judgment in the absence of the verification of the invoices and which could result in a possible reduction of the amount owed by BXI to the respondents. That this argument is misplaced is evident from paragraphs 124 and 125 of Rogers, J's judgment which reads as follows:

> "It does not follow that the applicant will be obliged to pay BXI for all the work duly verified. The usual source for such an obligation would be a contractual mandate and the question whether BXI has ever had valid contractual mandates is disputed. The applicant may yet apply to have Minister Zukwala's mandate set aside. The applicant has also foreshadowed the possibility that it might draw a distinction between work done before and after the termination letter of 15 August 2018. My order

will simply require the applicant to report to BXI the result of its verification and to state whether it tenders to pay BXI anything more than it has already paid. If there is such a tender this could be set off against BXI's liability."

It continues in paragraph 125:

"If the applicant does not tender to pay anything to BXI following such verification BXI will have to refund the full amount and pursue any claims it believes it has against the applicant by way of separate proceedings. Therefore it was never envisaged that the verification of the invoices had to be done before the respondents could take steps to execute on the judgment."

In this matter the applicants seek final relief and as the matter are application proceedings wherein final relief is sought the Plascon Evans principle is applicable.

In the founding affidavit the applicant states that he wrote to the Judge President seeking clarity regarding Smith, J's appointment to deal with the matters which gave rise to the orders of 5 and 12 October 2020. The applicant was still awaiting the Judge President's response. The applicant then

concludes that it seems clear that Smith, J had no jurisdiction. This is a conclusion reached by the applicant. However, the applicant fails to set out the facts on which the conclusion is based.

In the answering papers it is stated that Smith, J was seized with the matters. This particular allegation is not answered in the replying affidavit (see paragraph 63 on page 93 and the replying affidavit).

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Insofar as the applicant purports to deal with the allegation in paragraph 67 of its replying affidavit the applicant does not deny that Smith was seized with the matters.

Upon the application of Plascon Evans an issue which is not denied is deemed admitted. Therefore, on the application of the Plascon Evans principle the applicant has failed to show that Smith, J lacked the jurisdiction to grant the impugned orders.

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Furthermore, in any event in such matters where the parties disagree as to the status of an impugned judgment or order the court should be approached for rescission thereof either in terms of Rule 42 or the common law. In this regard see the matter of *Trailex Ltd v Maloney & Another* case number

823/2015 decision of the Supreme Court of Appeal granted on 27 September 2016 and *The Department of Transport v Tassimer* at paragraph 672G.

If this court is generous and interprets the application before it as a rescission application neither the requirements of Rule 42 nor the common law were met. In terms of Rule 42 if the allegation is that the orders were granted erroneously then the error must appear either from the record or from the application. In this case it would have to show that Smith, J had no jurisdiction to hear the matters before it. This appears neither from the record nor from the application.

In terms of the common law the applicant has to show sufficient cause which would include an explanation for the default for the failure to appear on 5 October 2020. Furthermore the applicant must show a *bona fide* defence and that the application is made *bona fide.*

No explanation for the default in respect of the order taken on 5 October 2020 was furnished and as the application was brought solely on the grounds that Smith, J lacked jurisdiction no *bona fide* defence was disclosed in the founding affidavit.

In the application to strike it pertains purely to a report which

was furnished as part of settlement discussions which was admitted by the applicant. Applicant admitted further that it wasn't about the content of the report but about the process which was not fair. This unfairness could have been placed before the court without breaching the well-known principle that settlement discussions are confidential. In the circumstances the striking application succeeds.

Initially the respondent elected not to ask for any cost of the application. However, during argument the respondent asked for cost on a punitive scale. One of the grounds on which the respondent asked for costs on a punitive scale was the non-compliance with the three orders on the part of the applicant who then approached court for assistance.

The applicant asked that should he win the cost would follow but in the event that he does not that no order be made in respect of cost. Usually when punitive cost orders are being sought notice thereof is given to the other side. Understandably this is an urgent application and it was not done. However, I do not deem it would be fair to impose a punitive cost order in circumstances where the respondent initially did not seek any cost.

However, I AM GOING TO DISMISS THE APPLICATION WITH

COST ON A PARTY PARTY SCALE, BUT I AM GOING TO DIRECT THAT THE COST WOULD INCLUDE THE COST OF TWO COUNSEL WHERE SO EMPLOYED.

SLINGERS, J

JUDGE OF THE HIGH COURT

DATE: .....