IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Appeal No: A22/2022

In the appeal between:

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Appellant

and

SARAH MMATAWANA MLAMULELI Respondent

CORAM: VAN ZYL, J *et* CHESIWE, J

JUDGMENT BY: VAN ZYL, J

HEARD ON: 24 JULY 2023

DELIVERED ON: 14 FEBRUARY 2024

---

[1] This is a full court appeal against the judgment of a single judge of this Division. When the appeal was heard, it served before myself, Chesiwe, J and Thamae, AJ. However, Thamae, AJ sadly and untimely passed away leaving a vacancy amongst the members of the court of appeal as previously constituted.

[2] Sections 14(4), 14(5) and 14(6) of the Superior Courts Act, 10 of 2013, determines as follows:

"**14. Manner of arriving at decisions by Divisions**

…

(4) *(a)* Save as otherwise provided for in this Act or any other law, the decision of the majority of the judges of a full court of a Division is the decision of the court.

(b) Where the majority of the judges of any such court are not in agreement, the hearing must be adjourned and commenced *de novo* before a court consisting of three other judges.

(5) If, at any stage during the hearing of any matter by a full court, any judge of such court is absent or unable to perform his or her functions, or if a vacancy among the members of the court arises, that hearing must-

(a) if the remaining judges constitute a majority of the judges before whom it was commenced, proceed before such remaining judges; or

(b) if the remaining judges do not constitute such a majority, or if only one judge remains, be commenced *de novo*, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of the remaining judges or of the one remaining judge as the decision of the court.

(6) The provisions of subsection (4) apply, with the changes required by the context, whenever in the circumstances set out in subsection (5) a hearing proceeds before two or more judges." (My emphasis)

[3] In **Ithuba Holdings Pty) Ltd v Lottostar (Pty) Ltd** 2021 JDR 2008 (MN) the court held as follows in similar circumstances:

> [1] This is a full Court appeal following the Supreme Court of Appeal ("SCA") granting the Appellant ("Ithuba") leave to appeal to this court. The appeal was heard on 11 June 2021 by the court constituted by Mashile J, Sigogo and Roelofse AJJ. On 31 July 2021, sadly Sigogo AJ passed away due to COVID-19 complications leaving a vacancy amongst the members of the Court.
>
> [2] Section 14(5) of the Superior Courts Act 10 of 2013 ("Superior Courts Act") makes a provision for instances where a vacancy amongst the members of a court arises prior to the finalisation of a judgment. It provides:
>
> '…'
>
> [3] Roelofse AJ and I remained and constituted the majority of judges before whom the appeal could have commenced. Notwithstanding the provisions of section 14(5) of the Superior Courts Act, the views of the parties were sought. The First ("Lottostar") did not wish to make any submissions. Ithuba, the Second Respondent ("the Board") and the Fourth Respondent ("the Commission") informed the court that they had no objection if Roelofse AJ and I delivered the judgment. The third respondent ("Betting World") proffered no views. The Court resolved to proceed to consider the matter and to deliver this judgment."

[4] In the present matter the parties were advised in writing that judgment will be delivered by the remaining two judges who constitute a majority of the judges before whom the appeal commenced.

Background:

[5] The primary issue to be determined in this appeal is whether, as contended by the appellant, a High Court which granted a restraint order under section 26(1) of the Prevention of Organized Crime Act, 121 of 1998 ("POCA"), has the power to rescind such an order in circumstances other than those prescribed in section 26(10) of POCA; more particularly, on common law grounds.

[6] Should the above question be found to be affirmative, the further question is whether the court *a quo* was correct in finding that the respondent satisfied the requirement of "good cause" for purposes of rescission under the common law.

[7] On 30 September 2020 the appellant obtained an *ex parte* provisional restraint order in terms of section 26(1) of POCA against the respondent. On the return date of the provisional order, 26 November 2020, the provisional order was confirmed in the absence of the respondent; hence, by default.

[8] The circumstances under which the final restraint order was granted against the respondent were undisputed in the court *a quo*, namely:

1. On the return date of the provisional restraint order, the respondent`s erstwhile attorneys were in attendance in court waiting for the matter to be called in order to apply for a postponement and an extension of the *rule nisi* in order for the respondent to file an answering affidavit.

2. Unbeknown to the respondent`s said attorneys, the other parties to the provisional restraint order were with Daffue, J in chambers at the time, since the matter served before him. Daffue, J, on the other hand, had no knowledge of the presence of the respondent`s attorneys in court at the time.

3. The other respondents who were present in the chambers of Daffue, J and who, like the respondent, had not filed their answering affidavits by the return date, applied for a postponement in order to file same. Their applications for a postponement was not opposed by the appellant and Daffue, J granted their request for a postponement and extended the *rule nisi* accordingly.

4. Due to the “absence” of the respondent, Daffue, J granted a final restraint order against the respondent.

[9] The respondent subsequently applied for rescission of the final constraint order, which application was based on the common law.

[10] The application was opposed by the appellant who contended that the respondent did not set out a reasonable explanation for her default and that she had no *bona fide* defence to the restraint application.

[11] The legal point which currently serves on appeal, was not raised by the appellant during the hearing of the rescission application,

but Mr Mazibuko correctly conceded already in his heads of argument that it does not preclude the appellant from raising the said point of law for the first time on appeal.

[12] The court *a quo* found that the respondent had satisfied the common law requirements for rescission of a judgment and consequently ordered the final restraint order to be rescinded and set aside, together with ancillary relief. The court *a quo* also ordered the present appellant to pay the costs of the application.

[13] The court *a quo* granted leave to appeal to the full court, with the costs of the application for leave to appeal to be costs in the appeal.

The Notice of Appeal:

[14] The appeal is directed against the whole of the order and judgment of the court *a quo,* including the order as to costs.

[15] The grounds of appeal as set out in the Notice of Appeal entail, in summary, the following:

1. The court *a quo* misdirected itself in finding that the final restraint order was to be set aside on the basis that the appellant established that she was not in wilful default and that she had set out a triable issue worthy of adjudication.

2. In having based its finding on the common law requirements for the rescission of a judgment, the court *a quo* erred since

the requirements for rescission of restraint orders are provided for in section 26(10) of POCA. The said finding is inconsistent with the binding authority of the Supreme Court of Appeal in the judgment of **National Director of Public Prosecutions v Phillips and Others** [2005] 1 All SA 635 (SCA), in terms whereof the rescission of a restraint order is only permissible in terms of section 26(10) of POCA or under the limited common law bases of fraud, common mistake and the doctrine of *instrumentum noviter repertum* (the coming to light of as yet unknown documents).

3. Regardless of the success of the rescission application, the court *a quo* erred by holding the appellant iable for the payment of the respondent`s costs in the rescission application, since the respondent was the party who sought an indulgence.

[16] According to the appellant the appeal is to be upheld, the order of the court *a quo* is to be substituted with one in terms whereof the application for rescission is dismissed with costs, including the costs of three counsel. The respondent is further to be ordered to pay the costs of the appeal, such costs to include the costs of the application for leave to appeal, including the costs of three counsel.

The merits of the appeal:

[17] I will first deal with the issue of section 26(10) of POCA, since should this ground of appeal succeed, the question whether the

respondent established good cause for common law purposes, will become irrelevant.

[18] Adv. NA Cassim SC, Adv. S Freese and Adv. TM Ngubeni appeared on behalf of the appellant in the appeal. Adv. MS Mazibuko appeared on behalf of the respondent.

Section 26(10) of POCA:

[19] Section 26(10) of POCA determines as follows:

> (10) A High Court which made a restraint order-
>
> *(a)* may on application by a person affected by that order vary or rescind the restraint order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied-
>
> (i) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and
>
> (ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and
>
> *(b)* shall rescind the restraint order when the proceedings against the defendant concerned are concluded.

[20] Mr Cassim submitted that the Supreme Court of Appeal held in **National Director of Public Prosecutions v Phillips and Others** [2005] 1 All SA 635 (SCA); 2005 (5) SA 265 (SCA) [the **Phillips**-judgment] that an applicant seeking rescission of a restraint order obtained under section 26(1), like in the present matter, is permitted to do so only on the grounds as set out in

terms of section 26(10) of POCA. For this submission he relied on paragraph [25] of the **Phillips**-judgment:

"[25] To sum up, a High Court which grants a restraint order in terms of s 26(1) of the Act has no inherent jurisdiction to rescind the order. Subject to one exception, its power to do so is circumscribed by the Act and is limited to the grounds set forth in s 25(2) and s 26(10). The exception is the existence of one or other of the recognised common-law grounds for rescission which must have existed when the restraint order was granted." (My emphasis)

[21] Mr Cassim further submitted, with reference to paragraph [21] of the **Phillips**-judgment, that what would constitute a basis in common law for rescinding a restraint order would be situations where the judgment is founded upon fraud, common mistake and the doctrine of *instrumentum noviter repertum.* I cannot agree with Mr Cassim`s interpretation of paragraph [21], which reads as follows:

[21] It is a well-established principle that a Court may always set aside its own final judgment in certain limited circumstances. These **include** situations where the judgment is founded upon fraud, common mistake and the doctrine of *instrumentum noviter repertum* (the coming to light of as yet unknown documents). See generally Van Winsen, Cilliers & Loots *Herbstein & Van Winsen The Civil Practice of The Supreme Court of South Africa* 4th ed at 690 - 8. The principle, however, has no application to the circumstances relied upon by counsel. As observed by Trengove AJA in *Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A) at 939D - E:

'I do not consider it necessary to enter upon a discussion of the grounds upon which the rescission of a judgment may be sought at common law because, whatever the grounds may be, it is

> abundantly clear that at common law any cause of action, which is relied on as a ground for setting aside a final judgment, must have existed at the date of the final judgment.'" (My emphasis)

[22] In terms of the aforesaid paragraph [21] of the judgment, rescinding a judgment on common law basis is not restricted to the three mentioned grounds, but **include** the said three grounds. The extract from **Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal**, AC Cilliers *et al,* 5th Edition (whilst the SCA above still referred to the 4th Edition), which the court referred to above, *inter alia,* reads as follows:

> "**VII Setting aside of judgments and orders in terms of the common law**
> As stated, a final judgment, being *res judicata*, is not easily set aside, but the court will do so on various grounds, such as fraud, discovery of new documents, error or procedural irregularity. At common law, any cause of action that is relied on as a ground for setting aside a final judgment must have existed at the date of the judgment. There must be some causal connection between the circumstances that give rise to the claim for rescission and the judgment.
>
> In terms of the common law, the court has power to rescind a judgment obtained on default of appearance provided that sufficient cause for rescission has been shown. The term 'sufficient cause' defies precise or comprehensive definition, but it is clear that in principle and in the long-standing practice of our courts two essential elements are: (1) that the party seeking relief must present a reasonable and acceptable explanation for default, and (2) that on the merits that party has a *bona fide* defence which, *prima facie*, carries some prospect or probability of success. Good cause need not, however, be established when the application for rescission is brought in terms of rule 42(1)*(a)*.

The phrases 'good cause' and 'sufficient cause' are synonymous and interchangeable. …"

[23] What the SCA consequently determined, in my view, is that the High Court has no inherent jurisdiction to rescind an order issued in terms of section 26(1) of POCA, but it can do so if one or other of the recognized common law grounds for rescission existed at the time when the restraint order was granted, absent which it may only be done in terms of and on the grounds of section 26(10). Had it not been for section 26(10), the High Court would not have been entitled and would not have had the jurisdiction to rescind or vary a section 26(1) order based on grounds that came into existence after the order had been granted. Section 26(10) has therefore actually endorsed that over and above the common law grounds to apply for a rescission of a section 26(1) order, which grounds had to exist at the time the order was granted, the court (now) also has the jurisdiction to vary or rescind its own order based on the grounds set out in section 26(10) and which grounds came into existence after the granting of the order.

[24] Section 26(10) of POCA consequently regulates rescission under certain circumstances which occurred or came into existence after the granting of an order in terms of section 26(1), whilst the common law grounds regulate or provide for rescission of such an order under circumstances which prevailed or existed before or at the date of the granting of the order.

[25] In my view the court *a quo* therefore did not err by setting aside the final order on common law grounds based on circumstances that prevailed at the date when the final order was made.

[26] In view of my findings above and in the particular facts and circumstances of this appeal, I deem it unnecessary to address the issue of the inherent jurisdiction of the court in terms of section 173 of the Constitution and what impact, if any, section 26(10) of POCA has thereon.

[27] The remaining issue is whether the court *a quo* erred in finding that the respondent made out a proper case for purposes of sufficient cause shown.

[28] It is trite and the court *a quo* also referred to the principle that whether the applicant has shown sufficient cause for the rescission of a default judgment, the applicant has to present a reasonable and acceptable explanation for the default and the applicant has to show the existence of a *bona fide* defence which *prima facie* has some prospect or probability of success. See **Harris v Absa Bank t/a Volkskas** 2006 (4) SA 527 (T) at para [4].

[29] The circumstances under which the final restraint order was issued against the respondent in her absence has already been set out in paragraph [8] above. From that it is evident, like the court *a quo* found, that had the respondent`s attorneys attended the proceedings in chambers and not waited in court, the respondent`s application for a postponement would in all

probability have been granted considering the stance taken by the appellant at that stage and the other postponements which Daffue, J granted.

[30] With regard to the requirement of a *bona fide* defence, the court *a quo* dealt in detail with the defence raised by the respondent. I do not intend repeating same herein. The crux of the respondent`s defence is that she did not receive any benefit from the alleged offences. The court *a quo* found as follows:

> "Clearly the issue whether the Applicant received a benefit for the purposes of POAC raises a triable issue that may decide the fate of the restraining order and in my view the Applicant has shown that she has a *bona fide* defence worthy of adjudication."

[31] The court *a quo* exercised its discretion to grant the rescission application. It is trite that a court of appeal should be loath to interfere with the discretion which was exercised by a court *a quo* and should only do so if the court *a quo* failed to exercise its discretion properly and judicially. See **EH Hassim Hardware (Pty) Ltd v Fab Tanks CC** (1129/2016) [2017] ZASCA 145 (13 October 2017) at para [29].

[32] In my view there is no basis upon which we can interfere with the discretion exercised by the court *a quo* in deciding to grant the rescission of the final restraint order.

[33] The appeal can consequently not succeed on its merits.

The appeal against the costs:

[34] As already indicated earlier in the judgment, the appeal against the order of costs made by the court *a quo* is based thereon that regardless of the success of the rescission application, the court *a quo* erred by holding the appellant liable for the payment of the respondent`s costs in the rescission application, since the respondent was the party who sought an indulgence.

[35] Mr Cassim acknowledged that the power of a court of appeal to interfere with a costs order is limited to instances of vitiation by misdirection or irregularity or absence of grounds on which a court, acting reasonably, could have made such an order. See **Attorney General Eastern Cape v Blom** 1988 (4) SA 645 (A) at 670 D - F. An order as to costs is a judicial discretion which a court *a quo* exercises with which a court of appeal cannot interfere unless it is satisfied that the discretion was not exercised judicially or was exercised on a wrong principle. See **Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another** 2015 (5) SA 245 (CC) at paras [83] – [89]. In the matter of **Dobsa Services CC v Dlamini Advisory Services (Pty) Ltd and Another; Dlamini Advisory Services (Pty) Ltd and Another v Dobsa Services CC** [2016] JOL 36725 (SCA) [the **Dobsa**-judgment] the aforesaid principles were stated as follows at para [14]:

> [14] Accordingly, these being appeals in relation to awards of costs, it is necessary to briefly set out the principles relating to the nature and proper exercise of the discretion vested in a judicial officer when

making an order as to costs and the circumstances in which an appellate court can interfere with the exercise of that discretion. The discretion of the nature under consideration in these appeals has been described as "a discretion in the strict or narrow sense". Accordingly, the appellate court's power to interfere on appeal is limited to instances where it is found that the court of first instance did not exercise the discretion judicially, or acted upon a wrong principle, or exercised its discretion capriciously, or did not bring its unbiased judgment to bear on the question or did not act for substantial reasons. And as the Constitutional Court put it, albeit in a different context:

> '. . . the lower Court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a Court properly directing itself to all the relevant facts and principles.'

That the appellate court would probably have come to a different conclusion had it sat as a court of first instance is of no moment. The appellate court would still not be entitled to interfere solely on that ground."

[36] Mr Cassim submitted that the court *a quo* failed to take into consideration the fact that an applicant seeking rescission of an order is in essence seeking an indulgence and therefor ought to bear the costs of such an application. The said principle is indeed applicable. See **Minnaar v Van Rooyen N.O.** 2016 (1) SA 117 (SCA) at para [20].

[37] As further pointed out by Mr Cassim, it is also an accepted principle that the successful applicant in such an application is

usually also ordered to pay the costs of the opposition to the application, on condition that the opposition is reasonable. In the **Dobsa**-judgment at paragraph [11] thereof the SCA referred with approval to certain judgments from which the said principle is evident:

> "[11] … The first two of these decisions are to the effect that in an application for rescission of default judgment the applicant seeks an indulgence and must therefore bear the costs reasonably incurred in opposing the application. And the latter of the three decisions is to the effect that a party opposing a rescission application ought not to be required to do so at their peril even if rescission is ultimately granted."

[38] The aforesaid principles were applied in the judgment of **Minister of Police v Nongwejane** [2016] JOL 34786 (ECM)at para [17]:

> "[17] An application for rescission of a default judgment is regarded as an indulgence and, as a general rule, the applicant would be ordered to pay the costs of such an application if the respondent's opposition thereto was reasonable. I am of the view that in the circumstances of this matter, set out fully in the founding affidavit in a manner which allowed the respondent very little room for objective and justifiable opposition and which exposed a lamentable poverty in the application for default judgment, opposition to the application for rescission of the default judgment was unreasonable. In such circumstances, the respondent ought to have borne the costs of the application for rescission."

[39] It is evident from the judgment of the court *a quo* that the said order of costs against the appellant was made on the basis of the

general rule of costs, namely that costs follow the event. It appears that the court *a quo* failed to appreciate and apply the aforesaid rules and principles regarding rescission applications; hence, when an applicant seeks an indulgence. In the circumstances I am of the view that the court *a quo* either failed to exercise its discretion and/or did not exercise its discretion judicially and/or exercised its discretion based on a wrong principle.

[40] In the circumstances we are entitled to interfere with the costs order of the court a quo.

[41] When a court considers that liability for costs can be more effectively determined at a later stage, it will reserve the question for later decision. In normal circumstances the costs of an application for interim relief would be reserved for determination on the return date. See **Law Society of South Africa and Others v Road Accident Fund and Another** (12209/08) [2008] ZAWCHC 47; 2009 (1) SA 206 (C) (15 August 2008) at para [21].

[42] The aforesaid principle was applied in the judgment of **McDonald t/a Sport Helicopter v Huey Extreme Club** 2008 (4) SA 20 (C) at 27:

"For the reasons stated I am satisfied that this is indeed a case where this court ought to set aside the costs order made a quo and to substitute therefor an order that the costs should stand over for determination at the trial. The reason for making the order I propose in regard to the costs standing over is because a court has not yet adjudicated upon the issues

which were raised by the applicants in their application and that a court will indeed have to adjudicate upon those very issues when it comes to consider what is described as 'claim C' in the respondent's particulars of claim. It seems to me, therefore, that fairness requires that at this stage the order should allow the costs to stand over for a more appropriate occasion and that would be at the trial when the facts and the argument will be before the court."

[43] In **Sea Lake Investments (Pty) Ltd t/a Sea Lake Industries v Msunduzi Municipality and Another** [2006] 1 All SA 656 (N) at 661 the court also reserved the costs in circumstances where it was of the view that "*there is a vital issue relevant to the determination of the issue of costs at this stage, which will only be determined in the action*".

[44] In the present matter it has been found that the respondent made out a case in respect of a *bona fide* defence for purposes of showing "sufficient cause". However, it will only be at the extended return date when the application for a final restraint order will be considered, that the court will have the full versions of both the appellant and respondent before it for adjudication, which will include the hearing of arguments on behalf of both parties. In my view the court will then be in much better position to determine whether the applicant indeed had a bona defence as alleged for purposes of the rescission application and whether the opposition of the rescission application by the appellant was reasonable. The court will then be in a proper position to apply the applicable rules in respect of costs of rescission applications in order to make an appropriate order as to the costs of the application.

[45] In the circumstances we consider it appropriate that the costs order of the court *a quo be* substituted with one in terms whereof the costs be reserved for later determination.

Costs of the appeal:

[46] Where a litigant has small or only partial success in litigation, it depends on the circumstances what costs order the court will make. In a number of cases in which the plaintiffs had only limited success the court did not allow them to recover all their costs. An appellant who has achieved partial success on appeal may be awarded a portion of the costs of the appeal. See **Rondalia Assurance Corporation of SA Ltd v Dassie** 1975 (3) SA 689 (A). See also **AR & H v Orford** 1963 (1) SA 672 (A) at 680. See further **EMS Belting Co of SA (Pty) Ltd v Lloyd** 1983 (1) SA 641 (E) at 646–647.

[47] In the present matter the appellant has been partially successful on appeal, being against the costs order of the court *a quo.* In our view the appellant is consequently entitled to be awarded a portion of the costs of the appeal. However, the respondent has also been partially successful in that she successfully averted the appeal on the merits thereof and she is consequently also entitled to be awarded a portion of the costs of the appeal.

[48] In our view the percentage time and effort which the parties put into the preparation and the arguing of the appeal in respect of the merits thereof, by far outweighs that of the costs issue. In exercising our discretion, we deem a 80% / 20% apportionment of

the costs of the appeal in favour of the respondent, to be fair and reasonable.

[49] The respondent engaged the services of three counsel for purposes of the appeal. In the Notice of Appeal, the respondent requested that the respondent be awarded the costs of the appeal, which costs are to include the costs of three counsel. No specific request was made in this regard in the respondent`s heads of argument nor during the presentation of oral argument. Be that as it may, in my view there is, in any event, no basis upon which the employment of more than one counsel can be justified, even less so three counsel.

Order:

[50] The following order is made:

1. The appeal against the order of the court *a quo* in terms whereof the respondent`s rescission application was granted, is dismissed.

2. The appeal against the costs order made by the court *a quo* is upheld, the said costs order is set aside and substituted with the following order:

> "The costs of the rescission application are reserved for later adjudication."

3. The appellant is to pay 80% of the respondent`s costs of the appeal.

4. The respondent is to pay 20% of the applicant`s costs of the appeal.

5. The aforesaid costs of the appeal are to include the costs of the application for leave to appeal.

_____

C. VAN ZYL, J

I CONCUR:

_____

S. CHESIWE, J

On behalf of the appellant:	Adv NA Cassim SC Assisted by: Adv S Freese & Adv TM Ngubeni Instructed by: Office of the State Attorney Bloemfontein Ref: 619/202000863/P16M
On behalf of the respondent:	Adv. MS Mazibuko Instructed by: Matlho Attorneys Bloemfontein Ref: MD Matlho/MLA14/0001