IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE

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

22/02/2018 .....
DATE

.....
SIGNATURE

APPEAL CASE NO: HCA19/2015

In the matter between:

MINISTER OF SAFETY AND SECURITY **APPELLANT**

And

OUPA SIPHO PHAKULA AND
300 OTHERS **FIRST RESPONDENT**

TT MALAHLELA ATTORNEYS **SECOND RESPONDENT**

JUDGMENT

M.G. PHATUDI J

[1] Factual Background:

1.1 On 02 November 2012, the plaintiff ("the first Respondent) and some 300 or so other persons were allegedly arrested by members of South African Police Service ("SAPS") without a warrant of arrest. Pursuant to such arrests, the plaintiff and his co-arrestees were detained in the police cells at various police stations in Sekhukhune area until around 05 November 2012, when they were released.

1.2 On 15 May 2013, following their arrest and detention, each of the estimated 300 plaintiffs issued out summons against the appellant (defendant in the court below) for damages of unlawful arrest and detention. The particulars of each claim, it appears, were couched in similar terms and reciprocally circumscribed.[1]

1.3 On 10 September 2013, the plaintiffs' claims were settled on the basis that the appellant tender payments of an amount of R30 000.00 capital debt and R3 000.00 in respect of the plaintiff's costs.

1.4 Pursuant to the alleged settlement, on 29 November 2013 judgment was granted in favour of the plaintiff under case number 424/2013 as claimed.[2] It appears from the record that the judgment or orders so granted were in favour of the plaintiffs. I shall refer to the judgment/orders as "orders" for the purpose of completeness.

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[1] Annexure "FA 2), vol, pp 40-48 Record.
[2] Annexure "FA 3), vol, pp 49 Record.

1.5 In order to give effect to the court orders referred to, on 02 December 2013 the law firm TT Malahlela Attorneys directed a letter to the office the of State Attorney Polokwane in which it was said in part that :-

"the court ordered that the court orders attached hereto apply to all 305 matters".[3] Only one court order was however (case no 424/2013) attached thereto.

1.6 Furthermore and in pursuance to the aforestated letter, the Second Respondent on the 14 January 2014 obtained a warrant of execution against the appellant's property authorised to the value of R33 000.00 inclusive of costs.[4] The warrant was apparently in respect of the plaintiff in case no: 424/2013, namely, one Oupa Sipho Phakula, better described as "Execution Creditor" as against the appellant.

1.7 Acting on the authority of the said warrant, the sheriff of Polokwane on 07 March 2014 subsequently proceeded to attach certain movable assets owned by the state and generally used by the department of Safety and Security at the offices of SAPS in Polokwane.

[2] It seems to me that it was the execution of the warrant by the sheriff that actuated the launching by the appellant of a rescission application in the court below.[5]

[3] In the application, the appellant sought a rescission of the orders granted against it on 29 November 2013, alternatively that in the event of any material dispute of fact arising on paper which calls for the referral of the application to oral evidence, a stay in execution of

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[3] Annexure "FA 4), vol, pp 50 Record.
[4] Annexure "FA 5), vol, pp 51 Record.
[5] Paginated Index, vol, pp1-27, Record (Rescission application).

the warrant be granted pending finalisation of the principal rescission application. The appellant also prayed for costs *debonis propriis* on a punitive scale against each 302 respondents in the event of opposition and ancillary relief.

[4] Mr TT Malahlela in resisting the application deposed to an opposing affidavit on behalf of the Second Respondent in the court a quo.[6] In doing so, he raised four points *in limine* ranging inter alia from alleged hearsay evidence in the applicant's papers, mis-joinder of himself in the proceedings, the non-application of section 36 (1) (b) of the Magistrate Court[7] Act ("the Act") to Rule 52 of the same Act. (On attorney's lack of authority).

I consider it unnecessary to delve deep into these issues for present purposes, as they are not wholly material to the present appeal. The application was opposed and the points *in limine* were disposed of.

[5] What nonetheless is crucial in this appeal is the correctness or otherwise of the judgment of the court *a quo* in having refused to grant a rescission of judgment or orders granted by it. It is the refusal by the court below of the rescission of judgment or orders that brought about the present appeal.

[6] The crisp issues on appeal are essentially whether the judgment or orders sought to be rescinded were fraudulently obtained, or were *void ab origine* as envisaged in section 36 (1) (b) of the Act.

Section 36 (1) provides that:

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[6] Vol 3, pp 200-209, Record.

[7] Act 32 of 1944 as amended, r/w Rule 49(7) & (8) thereof.

" the court may upon application by any person affected thereby, or, in cases falling under paragraph (c), *suo motu*

(a)----------

(b) Rescind or vary any judgment granted by it which was void ab origine or was obtained by fraud or by mistake common to the parties".

[7] Paragraphs (a) ; (c) and (d) of subsection 1 of Section 36 do not, in my view, find application for purposes of determining this appeal.

[8] That said, the next leg of the inquiry is whether or not the Second Respondent did not misrepresent his mandate to represent all the plaintiffs he professed to appear for, when the alleged settlement-agreement was reached on 10 September 2013, and thereafter on 29 November 2013 when the orders were granted.

[9] In consequence, should it be found on appeal that the Second Respondent lacked original mandate to act on behalf of the 300 or so plaintiffs, then, naturally, his conduct amounts to fraudulent misrepresentation which hits cancerously at the roots of his authority as an attorney of this court in those proceedings. This finding would invariably have an adverse effect on the process leading to the alleged settlement of the claims and ultimately, the resultant court orders and the judgement under consideration on appeal.

[10] I now turn to synthesise the facts that led to the initial settlement prior to the granting of the orders appealed against. Counsel for the appellant Mr Maite submitted that the alleged settlement was arrived at by agreement between the state attorney's legal representatives on behalf of SAPS and the Second Respondents attorney's, whom it

was thought that he has had a genuine mandate to obtain the orders on behalf of the plaintiffs he claimed to represent.

[11] It was furthermore contended on behalf of the appellant that subsequent to the orders been granted, it later came to the applicant's attention, and unbeknown to the state attorney that the Second Respondent lacked authority to settle the claims on the basis he had done with SAPS legal representative.

[12] Fortifying its contention as aforesaid, the appellant submitted several sworn statements deposed to by various deponents, in which they disassociated themselves with any further interaction with Mr Malahlela (Second Respondent) after the criminal charges had been withdrawn or disposed of, as the case maybe. These affidavits appear in the records of appeal before court in two separate bundles.[8] I deem it unnecessary to deal piecemeal with the contents of each affidavit. These would be cumbersome and unduly tedious.

[13] Based on these affidavits which were allegedly deposed to by some if not the majority of some 300 other claimants in the court below, the applicant later became aware of the misrepresentation made as and when the matter became settled. For that reason, the appellant submitted that the orders made as a result of the misrepresentation were fraudulently obtained, and are consequently void from inception within the meaning of section 36(1) (b) of the Act. The orders being void, are therefore liable to be rescinded.

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[8] Annexure "FA 7), vol 1, pp 53 – The annexure contain several affidavits denying Mr Malahlela's mandate. Similar affidavits appears in pp1-130 of paginated bundle of hand written statements by affected deponents. It suffices to mention that the contents are adverse to Mr Malahlela's alleged authority to sue civilly.

[14] Counsel for the respondents, Mr. Van den Ende submitted on ,the other hand, that the orders granted were not fraudulently obtained and therefore could not have been void as alleged by the applicant's counsel. This submission, in essence was to the effect that Mr Malahlela had a mandate to settle and obtain the orders as granted. It was furthermore argued that when the application for rescission of judgement was entertained the Second Respondent had allegedly furnished some 232 powers of attorney and additional 10 of them to the applicant's attorneys.[9]

[15] I am unable to subscribe to this submission in that from what the learned counsel had said, it follows that the 232 powers of attorney were only displayed to the applicant's attorneys at the door step of the court room on 10 September 2013 when the matter was apparently settled. The mandate, it appears to me, was only produced *ex post facto* the day on which the claim became settled as opposed to when the actions were instituted. I shall revert to this aspect in the course of this judgement.

[16] I now proceed to consider the judgement of the court *a quo* sought to be appealed against. This is in relation to an application by the applicant seeking a rescission of judgement or orders the court *a quo* made against it.

[17] The learned Magistrate when considering the points *in limine* on the applicability or otherwise of section 36 found, and correctly so, in my view, that:-

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[9] Paginated pp347-348, vol 4 Record.

"Section 36 does not require the applicant to disclose a prima facie defence when applying for a rescission of judgement. What is required for the applicant is to disclose reasons for averment that the judgement was obtained by fraud. The submitted affidavits discloses **prima facie** basis of fraud. The duty now rests on the shoulders of the respondents to refute the allegation. This point *in limine* is not upheld"

[18] The learned Magistrate in dealing with the question of the Second Respondent's authority further remarked as follows:-

"On this issue (mandate) it is obvious that the allegations of lack of mandate emerged after the judgement was granted. (It was possible for the), it was not possible for the issue to be raised before the judgement. Therefore the point *in limine* is dismissed."[10]

[19] In providing reasons for his judgment, the learned Magistrate and in refusing the granting of a rescission of judgment granted on the 29 November 2013 held that:-

"The application (for rescission) is based on the affidavits submitted. The starting point is that only (80) eighty affidavits were submitted. The court must only confine itself within (80) eighty cases because each deponent is only supporting his or her case. We have (221) two hundred and twenty one cases not supported by the affidavits. The application for rescission also includes all the cases. The question now is whether to rescind them without supporting evidence that they were obtained by fraud. It was the duty of the applicant to submit

[10] Paginated pp346-347, vol 4 Record.

those supporting affidavits. In the absence of those affidavits it is not possible for the court to grant rescission in those cases."[11]

[20] The learned Magistrate went on to state that:-

"The reason why the court requested them to read them carefully (affidavits) was because the majority of the affidavits contradict themselves. The contradictions are so material that the court could not simply ignore them. It is important to note that the general impression created by these affidavits is that no fraud was committed..."

[21] It was this finding that perhaps calls for closer scrutiny. The question in the main upon the hearing of the rescission application should have been whether or not the Second Respondent as an attorney of record of the 300 other plaintiffs, initially had legal standing or authority to have launched civil action for damages on their behalf. If the answer is in the affirmative, then *cadit quaestio*. If however, he lacked original mandate, not only upon institution of the action (s), but also on the purported settlement that amicably led to the order(s) granted, it follows logically that such settlement and/or orders were fraudulently obtained. In consequence, the resultant order(s) are *per se void ab origine* and should by and large, have been rescinded. The court *a quo* erred in this regard.

[22] The observations and findings made by the court below referred to in paragraphs 17 and 18 above, are mutually destructive to the judgement itself. Not only that, the findings are throwing the initial

[11] Paginated Index pp408-410, vol 5, Record (these are the reasons for judgment re: rescission.

ruling with regard to the point *in limine* on this aspect deeper into disarray.

[23] It is also a matter of grave concern that while the Second Respondent might have represented some of the plaintiffs during their first appearances in the criminal court, (which were withdrawn without further ado) *ex facie* the sworn statements submitted in support of the rescission application, it does not necessarily follow that, as a matter of principle, he should have arrogated to himself the right of authority to sue out summons on their behalf en masse, not unless he was bestowed with a General Power of Attorney collectively by the plaintiffs as his clients to do so. Absent such General Power of Attorney, he could not in my view, have claimed the right to sue the applicant without proper instructions. His conduct, properly viewed, amount to touting which in the attorney's profession equates unethical or dishonourable conduct on his part.

[24] Accordingly, the dictum in the judgement forming part of the reasons where it is stated that "they further explain how they were arrested and detained at various police cells, ------- some acknowledges that they were represented by Mr Malahlela. -------- only minority knew that the attorney was arranged for them by the community leaders ------- " could not have led the court to infer that his appearance in the criminal court was naturally also intended to confer instructions upon the Second Respondent to sue by way of civil suit. This conclusion and the reasons advanced are erratic.

[25] In addition, nowhere in the record of the court *a quo* it is captured that the parties agreed, alternatively that it was ordered that all 300 or so matters be **consolidated** and heard i*n tandem* for the purpose of the

orders made. What the court below ordered under case no: 424/2013 involving Mr Oupa Sipho Phakula and 305 others against the applicant was payment of the amount of R30 000.00 as capital debt plus costs of R3 000.00 to be paid into the Second Respondent's specified banking account. A closer analysis of the record rules out the judgement or order encompassing the balance of other plaintiffs. Accordingly, the court order liable to be rescinded, if necessary, would be the one involving Mr Phakula exclusively. The rest, as matters stand, were not properly adjudicated upon by the court, and remain pending in the court *a quo*. Whether those claims have become prescribed if pursued is not an issue before us on appeal.

THE LEGAL FRAME WORK:

[26] It is common cause that the appeal orbits around the question whether or not the provisions of section 36(1) (b) find application and whether the reasons proffered by the court *a quo* in rejecting the rescission application under the said section, hold water. The relevant provisions are referred to in paragraph 6, above.

[27] Section 36(1) (b) confers upon a Magistrate court a judicial discretion whether on application or *suo motu* to rescind or vary any judgement granted by it which was void originally or was obtained by fraud or by mistake common to the parties. In *casu*, no claim of a mistake common to the parties has been asserted. This latter part (b) is discarded.

[28] Accordingly, a party seeking relief under section 36(1) (b) is not required to establish both jurisdictional factors to succeed (i.e. existence of fraud and *voidness ab origine*). It is sufficient if one of these factors is established on paper, evidentially. If the court were

mindful of the attorney's lack of authority, first to sue out summons, negotiate a settlement and ultimately obtain the orders it granted, it is axiomatic that the court would not have granted such orders where fraud was an element in the process.

[29] In **TODT V IPSER**, [12]the Appellant Division stated that:-

"according to our common law authorities judgments are void in only three types of cases, where there has been no proper service, where there is no proper mandate or where the court lacks jurisdiction."

[30] In *casu*, it is plain that the appellant only became aware of the Second Respondent's lack authority after the orders were granted as a sequel to the purported settlement. To that extent, the principle enunciated in **ROWE V ROWE**[13] becomes a useful guide. It recites in part as follows:-

"The order was granted by consent in terms of an agreement of settlement which the appellant is alleged to have cancelled on account of the respondent's fraud. A party is, of course, entitled to resile from any agreement on account of the other party's fraud and a more appropriate question would have been whether the fact that the agreement had been made an order of court had a nugatory effect on the right to resile ------." I cannot agree more to the principle which this court is bound to follow. This is precisely because fraud is seen in our law as far-reaching, with the result that it vitiates every transaction known to the law. It is an insidious disease, and affects cancerously the root network of the transaction, albeit agreed on. Fraud therefore permeates the entire civil law, as it even rendered

[12] 1993 (3) SA 577 (AD) at 589 C-D
[13] 1997 (4) SA 160 (SCA) at 165-166 I-J and A-B

agreements, such as the present one, voidable at the instance of the aggrieved party.

See also **FIRST RAND BANK AND ANOTHER V MASTER OF THE HIGH COURT 2014 (2) SA 527 (WCC)**

[31]Furthermore, in the present instance, the parties on 10 September 2013, appears to have settled the dispute with the view to end litigation or to avert protracted and costly litigation. Hence the agreement is termed in legal parlance a *transactio*. Whether extra-judicial or embodied in an order of court, it has the effect of *res judicata* and like any other contract and any order of court, made by consent, it may be set aside on the ground that it was fraudulently obtained or on the ground of *iustus* error only if it vitiated true consent, and not correlated to the motive or the merits. This is generally akin to so-called "consent judgments".

See also, **GOLLACH & GOMPERTS (1967) (PTY) (LTD) V UNIVERSAL MILLS & PRODUCE 60. (PTY) (LTD) & OTHERS (1978) SA 914 (A)** in this regard.

[32] Because, the nature of the orders granted in the manner described, are as they stand having a final effect, they are thus *res judicata*. Ordinarily, the court would be loath to set them aside lightly. But, the court will intervene if the agreement leading to the consensual court order was procured by fraud of the other party.

[33] In this instance, it is clear that the Second Respondent failed to submit his authority when called upon to do so by the appellant when the application was sought. He instead produced certain unwarranted confirmatory affidavits from some few deponents who purport to confirm his opposing papers. Such confirmatory affidavits do not

constitute his authority to act, the more so that they were procured much later after the event. Not even a common law or statutory contingency fee agreement was raised, either. Accepting these affidavits was a clear misdirection.

[34] In **SOUTH AFRICAN MILLING CO (PTY) (LTD) V REDDY** [14]the court appears to have discouraged the tendency where a party who sought to cure lack of *locus standi* in its founding papers, attempts to do so by rectification or resolution. Failure to establish original authority, entitles the respondent to acquire a right to dismiss the application on the ground of lack of *locus standi.* In this case to allow the confirmatory affidavits as the court *a quo* did, was blatantly prejudicial to the appellant's application for rescission of judgement. This was an error.

[35] Similarly, it was held in **UNITED METHODIST CHURCH OF SOUTH AFRICA V SOKUFUNDUMALA**[15] that the ratification of the applicant's lack of *locus standi* in an attempt to clothe him retrospectively with authority would be prejudicial to the respondent.

[36) Accordingly, the Second Respondent lacked authority to have brought the civil action and resultant application/s that were ordained court order/s. As stated in **GANES AND OTHERS V TELKOM NAMIBIA LTD**,[16] the principle espoused is plainly that it is the institution and prosecution of the proceedings that must be authorised to validate them.

[37] The submissions therefore made on behalf of the respondents seems to me to be misconstrued. The application for a rescission of

[14] 1980 (3) SA 431 (SECLD)
[15] 1989 (4) SA 1055 (OPD) at 1057 E-H
[16] 2004 (3) SA 615 (SCA)

judgement was not predicated under Rule 49 (1) nor 49 (7) of the Magistrate's Court rules. For the purpose of section 36(1) (b), it is not required that the appellant should have set out reasons for absence or default. The application had no bearing for absence or default, but had everything to do with fraud and validity of the consent orders granted, which were said to have been fraudulently procured. In this case, I am satisfied from the record that the application was properly filed within the time lines set out in Rue 49 (7), and could, therefore, not be faulted. I do not agree with the submission that under Rule 49 (7) the appellant should have explained its default. The appellant was not in default when the orders were made. Its contention is that the orders were procured fraudulently as the Second Respondent misrepresented and/or lacked authority to have purportedly acted on behalf of the 300 or so plaintiffs. The confirmatory affidavits submitted *ex post facto* on rescission application were of no avail.

[38] As already shown, the submission by the Second Respondent of the 232 powers of attorneys or confirmatory affidavits on the day of the hearing of the rescission application was neither here nor there. They were uncalled for. The authority to institute the civil suit was of cardinal importance to found his mandate in civil actions of this nature. The best he sought to do in producing the powers of attorney, was an attempt to do damage control. Again, the confirmatory affidavits produced do not replace the *locus standi* required in practice. It is fallacious for the Second Respondent to contend that the Appellant carried the onus to dispute Mr Malahlela`s presumed mandate. All what the appellant was obliged to do was merely to show the grounds set out in Section 36(1)(b) that the transaction was fraudulently obtained and, therefore, *void ab origine*, nothing more

nothing less. This was not a matter of default judgment where elements of absence of wilful default and bona fides play a role. I find that the court *a quo* exercised its discretion improperly.

COSTS:

[39]

39.1 The issue of costs, I thought, deserves special attention. The purpose of an award of costs generally, is to indemnify a successful litigant who has incurred costs in the process of litigation. These are ordinarily the costs which a litigant is indebted to his/her attorney.

39.2 The general rule in practice is that the successful party is entitled to costs of suit. This rule should not lightly be departed from and the court should be astute in exercising its discretion when warding costs.

39.3 The underlining dispute on appeal is the fraudulent manner in which this court finds to have taken place when the disputed settlement and ultimately the orders were made. As already shown, the fraudulent misrepresentation made by the Second Respondent led directly to the appellant's attorneys having to settle the matter by consent judgement. On discovery of the misrepresentation of his authority, the appellant sought to seek a rescission of the orders made. The application was met with stringent opposition at his instance.

39.4 The appellant escalated the matter on appeal seeking relief. Once again, the appeal was rigorously opposed up to a point where it was argued before this court. On the hearing of the matter, the issues were that of perceived fraudulent misrepresentation of Second Respondent's mandate.

39.5 It is trite that the courts may award costs against a frivolous litigation on attorney and client costs in circumstances where dishonesty or fraud has been proven in the litigation process. [17]In the present instance, this court finds no justification for departure from the entrenched rule which has been followed by the courts over the years. Accordingly, the Second Respondent by his conduct, exposed himself to such punitive costs at own peril. In any event, both parties prayed for punitive costs if successful.

[40] On the semblance of the facts in this matter, I propose, if I may, that the appeal on the merits succeeds as follows:-

ORDER:

(a) The appeal is upheld.
(b) The decision of the court a quo in refusing to grant a rescission of judgement or the orders made, is set aside.
(c) The judgement or order/s of the court a quo is substituted with the following order:-
(d) The court order/s granted on 29 November 2013 is rescinded.
(e) The Second Respondent is ordered to pay the costs on attorney and client scale, such costs to include costs of two counsel.

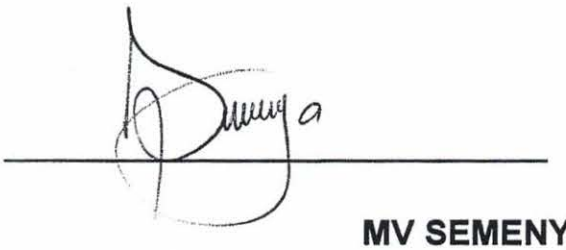
[17] Law society of the Northern Provinces v Mogami 2010 (1) 186 (SCA) at 1961. See also, Buthelezi v Poorter 1975(4) SA 608 (W).

MG PHATUDI

Judge of the High Court

Limpopo division

I concur.



MV SEMENYA

Judge of the High Court

Limpopo division

REPRESENTATIVES:

1. For appellant : Adv. M Gwala
   Adv. L.M. Maite

   Instructed by : State attorney

   Pretoria

2. For Respondents : Adv. I.A. Van den Ende
   c/o T.T. Malahlela attorneys
   Polokwane

3. Date heard : 20 October 2017

4. Date delivered : 22 January 2018