

**IN THE HIGH COURT OF SOUTH AFRICA**

**KWAZULU-NATAL LOCAL DIVISION, PIETERMARITZBURG**

**CASE NO: 4373/2019P**

**In the matter between:**

**REVEREND MAQHINGA EPHRAIM DLOMO**

**FIRST APPLICANT**

**REVEREND ISAAC SAKHEPHI NDABA**

**SECOND APPLICANT**

**and**

**AFRICAN GOSPEL CHURCH**

**FIRST RESPONDENT**

**REVEREND ALPHA MBILI**

**SECOND RESPONDENT**

**REVEREND NHLANHLA MHLONGO**

**THIRD RESPONDENT**

**REVEREND WISEMAN NGCOBO**

**FOURTH RESPONDENT**

**REVEREND B J BURTHELEZI**

**FIFTH RESPONDENT**

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**JUDGMENT**

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**BEZUIDENHOUT J:**

[1] On 26 June 2019 Applicants brought an urgent application seeking certain relief against Second to Fifth Respondents. No relief was sought against First Respondent. In the interim First Applicant has died and the Reverend Gigaba of First Respondent has also died. Second, Third, Fourth and Fifth Respondents filed a notice abiding the decision of the Court. Thereafter a notice was filed on behalf of Third and Fourth Respondent opposing the application. Except for the attorneys of Second Appellant and First Respondent the attorneys of the other parties had withdrawn. When this matter was heard only Second Appellant and First Respondent appeared in respect of the application to rescind the order that had previously been granted, and the counter application.

[2] The relief sought by First Respondent is that the consent order dated 12 November 2019 be rescinded. The affidavit in support of the application for rescission was deposed to by Reverend Gigaba before his demise. The application is brought in terms of Rule 42(1)(a) on the grounds that the order was erroneously sought or erroneously granted in the absence of First Respondent who was affected by the order.

[3] On 28 June 2019 a rule *nisi* was issued returnable on 26 August 2019. The Rule *nisi* provided for an interim interdict in respect of the election of office bearers and the delivery of supplementary affidavits. On 12 November 2019 an order was taken by consent between Applicants and Third Respondent adjourning the application *sine die* and the Rule extended until confirmed or discharged and Applicant and Second to Fifth Respondents were directed to attend an annual conference in terms of First Respondents constitution which had to be held within four months of the order and such to be convened by a person to be appointed by The Chairperson of the KwaZulu-Natal Society of Advocates and costs were reserved.

[4] It is submitted by First Respondent that none of these notices of application and notices of set down were served on First Respondent. Its main contention is therefore that it did not receive notice of the said application and the order taken by consent and accordingly on that basis that the order should be rescinded.

[5] A consideration of the original application thereafter referred to as the main application was brought on 26 June 2019 as Annexure "MD2" the constitution of First Respondent which on the front page states:

"The Headquarters of the African Gospel Church shall be in the Magistrate District of Durban in the Province of Natal, South Africa

P. O box 3 – Lamontville, Durban"

[6] Notice to oppose the main application was filed by Third Respondent 26 June 2019 and an answering affidavit was also filed. The notice of set down of the application on the opposed roll appears at pages 150 to 152 of the bundle of documents. It set the matter down on the opposed roll on 12 November 2019 but there is no indication of any service thereof on First Respondent. There is also no indication

in that bundle relating to the order that was granted by consent on 12 November 2019 after the initial order was granted on 26 June 2019 that there was any service on First Respondent.

[7] It is therefore submitted on behalf of First Respondent that it was not aware of the proceedings of June 2019 and on 12 November 2019, that it was not drawn to the courts attention that there was no service upon them and accordingly they were not represented at the hearing and that the order of 12 November 2019 could therefore not have been granted by consent.

[8] In the founding papers of the main application First Respondent is described as an association of persons with its headquarters at C97 Ndakane Road Umlazi, KwaZulu-Natal. It further sets out that it is joined as it has an interest in the proceedings but no relief is claimed against it.

[9] In the founding affidavit of the rescission application it is contended that there is no proof that there was service of the Rule *nisi* on First Respondent nor of the notice of set down for 12 November 2019 when the order was taken by consent between Applicants and Third Respondent. It is contended that First Respondent was indeed affected by the order which was granted and that it was well known to all the parties that the headquarters of the African Gospel Church had moved to 339 Martin Street, Cedarville. On page 274 of the rescission application papers as annexure "AA2" is a return of service of 26 June 2019 that was served at 17 hours 45 upon Thamsanqa Luthuli a Pastor at 2840 Mhlongo Road, Lamontville which it indicates is the principal place of business of the African Gospel Church in the courts jurisdiction.

[10] It was submitted on behalf of First Respondent that the order of 12 November 2019 was granted erroneously as it was granted in its absence and without the knowledge of First Respondent.

[11] It was further submitted that the service was not at the address in the constitution and it was also not at the address as set out in the founding affidavit. The consent order could therefore not have been made as First Respondent had no knowledge of the matter on both occasions. There was accordingly no proper service. It was further

submitted that the counter application had to be dismissed with no order as to costs and the application in terms of Rule 7(1) to be dismissed with costs.

[12] It was submitted on behalf of Second appellant that the term of office of the founder Reverend Gigaba expired in 2013. It therefore contended, that he had no authority to depose to the affidavit in the main application. It is conceded that First Respondent was absent when the order was granted. The Cedarville address is not in the constitution and was never changed to that address, accordingly there was no need to serve at that address. First Respondent, at present, does not have a moderator as Reverend Gigaba had passed away. It was necessary that the elections proceed.

[13] It is in the replying affidavit, once again, contended that the address in the affidavit is Ndakane Road where the constitution says the headquarters is in Durban. Further that there is no return of service indicating that there was any service of the set down or of the application on First Respondent as is apparent from the notice of set down appearing at pages 150 to 152 of the main application. It was submitted that taking into consideration all the factors that it indeed indicates that First Respondent did not have notice.

[14] A notice in terms of Rule 7(1) was served on First Respondent by Third and Fourth Respondents whose attorneys had withdrawn. They were not represented at this hearing and it was submitted that there was no list between First Respondent and Third and Fourth Respondents and therefore they had no legitimate interest in the representation of First Respondent in the proceedings. The notice in terms of Rule 7(1) was far out of time and there was no good cause shown why this was so. Accordingly the application had to be brought to have the said notice set aside. The legal representative of Second Appellant did not address the court in this regard and rightly so as it did not concern his client.

[15] Applicant sought condonation for the late filing of its heads of argument and this was not opposed and such condonation was accordingly granted. First Respondent sought condonation for the late furnishing of its rescission application which was also not opposed and such condonation was granted.

[16] From a perusal of all the documents as set out above the service of the main application was not at the correct address of First Respondent. From the documentation it is not clear what the exact address should be besides that it should be in Durban in terms of the constitution. Therefore there is no indication that the main application was served on First Respondent. There is also as set out above no indication that the notice of set down of the matter on 12 November 2019 was served on First Respondent. The order granted on 12 November 2019 was by consent between Applicant and the Third Respondent who were the only parties present at court at the time. It would have been a different situation if First Respondent was indeed notified or had been served with the necessary documents and date and did not appear in court but as already set out there is no indication that First Respondent was aware or had been served with the necessary papers and notices.

[17] There is in the papers a counter application to amend the notice of motion if the order of 12 November 2019 is rescinded. There was no address on behalf of Applicant on this issue nor was it dealt with in their heads of argument. This was thus not pursued. This also appears to me to be a matter which can be dealt with later after proper service to all the parties which was not done.

[18] As the address of First Respondent may become an issue, although it was not served at the correct address due to the conflictive addresses the court hearing the main application would be in a better position to deal with the issue of costs in this regard.

Accordingly the following order is made:

1. The notice in terms of Rule 7(1), filed by Third and Fourth Respondents is set aside as an irregular proceeding with Third and Fourth Respondents to pay the costs of the application, jointly and severally the one paying the other to be absolved.
2. The consent order made on 12 November 2019 is rescinded.
3. First Respondent is granted leave to oppose the main application and is to deliver an answering affidavit within fifteen (15) days of this order.

4. The costs of the application for rescission is reserved for determination by the court hearing the main application.
5. The conditional counter application by Second Applicant in the rescission application is dismissed.

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**BEZUIDENHOUT J.**

**JUDGMENT RESERVED ON: 1 AUGUST 2022**

**JUDGMENT HANDED DOWN ON: 23 AUGUST 2022**

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