Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case Number: 1078/2019
Heard: 26 February 2021
Date delivered: 30 September 2022

In the matter between:-

WASTE RE (PTY) LTD [formerly Waste Beneficiation (Pty) Ltd

(Reg. No: 2014/234102/07) First Applicant

KHOTHATSO CHRISTOPHER MOLOI Second Applicant

and

RECYCLING AND ECONOMIC DEVELOPMENT INITIATIVE OF

SOUTH AFRICA NPC Respondent

Coram: Eillert, AJ

JUDGMENT

Eillert, AJ

[1] This is a judgment in respect of two applications brought by Waste Re (Pty) Limited [previously known as Waste Beneficiation (Pty) Ltd] and Mr Khothatso Christopher Moloi, the Applicants, against the Recycling and Economic Development Initiative of South Africa NPC, the Respondent. The Applicants issued the first application on 18 May 2020. The relief claimed therein pertains to an order of this Court made by O'Brien, AJ under case number 1078/2019 on 17 May 2019. I will refer to this application herein as "*the interlocutory application*". The Applicants issued the second application on 3 July 2020. The relief claimed therein is for rescission of an order made by Makoti, AJ, also under case number 1078/2019 on 8 May 2020. I will refer to this application herein as "*the rescission application*".

[2] Where it is necessary in this judgment to distinguish between the Applicants, I will refer to the First Applicant as "*Waste Beneficiation*", and to the Second Applicant as "*Moloi*". The Respondent will be referred to as "*Redisa*".

[3] The Applicants initially only enrolled the rescission application for argument. Following a request by Redisa's attorneys that the interlocutory application also be enrolled for hearing on the same day as the rescission application, I issued a directive that this be done, and Redisa's attorneys delivered a Notice of Setdown also enrolling the interlocutory application. It was further necessary for me to make a ruling during the hearing that the interlocutory application had been properly enrolled after Mr Sebola, on behalf

of the Applicants, disputed that this was the case.

[4] The orders referred to in paragraph 1 above were made in the course of an application brought by Redisa against the Applicants and further Respondents on 15 May 2019. I will refer to this application herein as "*the main application*".

[5] The background facts to the main application were quite extensively set out in the written judgment handed down by Vuma, AJ in the main application on 6 December 2019. I will not repeat them in detail here, save to provide a summary of the pertinent facts for purposes of clarity.

[6] Redisa was brought into being by what was termed as the "Redisa Plan". The Redisa Plan envisaged the establishment of a tyre waste recycling scheme which would have entailed the creation and management of a national network for collecting tyres, storing them, and delivering them to recyclers for processing. From 2013 Redisa worked on a Mining Stockpile Plan to assist in the abatement and recycling of the historic stockpiles of tyres that have accumulated on mines throughout South Africa. It was during the implementation of this plan that Waste Beneficiation was formed. Eventually a pilot project was launched at Anglo American's Mogalakwena Mine in Limpopo. Waste Beneficiation was appointed to manage the operations at the Mine and Redisa identified Moloi as the potential operator of the business. Redisa acquired the necessary equipment for use in a mobile downsizing and recycling plant, which equipment, according to Redisa, was valued at approximately R50 million. Redisa and Waste Beneficiation, represented by Moloi, engaged in negotiations to *inter alia* make it possible for Redisa to avail the equipment to

Waste Beneficiation, which negotiations included draft service level agreements being provided to Waste Beneficiation. The negotiations around the detailed terms of the service level agreement were protracted, but the parties agreed to an interim working relationship pending its finalisation, and Waste Beneficiation commenced with operations in the first part of 2017. However, on 1 June 2017 Redisa was provisionally wound up *ex parte* by the Minister of Environmental Affairs. The provisional order of liquidation of Redisa would later, on 24 January 2019, be set aside by the Supreme Court of Appeal ("*the SCA*"). One result of the provisional winding up of Redisa was that the service level agreement between it and Waste Beneficiation was never signed. During the process of the provisional winding up of Redisa, the equipment, except for a Toyota Land Cruiser which Redisa made available to Moloi for business purposes, remained at the Mogalakwena Mine. Following the discharge of the provisional order, Redisa wanted to revive the recycling project, but the Mine was unwilling to do so and requested Redisa to make arrangements for the removal of the equipment from the Mine. To this end, a site visit was arranged to take place on 16 May 2019 to finalise a de-commissioning and removal plan for the equipment. Unbeknownst to Redisa however, Waste Beneficiation caused the equipment to be removed from the Mine on 9 May 2019. Redisa succeeded in tracing the equipment to a property in Postmasburg, and it appeared that the equipment was being set up to operate on such property.

[7] It is against this background that Redisa launched the main application on 15 May 2019 for interdictory relief against the Applicants. Part A of the main application was brought on an urgent and *ex parte* basis and was aimed at the attachment and

preservation of the equipment, pending the adjudication of Part B of the main application, in which vindicatory relief was claimed.

[8] On 17 May 2019 O'Brien, AJ issued an order in favour of Redisa in respect of Part A of the main application, the relevant provisions whereof stipulated as follows:

"*1. That pending the outcome of the relief sought in Part B of the Notice of Motion:*

1.1 That any and all machinery, vehicles and/or equipment, as described in the list hereto marked Annexure A to this Notice of Motion ("the Equipment") located on the premises of First and/or Second Respondent, corner of 1 Mangaan Road and Erts Street, Industrial Area, Postmasburg, Northern Cape Province (or wherever it may be located) be immediately attached and secured by the Sheriff of this honourable Court within whose jurisdiction any part of such Equipment may be located;

1.2 That the Equipment not be used for any purpose whatsoever pending the outcome of the relief sought in Part B of this Notice of Motion;

1.3 That all ignition keys and/or remote control devices enabling the Equipment to be started and/or operated

be taken into custody by the Sheriff.

2. *...*

3. *...*

4. *That leave is granted to the Applicant (*Redisa*) to approach this honourable Court on the same papers, duly supplemented, for the relief set out under Part B below.*"

[9] The Applicants delivered a notice of intention to oppose the main application on 7 of June 2019. Thereafter, although the parties filed further affidavits, no steps were taken by any of the parties, least of all by Waste Beneficiation, to revisit the granting of the interim order issued on 17 May 2019 in respect of Part A of the main application.

[10] Part B of the main application was subsequently enrolled for hearing on 13 September 2019 in accordance with a directive issued by the Judge President of this Court. On 13 September 2019 the parties presented extensive arguments to Vuma, AJ with regard to Part B of the main application, and no argument was presented on Part A thereof. Thereafter Vuma, AJ reserved her judgment.

[11] On 6 December 2019 Vuma, AJ delivered her judgment in respect of Part B of the main application. In paragraph [34] of her judgment, Vuma, AJ found that the Applicants (then Respondents) failed to make out a case that Waste Beneficiation is the owner of the equipment, and that Redisa's application must succeed with costs. Notwithstanding this finding, Vuma, AJ *inter alia* made the following order:

"*1. A rule nisi is issued calling upon the Respondents, or any other party with legitimate interest therein, opposing this application to show cause, if any, on such date as may be determined by this honourable Court why –*

1.1 the equipment should not be returned to the Applicant; .."

The order dated 6 December 2019 therefore did not include a specific return date, but stipulated that the return date was still to be determined by the Court.

[12] On 30 December 2019 Waste Beneficiation filed an application for leave to appeal against the judgment and order granted by Vuma, AJ on 6 December 2019. The application for leave to appeal was in due course set down for hearing on 14 February 2020. Having heard the parties, Vuma, AJ delivered an *ex-tempore* judgment dismissing the application for leave to appeal. Thereafter, and still during the hearing, Vuma, AJ proceeded to deal with her order of 6 December 2019. The record of what exactly transpired has been transcribed and forms part of the typed record before this Court. In the presence of Mr Maluleke for the Applicants and Mr Cooper for Redisa, Vuma, AJ determined the return date for her order of 6 December 2019 to be 14 April 2020. Subsequent to the proceedings of 14 February 2020, the court order issued by the Registrar in respect thereof included a second paragraph stipulating that the return date of the rule *nisi* was extended to 14

April 2020, with the proviso that any interlocutory application was to be brought before or on 30 March 2020.

[13] The Applicants were dissatisfied with the dismissal of the application for leave to appeal and filed a petition for leave to appeal to the SCA on 13 March 2020.

[14] As is well-known, on 26 March 2020 South Africa entered a period of what was termed as a nationwide "hard lockdown" which was initially determined to last for a period of 21 days. On 25 March 2020 the Judge President of this Court issued Directive 1 of 2020, which was an urgent directive to regulate the operations and judicial functions of this Court during the lockdown. I quote the relevant and important provisions of the Directive for purposes of this judgment:

"*1. ...*

2. The Directive is in respect of the operations and judicial functions of the Northern Cape Division during the Nationwide Lockdown for the period of 21 (twenty one) days with effect from midnight of Thursday 26 March 2020 declared in terms of the Disaster Management Act, 2002, in order to, inter alia, prevent and curb the spread of the COVID-19 throughout the Republic, and it will also apply during any extended Lockdown period that may be declared in terms of the said Act.

3. The Northern Cape Division shall remain open during the

period of the Lockdown, subject to the restrictions provided for hereunder:

3.1 There shall be no Motion Court sitting during the period of the Lockdown.

3.2 ...

3.3 ...

3.3.1 ...

3.3.2 ...

4. All matters already enrolled on the days on which the Motion Court would have been held shall be postponed to a date beyond the period of the Lockdown and further:

4.1 Postponements shall be done in chambers by the Judge on duty or any other Judge designated by the Judge President for that purpose.

4.2 The parties involved in such matters shall not be required to attend Court on those days.

4.3 Where applicable the rule nisi issued in the matter shall be extended to the postponed date."

[15] On 14 April 2020, being the return day determined by Vuma, AJ on 14 February 2020, Redisa's application came before Mamosebo, J in chambers. The learned Judge ordered that the matter be postponed and the rule *nisi* extended 8 May 2020 in compliance with paragraph 4.1 of the Judge President's Directive.

[16] As we further know, the nationwide hard lockdown came to an end on 30 April 2020. This Court thereafter recommenced with court hearings in open court, with the application of the necessary Covid-19 protocols.

[17] On 8 May 2020 Part B of the main application was heard in Motion Court by Makoti, AJ. There was no appearance on behalf of the Applicants at this hearing, but counsel moved the application on behalf of Redisa. On this day, Makoti, AJ confirmed the order of 6 December 2019 in respect of Part B of the main application.

[18] The Applicants proceeded to deliver the interlocutory application on 18 May 2020.

[19] On 30 June 2020 Waste Beneficiation's application to the SCA for leave to appeal the judgment of Vuma, AJ and order of 6 December 2019 was dismissed on the grounds of there being no reasonable prospect of success in an appeal and there being no other compelling reason why an appeal should be heard.

[20] On 3 July 2020 the Applicants proceeded to deliver the Rescission Application.

THE RESCISSION APPLICATION

[21] The basis on which the Applicants submitted that the order of 8 May 2020 should be rescinded and set aside was only made clear in the Applicants' Heads of Argument. The Applicants submitted therein that the order of 8 May 2020 falls to be rescinded in terms of Uniform Rule 42(1)(a) and/or on common law grounds.

[22] Uniform Rule 42(1)(a) caters for the rescission or variation of an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby[1].

[23] The meaning of the phrase "*erroneously sought or erroneously granted*" has been considered in numerous cases to date. In **Stander vs ABSA Bank** 1997(4) SA 873 (E) at 882 E – F Nepgen, J held that:

"*It seems to me that the very reference to 'absence of any party affected' is an indication that what was intended was that such party, who was not present when the order or judgment was granted, and who was therefore not in a position to place facts before the court which would have or could have persuaded it not to grant such order or judgment, is afforded the opportunity to approach the court in order to have such order or judgment rescinded or varied on the basis of facts, of which the court would initially have been unaware, which would justify this being done.*"

In **Nyingwa vs Moolman** 1993(2) SA 508 (Tk) at 510 White, J held that:

"*It therefore seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the Judge*

[1] *Rule 42(1)(a) stipulates that:* "The Court may, in addition to any other powers it may have mero moto or upon the application of any party affected, rescind or vary –
(a)an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby; ..."

was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment."

The SCA in **Colyn vs Tiger Food Industries Ltd t/a Meadow Feed Mills Cape** 2003 (6) SA 1 (SCA), referring to **De Wet and Others vs Western Bank Limited** 1979(2) SA 1031 (A), made it clear that Uniform Rule 42(1) does not cover all kinds of mistakes or irregularities. In order to qualify as a mistake or irregularity which would justify the rescission of the judgment or order under the rule, the mistake or irregularity must be of a procedural nature that can be ascribed to either the other party or the Court.

[24] In oral argument, Mr Sebola on behalf of the Applicants confined himself to two grounds upon which he contended that the order of 8 May 2020 was erroneously sought or erroneously granted. This was a sensible approach, as the extensive contentions set out by the Applicants in their Heads of Argument were all in actual fact founded upon the two propositions advanced by Mr Sebola and, whatever my finding on the two propositions, would be dispositive of the Rescission Application. I proceed to deal with the Applicants' two main contentions in turn.

WHETHER THE ORDER OF 6 DECEMBER 2019 WAS A RULE *NISI*

[25] The Applicants submitted firstly that Vuma, JA did not issue a rule nisi on 6 December 2019. They contend that the order made was the order that Redisa had prayed for in Part B of the main application and that the order was of a final nature.

[26] This first proposition by the Applicants is difficult to comprehend in light of the parts of the judgment and order that I have quoted in paragraph 11 above. I am left to assume or speculate that the implication of this submission, if upheld, would be that all orders subsequent to 6 December 2019 would thereby be invalidated, as the Applicants did not make the implication of their contention clear. Whilst it is correct that the order that Vuma, AJ granted on 6 December 2019 was in the exact same terms prayed for by Redisa in Part B of the main application, the ordinary and clear meaning of the terms of Vuma, AJ's judgment and order indicate that the learned Judge meant to, and in fact did, issue a rule nisi on 6 December 2019.

[27] This is not the first occasion on which the Applicants have advanced the contention that the order of 6 December 2019 was a final order. This was the central issue on which the Applicants' application for leave to appeal turned. It is evident from the *ex-tempore* judgment of Vuma, AJ in the application for leave to appeal that the order of the 6 December 2019 was a rule *nisi* [2], and because the order was not of a final nature, the Applicants' application for leave to appeal was dismissed. The SCA dismissed the Applicants' subsequent application for leave to appeal on the grounds that there was no reasonable prospect of success in the appeal and no other compelling reason as to why an appeal should be heard.

[28] It was stated in **Fischer vs Fischer** 1965(4) SA 645 (W)[3] that a rule *nisi* is a court order which is given a determined period of

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[2] *See ex tempore judgment of Vuma, AJ, Index: Application for Rescission of Final Order, P. 27, Lines 4, 9 – 11; P. 29, Lines 7 and 10; P. 30, Lines 15 to 17; Page 31, Lines 21 – 25; and Page 33, Lines 13 to 18*

[3] *At 645 E*

validity.[4]

[29] In **National Director of Public Prosecutions vs Mohamed N.O.** 2003 (4) SA 1 (CC) the Constitutional Court *inter alia* dealt with the historical development of rules nisi and stated that:

"*... the rule may be defined as an order by a court issued at the instance of the applicant and calling upon another party to show cause before the court on a particular day why the relief applied for should not be granted.*" [5]

The Uniform Rules of Court do not provide substantively for the granting of a rule nisi, but the practice of doing so is firmly embedded in our procedural law.[6]

[30] The rule *nisi* issued by Vuma, AJ on 6 December 2019 provided that the return date of such order was to be determined subsequently by the court. I am of the view that this aspect did not affect either the essential nature or validity of the order made on 6 December 2019, such order being a rule *nisi*. The Applicants' first contention that the order made on 6 December 2019 was of a final nature therefore cannot stand.

WHETHER THE APPLICATION FOR LEAVE TO APPEAL AUTOMATICALLY SUSPENDED THE FURTHER PROCEEDINGS

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[4] *This is translation from the Afrikaans, which reads "'n Bevel nisi is immers 'n Hofbevel waaraan 'n vasgestelde geldigheidsduur verleen is."*

[5] *At paragraph [28]*

[6] ***Safcor Forwarding Johannesburg (Pty) Ltd vs National Transport Commission*** *1982(3) SA 654 (A), endorsed in* ***NDPP vs Mohamed, supra***

[31] I now turn to the Applicants' second contention regarding the suggested suspension of proceedings. The Applicants submitted that in light of the appeal process initiated by them:

(a) the legal effect of the automatic suspension of the operation and execution of Vuma, AJ's judgment and order was also suspended pending a decision on the appeal process;

(b) that on 14 February 2020 Vuma, AJ had no jurisdiction to determine the return date (i.e. 14 April 2020) and to direct that her order of 6 December 2019 be a rule *nisi* which has to be heard on 14 April 2020, after dismissing an application for leave to appeal which was later followed by one at the SCA;

(c) that on 14 April 2020 Mamosebo, J lacked jurisdiction to postpone the matter and to extend the purported rule *nisi* to the 8 May 2020; and

(d) that on 8 May 2020 Makoti, AJ had no jurisdiction to confirm the purported rule *nisi*.

[32] Section 18 of the Superior Courts Act, 10 of 2013 ("*the Act*") deals with the suspension of a decision of Court pending an appeal. Subsections (1) and (2) of Section 18 stipulates as follows:

"*(1) Subject to sub-sections (2) and (3), and unless the Court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is*

suspended pending the decision of the application or appeal.

(2) Subject to sub-section (3), unless the Court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal."

[33] Section 18(1) of the Act was clearly made subject to Section 18(2) thereof. In terms of Section 18(2) of the Act, an interlocutory order, not having the effect of a final judgment, which is the subject of an application for leave to appeal, is not suspended pending the decision of the application for leave to appeal, unless the Court under exceptional circumstances orders otherwise.

[34] The Applicants did not approach this Court at any stage for an order that, pending the outcome of the application for leave to appeal, the operation and execution of Vuma, AJ's order of 6 December 2019 ought to be suspended. I have already found that such order was a rule *nisi*, an interlocutory order and not a final order. It follows that Section 18(2) of the Act must prevail, and therefore that Vuma, AJ's order of 6 December 2020 was not suspended pending the outcome of the Applicants' application for leave to appeal to the SCA. This being the case, it also follows that the Court on the subsequent occasions of 14 February 2020, 14 April 2020 and 8 May 2020 had the necessary jurisdiction to make

the orders that it did.

[35] In the circumstances the Applicants did not establish a case in terms of Uniform Rule 42(1)(a), as the order confirming Part B of the main application on 8 May 2020 was not erroneously sought or erroneously granted and Redisa was procedurally entitled to such order.

RESCISSION IN TERMS OF THE COMMON LAW

[36] Next, I need to consider whether the Applicants have made out a case, under the common law, for rescission of the order of 8 May 2020.

[37] In 1997 the erstwhile Appellate Division in **De Wet** *supra* at 1042 F – H held that under the common law a court is empowered to rescind judgments obtained on default of appearance, on sufficient cause shown. The power is entrusted to the discretion of the court. Under the common law the courts laid down certain general principles to guide them in the exercise of their discretion. The exercise of the court's discretionary power, broadly speaking, appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case.

[38] The manner in which a Court ought to approach the requirement of "good cause" (which has been used interchangeably with the term "sufficient cause" in case law) was succinctly stated in **Colyn *supra*** at paragraph [11] as follows:

"*In order to succeed an applicant for rescission of a judgment*

taken against him by default must show good cause (De Wet and Others vs Western Bank Ltd (supra)). The authorities emphasised that it is unwise to give a precise meaning to the term 'good cause' as Smallberger, J put it in HDS Construction (Pty) Ltd vs Wait:

'When dealing with words such as 'good cause' and 'sufficient cause' in other Rules and enactments the Appellate Division has refrained from attempting an exhaustive definition of the meaning in order not to abridge or fetter in any way the wide discretion implied by these words (Cairns' Executors vs Gaarn 1912 AD 181 at 186; Silber vs Ozon Wholesalers (Pty) Ltd 1954(2) SA 345 (A) at 352 – 3). The Court's discretion must be exercised after a proper consideration of all the relevant circumstances.'

With that as the underlying approach the courts generally expect an applicant to show good cause (a)by giving a reasonable explanation of his default; (b)by showing that his application is made bona fide; and (c)by showing that he has a bona fide defense to the plaintiff's claim which prima facie has some prospect of success (Grant vs Plumbers (Pty) Ltd, HDS Construction (Pty) Ltd vs Wait (supra), Chetty vs Law Society, Transvaal.)"

Most recently, the Constitutional Court in **Zuma vs Secretary of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and Others** [2021] ZACC 28, reaffirming the Court's earlier decision in **Government of the Republic of Zimbabwe vs Fick** 2013(10) BCLR 1103 (CC), held at paragraph [71] that –

"*The requirements for rescission of a default judgment are two-fold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defense which prima facie carry some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.*"

[39] At this juncture I must remark that whilst the Applicants in their papers dealt extensively with their explanation for the default of appearance on 8 May 2022, very little regard was paid to the requirement that the Applicants had to show that, on the merits, they have a *bona fide* defense, which *prima facie* carries some prospect of success. I will deal with this aspect in more detail below.

THE APPLICANTS' EXPLANATION FOR THEIR DEFAULT

[40] The explanation given by the Applicants as to why they were in default of appearance on 8 May 2020 is as follows: Soon after the lockdown had commenced on 26 March 2020 the Applicants' instructing attorney, Ms Rabyanyana, phoned the Registrar to enquire whether the matter would be heard on 14 April 2020. The Registrar's response was that because of the lockdown the matter would not proceed and that she would send Ms Rabyanyane the Judge President's directive saying that all matters already enrolled on the days on which the Motion Court would have been held should be postponed. According to the Applicants, the Registrar added that the parties would in due course be given a notice of setdown with a new hearing date beyond the period of the lockdown. The Applicants however did not receive any notice of setdown with a new hearing date. On 30 April 2020 the Acting Registrar e-mailed a copy of the Judge President's directive to Ms Rabyanyana. Upon the announcement of the nationwide lockdown, the correspondent attorneys of the Applicants in Kimberley informed their instructing attorneys that they were closing their offices for the lockdown and that its staff members were returning to their respective home provinces outside of the Northern Cape. On 29 and 30 April 2020 Redisa's attorneys and the Applicants' attorneys respectively addressed correspondence to the Judge President of this Court regarding the further prosecution of Part B of the main application. It is not necessary to refer to the contents of this correspondence, save to remark that the letter of Redisa's attorneys incorrectly stated that the matter had been postponed *sine die* on 14 April 2020, and that in their founding affidavit the Applicants leveled blame at Redisa's attorneys for not informing either of the Applicants' firms of attorneys about a postponement order having been made on or

before 14 February 2020, or providing them with any copy of any postponement ruling or order having been made on or before 14 April 2020. The Applicants state that no postponement ruling or order has ever been given to either their correspondent or instructing attorneys. It was only when Redisa's attorneys delivered their answering affidavit in the interlocutory application on 18 June 2020 that the Applicants' attorneys became aware of the final order of 8 May 2020, as a copy of such order was annexed thereto. The Applicants therefore state that they were not in willful default on 8 May 2020 because they were not notified of such hearing. They were also not aware that Redisa's representatives would be in motion court on 8 May 2020 to move for the confirmation of Part B of the main application.

[41] The Applicants' explanation for the default was strenuously countered by Redisa's representatives. They stated that the matter is a long running matter in respect of which a rule *nisi* had already been granted and that all the parties were accordingly anticipating the allocation of a return date for a final order to be granted. Although they had no knowledge of the Applicants' averments regarding a supposedly forthcoming notice of setdown, they stated that the Acting Registrar received a telephone call shortly after 14 April 2020 (the exact date cannot be recalled) from a representative of the Applicants' attorneys who specifically enquired as to the date to which the matter had been postponed. They argue that this is consistent with the fact that the Applicants and Redisa were anticipating the allocation of a return date. The Acting Registrar advised the person making the enquiry that an order had been granted and that same was made available to the Applicants' correspondent attorneys as shortly after the postponement order of 14 April 2020 the Acting Registrar placed a

copy of the order in the pigeonhole of the Applicants' correspondent attorneys. Redisa's attorneys received a copy of the order on 4 May 2020. In addition, on 30 April 2020 Ms Rabyanyana sent an e-mail to the Registrar, for attention of the Assistant Registrar, requesting the Registrar to e-mail the Applicants' attorneys "*the postponement order for the mentioned case*". The Assistant Registrar responded to this e-mail later the same day and sent a copy of the order of 14 April 2020 to the Applicants' attorneys by e-mail. Redisa's averments set out above were supported by confirmatory affidavits by the then Acting Registrar and the Assistant Registrar. Redisa contends that the Applicants' failure to appear in Court on 8 May 2020 was entirely of their own volition and constituted willful and deliberate default of the order of 14 April 2020.

[42] In their replying affidavit, the Applicants admit that Ms Rabyanyana had phoned the Assistant Registrar on 30 April 2020, albeit to ask her to e-mail a copy of the "*sine die*" postponement order, if any, as a result of what was conveyed in the letter of Redisa's attorneys of 29 April 2020. In response, the Assistant Registrar asked Ms Rabyanyana to e-mail her request so that the Assistant Registrar could verify the claim, and if true, she would e-mail Ms Rabyanyana the *sine die* postponement order. Ms Rabyanyana then e-mailed her request to the Assistant Registrar. However, Ms Rabyanyana thereafter obtained an opinion from counsel that asking for a copy of a *sine die* postponement order was an academic exercise in light of the written confirmation from Redisa's attorneys, as officers of the court, in their letter of 29 April 2020 that the matter had been postponed *sine die*, and that Ms Rabyanyana should rather send the letter of 30 April 2020 to the Judge President. The Applicants further explained that Ms

Rabyanyana did not receive the Assistant Registrar's e-mail of 30 April 2020 with the attached order of 14 April 2020. Having received Redisa's answering affidavit in the rescission application on 13 August 2020, to which a copy of the Assistant Registrar's e-mail was attached, Ms Rabyanyana did a diligent search of all her e-mails, including her junk e-mail folder and therein found the Assistant Registrar's e-mail marked as spam. Furthermore, regarding the issue of the court order of 14 April 2020 being made available to the Applicants' correspondent attorneys' by placing same in their pigeonhole at the High Court on 4 May 2020, the Applicants stated that a certain Mr Zamuxoli Zama Kose of the correspondent attorneys' office did not see, and could not have seen, the order of 14 April 2020 as, on 4 May 2020, he was at home in the Eastern Cape after the announcement of the nationwide lockdown which commenced on 26 March 2020.

[43] In evaluating the versions of the parties set out above, I am bound to apply the test enunciated in **Stellenbosch Farmers' Winery Ltd vs Stellenvale Winery (Pty) Ltd** 1957(4) SA 234 (C), as refined in **Placon-Evans Paints Ltd vs Van Riebeeck Paints (Pty) Ltd** 1984(3) SA 623 (A)[7], namely: that I may accept those facts averred in the Applicants' affidavit which have been admitted by the Respondent, together with the facts alleged by the Respondent, provided that the Respondent has raised a real, genuine or *bona fide* dispute of fact, and unless the Respondent's version is so far-fetched or clearly untenable that I would be justified in rejecting same merely on the papers. I have no reason to reject Redisa's version *in casu*. I must therefore find that the Applicants' attorneys (at least initially), was also anticipating the allocation of the return date, that the Applicants' attorneys were

[7] *At pages 634 - 635*

advised in a phone call shortly after 14 April 2020 that an order had been granted and could be obtained from the Applicants' correspondent attorneys, that on 30 April 2020 Ms Rabyanyana had made an enquiry via e-mail regarding "the postponement order", and that the court order of 14 April 2020 was placed in the Respondent attorneys' pigeonhole on 4 May 2020.

[44] To this must be added that there are deficiencies in the Applicants' explanation that cannot be overlooked. It appears that the Applicants' instructing attorneys did nothing from 14 April 2020 until 30 April 2022 to obtain a copy of the order of 14 April 2020, knowing that the correspondent attorneys' offices had been closed. The attorneys further did nothing from 30 April 2020 until 18 June 2020 to obtain a copy of the order. Although I do not know what the cause of the incorrect statement in the letter of Redisa's attorneys was, this letter was written before the court order of 14 April 2020 had become available. The Applicants' attorneys did not have a lesser duty than Redisa's attorneys to ascertain what the outcome of the proceedings on 14 April 2020 was. In fact, one would expect that such duty would be meticulously carried out in order to represent their clients in a diligent and professional manner. I have no basis to reject the excuse that the Applicants' attorneys relied on counsel's opinion that obtaining a copy of the order was not necessary, but one would expect a higher degree of diligence and professionalism from the Applicants' attorneys under the circumstances. In this light, this excuse would seem to be slightly opportunistic. The court was further provided with scant facts regarding the Applicants' correspondent attorneys, which only gives rise to unanswered questions such as *inter alia*, given that the nationwide hard lockdown came to an end on 30 April 2020, when did the firm re-open and when did the staff return to

office? The Applicants stated that the correspondent attorneys had staff members (plural). Why do the Applicants only furnish an explanation involving Mr Kose not seeing or being able to see the court order of 14 April 2020? Were the other staff members available from 4 May 2020? When did Mr Kose actually return to office? Nothing is stated in the last-mentioned respect.

[45] I therefore cannot find that the Applicants have provided a reasonable and sufficient explanation for their default in appearing on 8 May 2020.

THE REQUIREMENT OF A *BONA FIDE* DEFENSE WHICH *PRIMA FACIE* CARRIES SOME PROSPECT OF SUCCESS

[46] It has long been the law that the inadequacy of an applicant's explanation may well justify a refusal of the application for rescission on such account alone, unless perhaps the weak explanation is canceled out by the applicant being able to give a *bona fide* defense which does not have a mere prospect, but a good prospect, of success.[8]

[47] As referred to above, Mr Sebola, at the hearing, did not present any argument on whether the Applicants have a *bona fide* defense. It is Mr Van Niekerk, on behalf of Redisa, who touched on the subject of whether the Applicants have a reasonable prospect of success on the merits. The crux of the matter before Vuma, AJ was whether it was established that Redisa was the owner of the equipment. The question was thoroughly and cogently dealt with by Vuma, AJ in her judgment of 6 December 2019. The Applicants

[8] *Chetty vs Law Society, Transvaal (supra); Melane vs Santam Insurance Co Ltd 1962(4) SA 531 (A); and Colyn (supra)*

did not file any further affidavits which might have disturbed any of the findings made by Vuma, AJ in her judgment. In my respectful view, Makoti, AJ was fully justified, considering the merits of the matter, in confirming the *rule nisi* on 8 May 2020.

[48] The Applicants did, in their founding affidavit however, attempt to add a further string to their bow by contending that they may still be able to show cause why the equipment should not be returned to Redisa. They aver that the existing business relationship between Redisa and Waste Beneficiation was never terminated in law or otherwise, or alternatively, because the equipment is Waste Beneficiation's Capital Expenditure (CAPEX) and that such Capex has, since 2014, never been lawfully terminated by Redisa.

[49] The last-mentioned contention above concerning Waste Beneficiation's Capex was thoroughly dealt with by Vuma, AJ in her judgment and I cannot fault her findings on the issue. The first-mentioned contention was only raised for the first time in the Applicants' founding affidavit in the rescission application. It was not argued before me by any of the parties, and in the circumstances I cannot make any finding in respect thereof. In fact, I decline to do so.

[50] To the extent necessary, I would in any event have found that the Applicants have not shown that on the merits they have a *bona fide* defense which *prima facie* carries some prospects of success.

THE INTERLOCUTORY APPLICATION

[51] It was contended on behalf of the Applicants at the hearing that

the interlocutory application has become academic, as the relief obtained in Part A of the main application dealt with an interim situation during the time that ownership of the equipment was in dispute.

[52] Mr Van Niekerk also submitted that the interlocutory application had become moot, as the interim order of 19 August 2019 ceased to exist on confirmation of Part B of the main application and that the interim order could only have been reconsidered whilst it was in existence.

[53] The Constitutional Court in **Van Wyk vs Unitas Hospital and Another** 2008(2) SA 472 (CC) at [29] held it to be axiomatic that mootness does not constitute an absolute bar to the justiciability of an issue, and that the Court has a discretion on whether or not to hear a matter. The test that should be applied is whether it is in the interest of justice to do so. One relevant factor to consider is whether the court order will have some practical effect on the parties or on others. Another is whether it will be in the public interest to hear the case because it will benefit the public or achieve legal certainty.

[54] The parties are *ad idem* that the interlocutory application has become academic or moot. I add that there are no considerations present in this matter which would deem it to be in the interest of justice to adjudicate the interlocutory application.

CONCLUSION AND COSTS

[55] The result is that both the rescission and the interlocutory applications should be dismissed. This leaves the question of costs. It is trite that the general rule regarding costs is that the unsuccessful party pays the costs of the successful party on the party and party scale. It may however be, by reason of special considerations, that a court may consider it just, by means of an order of attorney and client costs, to ensure more effectually than it can do by means of a judgment for party and party costs that the unsuccessful party will not be out of pocket in respect of the expense caused to him by the litigation.[9]

[56] Mr Van Niekerk submitted that the Applicants' conduct may be characterized as frivolous and vexatious, as well as reckless and in total disregard of the rights of others. He contends that the Applicants were opportunistic and reckless in trying to convince the Court in the main application that Waste Beneficiation was the owner of the equipment in the face of correspondence on its own behalf from which it was clear that the Applicants knew all along that Waste Beneficiation had no claim to ownership. The Applicants have persisted with this attempt even after the judgment of 6 December 2019 had found it to be devoid of any substance. Similar to what happened in the main application, the Applicants approached this Court in the rescission application without full disclosure of all relevant facts.

[57] As the then Appellate Court stated in **City Council of Johannesburg vs Television & Electronical Distributors (Pty) Ltd and Another** 1997 (1) SA 157 (A) at page 177, in appropriate circumstances the conduct of a litigant may be adjudged as "vexatious" within the extended meaning that has been placed

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[9] *Nel vs Waterberg Landbouwers Koöperatiewe Vereniging 1946 AD 597*

upon this term, as in when such conduct has resulted in "*unnecessary trouble and expense which the other side ought not to bear*". The Court however also cautioned that one must guard against censuring a party by way of a special costs order when with the benefit of hindsight a course of action taken by a litigant turns out to have been a lost cause.

[58] In the rescission application, the grounds for the Applicants' attack on procedural grounds can at best be described as wafer thin, and the contention regarding the supposed suspension of the main application due to the pending appeal proceedings, devoid of any merit. This tends to support Redisa's submission that the Applicants' motive was to delay and frustrate Redisa in the absence of its rights of ownership.

[59] The interlocutory application has its own unique features. The Applicants could have, and probably should have, withdrawn the application during June 2020 already. They did not do so and thereby compelled Redisa to oppose the application, with the concomitant expenditure of time and costs. The Applicants kept the interlocutory application in abeyance, making it necessary for Redisa to take steps to obtain the directive that the interlocutory application be heard simultaneously with the rescission application. This naturally also caused the wastage of the court's time and scarce judicial resources to consider and address the application. Even so, Mr Sebola still attempted to argue at the hearing that the interlocutory application was not properly enrolled and should not be adjudicated. These constitute appropriate circumstances for me to mark my disapproval of the Applicants' conduct in the interlocutory application.

[60] I am persuaded that the Applicants'conduct in both the rescission application and the interlocutory application falls within the extended meaning that has been placed on the term "*vexatious*", and that Redisa was thereby put to unnecessary trouble and expense which it ought not to bear. In both applications a punitive cost order is called for.

[61] I must lastly convey that it was my intention to deliver this judgment without delay. However, due to circumstances beyond my control, the judgment has taken much more time than was anticipated. I sincerely regret the delay.

In the premise the following order is made:

1. The Applicants' application dated 11 May 2020 against the order of this Court under case number 1078/2019, issued on 17 May 2019, is hereby dismissed.

2. The Applicants' application dated 30 June 2020 for rescission of the order of this Court under case number 1078/2019 issued on 8 May 2020, is likewise hereby dismissed.

3. The Applicants are ordered to pay the costs of the Respondent in both the abovementioned applications on the attorney and client scale.

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EILLERT, A

ACTING JUDGE

NORTHERN CAPE HIGH COURT

KIMBERLEY

Obo Applicants:	Adv. Sebola
Oio:	AA Solwandle Attorneys Inc.
	Instructed by MMamhlola Rabyanyana Att.
Obo Respondent:	Adv. J.G. van Niekerk SC
Oio:	Duncan & Rothman Inc.
	Instructed by Cliffe Dekker Hofmeyr Inc.