



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 103/2021

In the matter between:

THABO SINDISA KWINANA

FIRST APPELLANT

DALIKHAYA RAIN ZIHLANGU NO

SECOND APPELLANT

UNATHI MDODA NO

THIRD APPELLANT

and

LULAMA SMUTS NGONYAMA

FIRST RESPONDENT

NOKWAZI NOKWAZELELA

NGONYAMA NO

SECOND RESPONDENT

KHANYA MALUNGELO

NGONYAMA NO

THIRD RESPONDENT

QHAWA HLOMELO

NGONYAMA NO

FOURTH RESPONDENT

and

EYABANTU CAPITAL

CONSORTIUM (PTY) LTD

FIRST INTERVENING PARTY

EYABANTU CAPITAL

(PTY) LTD

SECOND INTERVENING PARTY

Neutral citation: *Thabo Sindisa Kwinana and Others v Lulama Smuts Ngonyama and Others* (Case no 103/2021) [2022] ZASCA 48 (8 April 2022)

Coram: VAN DER MERWE, NICHOLLS and CARELSE JJA and TSOKA and MATOJANE AJJA

Heard: 24 FEBRUARY 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 8 April 2022.

Summary: Civil procedure – application for intervention on appeal – no legal interest in subject matter of litigation – application for rescission of default judgment – sole ground relied upon had been raised in replying affidavit that was rightly not admitted.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg, (Grenfell AJ sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Matojane AJA (Van der Merwe, Nicholls and Carelse JJA and Tsoka AJA concurring)

[1] The appellants in this matter are Mr Thabo Sindisa Kwinana and the (substituted) trustees of the Eyabantu Development Trust (the Eyabantu Trust). For convenience, I refer to the appellants collectively as the Kwinana parties. They were the unsuccessful applicants in a rescission application before Grenfell AJ in the Gauteng Division of the High Court, Johannesburg (high court), and appealed against its decision refusing to rescind and set aside two default judgments previously granted by Dosio AJ in favour of the respondents. They are Mr Lulama Smuts Ngonyama and the trustees of the Khululekile Family Trust (the Khululekile Trust), collectively referred to as the Ngonyama parties.

Background

[2] During 2018, the Ngonyama parties instituted action in the high court against the Kwinana parties. Their particulars of claim essentially alleged the following: during or about 2005, the Ngonyama parties entered into an oral agreement with Mr Kwinana (the 2005 agreement), in terms of which the latter would act as agent and attorney for the Ngonyama parties in order to procure a 6,5% shareholding in Eyabantu Capital Consortium (Pty) Ltd (Eyabantu Consortium). In the execution of his obligations in terms of the 2005 agreement, Mr Kwinana advised that the shareholding should be held for the Khululekile Trust by another trust. Mr Kwinana thus caused the Eyabantu Trust to hold 6,5% shareholding in Eyabantu Consortium as the agent and for the benefit of the Khululekile Trust. At the time, Mr Kwinana was one of the trustees of the Eyabantu Trust. The Eyabantu Trust also held a further 6,5% shareholding in Eyabantu Consortium.

[3] Pursuant hereto, so it was alleged, the Eyabantu Trust orally agreed with the Khululekile Trust during November 2006 that the former would transfer 50% of all income derived from its 13% shareholding in Eyabantu Consortium to the Khululekile Trust (the 2006 agreement). The particulars of claim also alleged that as agents for the Ngonyama parties, the Kwinana parties owed the former a duty to fully account for all income that accrued to them pursuant to the 2006 agreement. On the back of these allegations, the Ngonyama parties claimed that the Kwinana parties render an account for debatement 'in respect of their shareholding interest' in Eyabantu Consortium, and the Khululekile Trust claimed transfer of the said 6,5% holding to it from the Eyabantu Trust.

[4] The Kwinana parties filed a notice of intention to oppose the action on 11 January 2019. Despite a notice of bar filed on 21 January 2019, they failed to file a plea within the period provided for in the notice of bar. Dosio AJ granted default judgment in terms of the particulars of claim on 15 April 2019 against the first and second appellants and on 17 April 2019 against the third appellant. The Eyabantu Trust took a decision ‘not to contest the default judgment’ but to seek to resolve the matter amicably through dialogue. No doubt the same applied to Mr Kwinana. Six months later, however, the Kwinana parties launched the rescission application against the Dosio AJ orders. As I have said, the application failed, hence the appeal.

[5] Two parties filed an application in this Court to be joined as parties in the appeal (the intervening parties). They were Eyabantu Consortium and Eyabantu Capital (Pty) Ltd (Eyabantu Capital). Eyabantu Capital holds 46,56% shareholding in Eyabantu Consortium. The Ngonyama parties opposed the application. After hearing counsel on 24 February 2022, we dismissed the application for intervention with costs, including the costs of two counsel. We indicated that reasons for this order would be furnished in due course. In what follows, I firstly give reasons for the dismissal of the intervention application and thereafter consider the appeal.

Intervention application

[6] The intervening parties principally averred that in terms of the written shareholders agreement between Eyabantu Consortium and its shareholders, including the Eyabantu Trust, Eyabantu Capital held a right of pre-emption in respect of the shares in question and Eyabantu Consortium had an obligation to see to the enforcement of that right. This constituted direct and substantial

interests, so it was contended, that afforded the intervening parties the right to be joined and to seek relief in the appeal.

[7] In *Pheko and Others v Ekurhuleni City*¹, Nkabinde J set out the test for joinder as follows:

‘The test for joinder requires that a litigant have a direct and substantial interest in the subject-matter of the litigation, that is, a legal interest in the subject matter of the litigation which may be affected by the decision of the Court. This view of what constitutes a direct and substantial interest has been explained and endorsed in a number of decisions by our courts.’²

These decisions include *Amalgamated Engineering Union v Minister of Labour*,³ *Aquataur (Pty) Ltd v Sack and Others*⁴ and *Bowring NO v Vrededorp Properties CC and Another*.⁵

[8] Therefore, the intervening parties had to show a legal interest in the subject matter of the appeal that could be prejudiced by the order on appeal. The subject matter of the appeal was whether the Kwinana parties had made a case for the rescission of the Dosio AJ orders in the court a quo. The intervening parties had no legal interest therein. They only had an indirect interest, in the sense that for the appeal of the Kwinana parties to succeed would suit their interests.

[9] What the intervening parties sought to do, was to obtain a rescission of the Dosio AJ orders at their own instance and on their own grounds, without ever having applied for that relief. That constituted an impermissible attempt to have this Court determine a matter as court of first instance. The remedy of the

¹ *Pheko and Others v Ekurhuleni Metropolitan Municipality (Socio-Economic Rights Institute of South Africa as Amicus Curiae)* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC).

² *Ibid* para 56.

³ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659.

⁴ *Aquataur (Pty) Ltd. v Sack and Others* [1988] ZASCA 86; 1989 (1) SA 56 (A) at 62.

⁵ *Bowring NO v Vrededorp Properties CC* [2007] ZASCA 80.

intervening parties was to institute proceedings for the rescission of these orders, in which the reasons for their delay and their grounds for the rescission would be ventilated and the Ngonyama parties would be afforded a proper opportunity to respond thereto. For these reasons, we dismissed the application for intervention with costs, including the costs of two counsel.

The appeal

[10] I turn to the consideration of the appeal. The sole submission of the Kwinana parties before us was that the Dosio AJ orders should have been set aside under Uniform rule 42(1)(a), on the basis that the particulars of claim did not disclose a cause of action against any of them. Rule 42(1)(a) provides:

‘(1) The court may, in addition to any other powers it may have, *mero motu* 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.’

In *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd*⁶ this Court held that where a plaintiff is procedurally entitled to a judgment in the absence of the defendant, that judgment cannot be said to have been granted erroneously in the light of the subsequently disclosed defence. The existence or non-existence of a defence on the merits was found to be an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.⁷

[11] Mr Kwinana argued that the particulars of claim did not disclose a legal basis upon which he could be ordered to account or to transfer the shares. The

⁶ *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* [2007] ZASCA 85; 2007 (6) SA 87 (SCA) (*Lodhi*).

⁷ *Lodhi* paras 25 and 27. See also *Freedom Stationery (Pty) Limited and Others v Hassam and Others* [2018] ZASCA 170; 2019 (4) SA 459 (SCA) para 18.

Eyabantu Trust contended that *ex facie* the registration number of the Khululekile Trust as reflected in the particulars of claim, it was only registered during 2007, that is, after the 2005 and 2006 agreements had been entered into.

[12] None of this, however, was raised in the founding affidavit in the rescission application. The Kwinana parties only purported to do so in their replying affidavit, which the court a quo refused to admit, for sound reasons. The replying affidavit was filed seven months out of time. The Kwinana parties ignored a notice under Uniform rule 30 to have the replying affidavit set aside, and also failed to submit an application for condonation for the late filing of the replying affidavit. Moreover, it contained what the court a quo aptly termed ‘an entirely new rescission application’, to the prejudice of the Ngonyama parties. There is no basis to interfere with the exercise of the discretion of the court a quo in this regard. It follows that it was not permissible to raise the rule 42(1)(a) argument on appeal.

[13] In the result, the appeal is dismissed with costs, including the costs of two counsel.

K E MATOJANE
ACTING JUDGE OF APPEAL

APPEARANCES

For the First Appellants:

D J Combrink

Instructed by:

Du Toit Attorneys

Webbers Attorneys, Bloemfontein

For the Second and Third Appellants:

E van Vuuren SC

Instructed by:

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For the Respondent:

L J Morrison SC and T Scott

Instructed by:

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For the Intervening Parties:

R Stockwell SC

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