



**Summary:** Civil procedure – order of court not appealed or rescinded – application to stay execution – issue *res judicata* unless set aside on appeal or by rescission – application to stay not competent.

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**ORDER**

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**On appeal from:** Gauteng Division of the High Court, Johannesburg (Makume J, Meyer J and Randerera AJ concurring, sitting as court of appeal):

- 1 The appeal is reinstated.
- 2 The appeal is dismissed with no order as to costs.

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**JUDGMENT**

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**Hughes JA (Gorven, Matojane and Weiner JJA and Chetty AJA concurring)**

[1] This is an appeal against the decision of the full court of the Gauteng Division of the High Court, Johannesburg (per Makume J, Meyer J and Randerera AJ concurring) delivered on 28 July 2021. This Court granted special leave to appeal that decision on 29 July 2022, which appeal was allowed to lapse. Before this Court is an application for reinstatement of that appeal and further prosecution thereof.

[2] As alluded to above, special leave to appeal was granted by this Court. The record was not filed on 1 November 2022 as was required. The appellant, Percy Suli Mosuetsa (Percy) submits that he only discovered on 13 February 2023 that the appeal had lapsed. He attributed this to the withdrawal of his attorney. He sought the assistance of Legal Aid which was granted. Coupled with the closure period over the festive season, it was Legal Aid who delayed in prosecuting his appeal.

[3] This Court's approach in granting condonation has long been settled. In *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others*, Ponnann JA held that factors relevant to the discretion to grant or refuse condonation include 'the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the

judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice'.<sup>1</sup>

[4] The appellant made out a case as set out above. In addition, in the interests of justice and for the sake of finality, it is appropriate for this Court to reinstate the appeal.

[5] I now turn to deal with the merits of the appeal. Percy, in an application to the Gauteng Division of the High Court, Johannesburg (the high court), sought that the second respondent, the Master of the High Court, South Gauteng, Johannesburg, (the Master) remove his half-brother, Derrick Thabo Mosuetsa (Derrick), the first respondent, as the Master's appointed representative of the deceased estates of their parents, Mrs Sibongile Mosuetsa and Mr Solomon Mosuetsa. Ancillary to the aforesaid relief, Percy also required that the Registrar of Deeds, Johannesburg (the third respondent) be ordered to reverse or prevent the transfer of ownership of the property described as 1369 Kgoposto Street, Molapo, Soweto (the property) into the name of Derrick. The pertinent relief was that the relevant Sheriff of the court be interdicted from giving effect to the warrant of ejectment granted against Percy and those who occupied the property.

[6] Fundamental to this appeal is the fact that a previous order of court was granted by Kgomo J based on a finding that Derrick is the owner of the property. On that basis, he obtained an order evicting Percy from the property. It was this order which prompted the application by Percy which led to the present appeal. I briefly set out the underlying circumstances hereinafter.

[7] Mrs Sibongile Mosuetsa and Mr Solomon Mosuetsa were married to each other in community of property in 1968. Mrs Mosuetsa came into the marriage with a child (Percy) from a previous relationship. Three children were born to Mrs and Mr Mosuetsa, the eldest being Derrick. Mrs Mosuetsa passed away on 5 July 2003. On 21 February 2008, Derrick received letters of authority from the Master authorising him to take control of the assets in the estate of his late mother. During Mr

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<sup>1</sup> *Dengetenge Holdings v Southern Sphere Mining and Development Company Ltd and Others* [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 11.

Mosuetsa's lifetime, and by way of a donation affidavit dated 14 October 2007, Mr Mosuetsa donated the property to Derrick. Percy had been residing on the property since 1995. Mr Mosuetsa died on 20 December 2011. The Master issued letters of authority in favour of Derrick on 12 April 2012 authorising him to take control of the assets in the estate of his late father, Mr Mosuetsa.

[8] On 14 November 2012, the Master accepted that the donation made to Derrick of the property during the lifetime of Mr Mosuetsa meant that the property did not fall into his estate. That decision of the Master has not been reviewed and set aside. Nor did the present application attempt to do so. On the very same day, ownership of the property was transferred to Derrick and his wife by the Registrar of Deeds, Johannesburg. This led to the application in the high court to evict Percy from the property. On 10 October 2013, Kgomo J granted the following order:

'1. The First Respondent and all persons who occupy the property known as ERF 1369 MOLAPO TOWNSHIP, SOWETO, GAUTENG, SITUATE[D] AT 1369 KGOPUTSO STREET MOLAPO, SOWETO ("the property") under and by virtue of the First Respondent's occupancy of the property, is and are hereby evicted from the property by the 30<sup>th</sup> of November 2013.

2. In the event of the First Respondent and all persons who occupy the property under or by virtue of the First Respondent's occupancy of the property failing and/or refusing to vacate the property within the period stipulated in paragraph 1 above, that the Sheriff is hereby authorised to forthwith enter upon the property and evict the First Respondent and all those who occupy the property under and by virtue of the First Respondent's occupancy of the property.

3. An interdict is hereby issued against the First Respondent and all persons who occupy the property under and by virtue of the First Respondent's occupancy, preventing and restraining them from moving back in to the property after eviction.

4. The First Respondent is to pay the costs of this application.'

[9] Essentially, the Kgomo J order directed that Percy and all persons who occupied the property were to be evicted and were to vacate the property by no later than 30 November 2013. Further, the order directed that Percy was interdicted from returning to the property after being evicted. In the full court judgment, the court stated that Kgomo J granted the order that he did 'on the basis that the appellant [Derrick] was the undisputed owner of the property'. This order, by Kgomo J has not

been challenged and remains extant. It is binding until it has either been rescinded or set aside on appeal.

[10] The Constitutional Court, in *Municipal Manager OR Tambo District Municipality and Another v Ndabeni*,<sup>2</sup> reaffirmed that a court order is binding until it is set aside by a competent court, and that this necessitates compliance, regardless of whether or not the party against whom the order is granted believes it to be a nullity. This principle gives effect to s 165(5) of the Constitution of the Republic of South Africa:

‘An order or decision issued by a court binds all persons to whom and organs of state to which it applies.’

[11] This Court, in *MEC for the Department of Public Works, Eastern Cape and Another v Ikamva Architects CC*, similarly developed the principle that an order of a court of law stands until set aside by a court of competent jurisdiction. An order that it should not be put into effect is not competent without a case being made out that there are prospects that it will be set aside by rescission or on appeal.<sup>3</sup> Until that is done, the court order must be obeyed even if it may be wrong; there is a presumption that the judgment is correct.<sup>4</sup> As such, the order of Kgomo J, based as it is on the ownership of Derrick, is decisive of that issue. This applies equally to administrative action, such as the decision of the Master to recognise the validity of the donation and the corresponding decision that the property did not fall into the estate of Mr Mosuetsa.<sup>5</sup> This also disposes of the relief sought in several other applications brought before the high court (the interlocutory orders) to reopen the estates of Mr and Mrs Mosuetsa and to appoint a new representative. The property does not fall into the estates and the entire motivation for the estates being reopened was based on the contention that the property had not been appropriately dealt with.

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<sup>2</sup> *Municipal Manager OR Tambo District Municipality and Another v Ndabeni* [2022] ZACC 3; [2022] 5 BLLR 393 (CC); (2022) 43 ILJ 1019 (CC); 2022 (10) BCLR 1254 (CC); 2023 (4) SA 421 (CC) para 23-24; *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC) para 182.

<sup>3</sup> *MEC for the Department of Public Works, Eastern Cape and Another v Ikamva Architects CC* [2022] ZASCA 184; [2023] 1 All SA 579 (SCA); 2023 (2) SA 514 (SCA) para 34.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA) para 31.

[12] In an earlier decision of this Court, *Firestone South Africa (Pty) Ltd v Gentiruco AG (Firestone)*, the Appellate Division pronounced on the position above as follows:

'The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased.'<sup>6</sup>

[13] As enunciated in the cases above, and in terms of the principles set out in *Oudekraal* and *Firestone*, the order of Kgomo J stands until rescinded or set aside on appeal. All the interlocutory orders that followed in the high court are a nullity as, factually, Kgomo J's order has pronounced a final judgment on the issue. There is accordingly no basis to interfere with the order granted by the full court.

[14] Consequently, the following order issues:

- 1 The appeal is reinstated.
- 2 The appeal is dismissed with no order as to costs.

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W HUGHES  
JUDGE OF APPEAL

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<sup>6</sup> *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 306F-G.

## Appearances

For the appellant: Heads of Argument prepared by NL Skibi  
Instructed by: Legal Aid South Africa, Johannesburg  
Legal Aid South Africa, Bloemfontein

For the first respondent: Heads of Argument prepared by ARG Mundell SC  
Instructed by: Carvalho Incorporated, Johannesburg  
Lovius Block Incorporated, Bloemfontein.