IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

In the matter between: Case number: **470/2020**

LESLIE CHRISTO VICTOR Applicant

and

GOODISON MOLEFE Respondent

In *re*:

GOODISON MOLEFE Plaintiff

and

LESLIE CHRISTO VICTOR Defendant

CORAM:	DAFFUE, J
HEARD ON:	22 APRIL 2021
JUDGMENT BY:	DAFFUE, J
DELIVERED ON:	23 APRIL 2021

This judgment was handed down electronically by circulation to the parties' representatives by email as agreed with them. The time and date for hand down is deemed to be 11h00 on 23 APRIL 2021.

I INTRODUCTION

[1] This is an application for rescission of a default judgment granted on 20 August 2020 in terms whereof the following orders were issued in a defamation suit:

"1. Payment of the amount of R250 000.00;

2. *Morae* interest on the aforesaid amount *a tempore morae*;

3. Costs of suit."

II THE PARTIES

[2] The applicant in this application and defendant in the main action is Mr Leslie Christo Victor, a 61-year-old male person residing at plot 48, Quaggafontein Small Holdings, Bloemfontein. He was born on the property and has been staying there his whole life. He is the registered owner plot 48. He is represented in this application by Adv Erwin Smit, an advocate practising with a Fidelity Fund certificate, also referred to as a trust account advocate.

[3] The respondent is Mr Goodison Molefe who as plaintiff successfully obtained default judgment in the main action as mentioned above. Adv SJ Reinders appeared for him before me as well as when default judgment was granted, he being duly instructed by Rossouws Attorneys, Bloemfontein.

[4] I shall refer to the parties as cited in this application in order to avoid uncertainty.

III THE RELIEF CLAIMED AND THE FACTUAL BASIS FOR SUCH A RELIEF

[5] Applicant seeks rescission of the default judgment granted against him and leave to proceed with the main action on a defended basis. He does not seek a costs order against respondent and failed to offer payment of the costs of the application, bearing in mind that he is seeking an indulgence.

IV THE REQUIREMENTS FOR RESCISSION OF JUDGMENT

[6] The requirements for a successful application for rescission of judgment in terms of rule 31(2)(b) are the following:

a. the applicant must give a reasonable explanation for his default; should it appear that the default was wilful or due to gross negligence, the court should not come to his assistance;

b. the application must be *bona fide* and not made with the intention of merely delaying the claim; and

c. the applicant must show that he has *a bona fide* defence to the plaintiff's claim and in this regard it is sufficient if a *prima facie* defence is made out, setting out averments which, if established at the trial, would entitle the applicant to the relief asked for."[1]

V EVALUATION OF THE EVIDENCE AND THE SUBMISSIONS BY COUNSEL

[7] In the first 19 pages of the founding affidavit the applicant deals with the description of the parties, the history between them and his belief that the respondent and his co-directors and co-trustees are criminals. The company ITAU Milling Pty (Ltd) erected a mill in an area that was for many years occupied by members of the public owning or leasing plots in Quaggafontein. Traditionally it was an area zoned for residential and agricultural purposes only as is apparent also from the conditions in the relevant title deeds quoted by applicant.[2]

[8] Numerous references to "criminal activities" and "criminals" are found in the founding affidavit and the following few examples will suffice:

8.1. "…the relevant role players commence with unlawful and criminal activities as far back as the year 2009."[3]

[1] See Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (0) 476-477; Colyn v Tiger Food Industry Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at 9 F; and Hassim Hardware v Fab Tanks (1129/2016) [2017] ZASCA 145 (13 October 2017) at paras 12 and 28

[2] Paras 53 and 54 on p 57.1

[3] Paragraph 5.1 p 15

These role players are *inter alia* the directors of the ITAU Milling Pty (Ltd) of which the respondent is one.

8.2. "I have addressed the criminal conduct and unlawful activities in the South African Police Bainsvlei Cas No. 72/11/2018 …"[4]

8.3. '…the operations conducted on Plots 46, 47, 49 and 50 … are unlawful *ab initio*." And also: "The so-called Environmental Authorizations issued by DESTEA … are unlawful."[5]

8.4. "…I need to stand up against the victimization of criminal activities and the gross violations of the my enshrined bill of rights."[6]

8.5. "…I am the victim of numerous Schedule 1 Criminal Offences in terms of the Criminal Procedure Act 51 of 1977"[7]

[9] Later on the in the affidavit the applicant backtracked to an extent when he said:

"I have the right to press criminal charges against suspected criminals and request the South African police to investigate the allegations."[8]

[10] These allegations in the founding affidavit in support of an application for rescission of the judgment are in line with the allegations contained in annexures "A" and "B" relied upon by the respondent in his action based on defamation. Annexure "A" to the particulars of claim consists of two documents, to wit: (1) a portion of an affidavit addressed to the applicable environmental assessment practitioner to object to an application by respondent and his co-directors and co-trustees in terms of the National Environmental Management Act[9] ("Nema") and (2) a copy of the A1 statement filed in the relevant SAPS docket wherein SAPS is requested to investigate alleged serious transgressions of Nema, which was attached to applicant's objection. In these documents there are several references to "unlawful activities and conduct which is an ongoing crime" and an allegation that the

[4] Paragraph 5.6 p 16
[5] Paragraph 5.7 p 17
[6] Paragraph 5.12.2 p22
[7] Paragraph 6.4.1.1.1 p 25
[8] Paragraph 6.4.2.3 p 28
[9] Act 107 of 1998

Department of Economic, Small Business Development, Tourism and Environmental Affairs of the Free State Province has turned a blind eye towards "these criminals" referring to *inter alia* respondent. According to the applicant "…the Department is assisting the subjects" and he even submitted that "corruption is alleged in this matter and the unlawful issuing of the Environmental Authorisations". Finally, he concluded "that these criminals already paid an admission of guilt which was reduced from R1 million to R200 000-00 which they paid and same was confirmed in the High Court case."

[11] A fine of R200 000.00 was indeed paid, it being an administrative fine in accordance with the provisions of s 24G of Nema. Although the respondent and his colleagues have not been convicted of criminal offences, it has to be accepted that the matter is still under investigation. Section 24G(6) pertinently states that the granting of an environmental authorisation in terms of subsection (2)(b) shall in no way derogate from the environmental management inspectors' or SAPS' authority to investigate any transgressions in terms of Nema or any other environmental management Act or the NPA's authority to institute criminal prosecution.

[12] The first requirement to be met by an applicant claiming rescission of judgment is the demonstration of good cause. Applicant tried to comply with this requirement.[10] He *inter alia* states that he did not serve a notice of intention to oppose the action "simply because I am the victim of numerous schedule 1 Criminal Offences in terms of the Criminal Procedure Act 51 1977" read with NEMA. According to him the annexures attached to respondent's particulars of claim were disposed to at a privileged occasion as complaints were made with the South African Police and the Environmental Assessment Practitioner in order to protect his rights. According to him he had a legal expectation that the court "would take judicial notice of the scenario" and refuse to grant judgment against him. On his version it should have been clear that the respondent was before the court with "dirty hands." He reiterated further on that he did not oppose the matter as he made the statements in the discharge of a duty or the furtherance of an interest.

[10] Paragraph 6.4.1.1 p 25 – 27

[13] Although one may have sympathy with applicant's predicament as set out in his founding affidavit, the fact of the matter is that he decided not to oppose the action. At that stage he was already involved in litigation pertaining to the subject matter and represented by a legal representative. It is apparent from the return of service that the sheriff served the summons on him personally and explained the nature and exigency of the process. My initial view was that applicant's default was deliberate and wilful in so far as he had full knowledge of the circumstances and of the risks attendant on his default, but freely decided to refrain from taking action. When I reconsidered the matter, I concluded that such an approach was flawed for the reasons advanced in the next paragraphs.

[14] The applicant believed that the court would consider the context in which the averments were made, that they were made in circumstances that the defence of privilege could be relied upon and that the court would come to his assistance. If his belief was mistaken, but *bona fide*, I cannot find that he acted wilfully or grossly unreasonable. This is a borderline case.

[15] I accept that an applicant with a poor explanation for his default may still try to show that he has a *bona fide* defence. A good defence may compensate for a poor explanation.

[16] The second requirement can be dealt with swiftly. I am satisfied that the application is *bona fide*. The applicant acted immediately upon receipt of the writ of execution. There is no indication that a letter to demand payment preceded the writ.

[17] Finally, the third requirement must be considered. Defamation is defined as the wrongful and intentional publication of a defamatory statement concerning the plaintiff.[11] Could it be said that there was publication *in casu* to bring the matter within the ambit of the definition? The investigating officer in the criminal case and the examiner in respect of Nema received information which was never meant for publication to third parties. A police docket is not a public document open to the general public.

[11] Khumalo v Holomisa 2002 (5) SA 401 (CC) at para 17

[18] Everyone has the right, and often an obligation, to lay criminal charges in particular circumstances and/or to oppose applications that may have a negative impact on one's constitutional rights as enshrined in the Bill of Rights. I think of the right to human dignity[12] and the right to a safe environment.[13] The right to human dignity is regarded as a pre-eminent right and it is apparent that our democratic state is founded on *inter alia* the value of human dignity.[14] We must protect the environment by *inter alia* preventing pollution and ecological degradation. Witnesses must be free to depose to all relevant facts in their witness statements to enable the investigating officer to investigate a matter thoroughly. It would be a sad day if a *bona fide* complainant in a rape case is sued for defamation by the alleged rapist before (and even after) conclusion of the criminal case. If this is the law, few citizens will be brave enough to lay criminal charges.

[19] Even if I accept that publication occurred, several defences excluding wrongfulness may be available to the applicant as defendant in the main action. He has already alluded to qualified privilege. No doubt, a statement alleging a crime volunteered to SAPS, or an interested party such as an investigator investigating statutory offences such as mentioned in Nema, qualifies for protection in a defamation claim. Such reliance on qualified privilege is an acceptable defence. Obviously, the statement must be made either in the discharge of a duty, or in the furtherance of a legitimate interest.[15] The privilege will be forfeited if it is made with an improper motive.

[20] If the factual statements relied upon by applicant could be found at the trial to be the truth and in the public interest – even if every word is not the truth - applicant may well be in a position to show that he put up a defence sufficient to disprove defamation. The same applies to the defence of fair comment.

[21] The third requirement has been met. As indicated *supra*, the applicant must show that he has *a bona fide* defence to the plaintiff's claim and in this regard it is sufficient if a *prima facie* defence is made out, setting out averments

[12] Section 10 of the Constitution, 108 of 1996
[13] Section 24 of the Constitution
[14] Section 1 of the Constitution
[15] De Waal v Ziervogel 1938 AD 112 and Wille's Principles of South African Law9th ed at 1180 and further; Harms, Amler's Precedents of Pleadings 9th ed at 159

which, if established at the trial, would entitle the applicant to the relief asked for. I explained the legal position in the previous paragraphs. I am satisfied that the applicant has made out a *prima facie* defence.

[22] I need to say something in respect of a submission made by Mr Smit. He submitted that the payment of an administrative fine demonstrates that a criminal offence had been committed. He relied on the following version in the founding affidavit: "The administrative fines and conduct alluded to in annexure "D" page 3 demonstrates that a criminal offence had been committed in terms of section 49A of the NEMA. I have already demonstrated here above that there is an administrative leg in the NEMA and a criminal liability and that the administrative leg does not exonerate a person from criminal liability or criminal prosecution."[16]

[23] Mr Smit is not entirely correct in his approach to support his client's view in labelling respondent a criminal. The mere payment of an administrative fine does not make a person a criminal for purposes of Nema. The authorities may or may not decide to institute criminal prosecution once an administrative fine has been paid. If they decide against further action, no conviction in respect of any alleged crime can follow.

VI CONCLUSION

[24] Applicant is entitled to rescission of judgment. The three requirements have been met. The only further issue is the costs of the application. The general rule is that the person seeking and receiving an indulgence must pay the costs of the application, unless the opposition was unreasonable. Having considered the serious allegations made by applicant, I am of the view that the costs of the application shall be costs in the main action.

VII ORDERS

[25] The following orders are issued:

[16] See paragraph 6.4.2.11 p 31

1. The judgment of 20 August 2020 is rescinded.
2. Leave is granted to applicant to defend the main action, his plea to be filed within 20 (twenty) days from the date of this order.
3. The costs of the application shall be costs in the main action.

J P DAFFUE, J

On behalf of Applicant	:	Adv E Smit (Trust Account Advocate) Bloemfontein
On behalf of the Respondent:		Adv SJ Reinders
Instructed by	:	Rossouws Attorneys Bloemfontein