REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.
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DATE..... SIGNATURE:

Case No: HCA08/2015

In the matter between:

TSHIKUNDAMALEMA VHUTSHILO JANE **APPELLANT**

And

MUDAU KHAMUSI SYDNEY **RESPONDENT**

CORAM : JUDGE PRESIDENT E.M MAKGOBA, F.E MOKGOHLOA J

AND M MADIMA AJ

JUDGMENT

M MADIMA AJ

[1] The Appellant appeals against the Judgment of Tlhapi J, who dismissed the Appellant's application for rescission of a Judgment or order granted by Makhafola J in case number 405/2011, sitting in the High Court of South Africa, Limpopo Local Division, Thohoyandou on the 23rd day of September 2014. The Court *a quo refused* the Appellant's application for leave to appeal.

On petition to the Supreme Court of Appeal, Appellant was granted leave to appeal to the Full Court of this Division.

[2] The Appellant and respondent (hereinafter referred to as "the parties") were involved in a love relationship out of which two minor children, aged 7 and 4 years respectively, were born. The relationship was terminated in 2011.

[3] Prior to termination of the love relationship, the parties concluded a 'Partnership Agreement' (agreement) with the aim of acquiring and selling houses. That was done on the 02nd day of August 2006.

[4] The above agreement and an immovable property known as Erf 1358, situated at Bendor Extension 1 P, became the subject matters of a dispute in a civil matter instituted by the Respondent against the Appellant in the Local Division, Thohoyandou. In the aforesaid matter the Respondent prayed for, *inter alia*, dissolution of the partnership and sale of Erf 1…. in liquidation of the partnership.

The Appellant in her plea specifically traversed and denied the averments by Respondent and further averred, *inter alia*, that, in law, there never ever existed such a partnership and that, Erf 1358 is her own property, not forming part of the purported partnership.

[5] The above Erf 1….. is the property where the Appellant and the above minor children are staying.

The disputes, illustrated above had to be ventilated fully in court but for the default judgment granted on 23rd day of September 2014.

[6] According to papers filed of record, the appeal turns on Rule 42 (1) (b) and (c) of the Uniform Rules in that the Appellant stated that '…*a request to the Honourable Court is made on the basis of a patent error in the Court having*

granted the said order or …the Honourable Court granted the order as a result of a mistake common to the parties…' (*My underlining*)[1].

By all accounts, I do not find the Appellant's arguments constrained to above grounds of rescission to be sustainable. A proper reading of record reveals a host of glaring, disquieting and inherent irregularities and which, in my view, are deserving of this Court's intervention. The Appellant slightly touched on those irregularities. I shall deal with these irregularities at length later on.

[7] As arguments advanced further before us, we asked Counsel for the Respondent whether this Court can, in terms of Rule 42 (1) (a) and in light of the existing irregularities, *mero motu*, rescind the default judgment. The answer was in the affirmative.

[8] 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…'

[1] Page 7 at para 5.1

The phrase 'erroneously granted' was authoritatively discussed in **Nyingwa v Moolman N.O** [2] where the court said:

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

(See also **Naidoo v Matlala N.O and others)**[3]

[9] Thus it is apposite to specifically deal with the irregularities in order to establish whether they (irregularities) would have, if known by the Judge at the time of judgment, impeded the granting of such (default) judgment:

9.1. The Respondent's Attorneys (Mathivha Attorneys) went and obtained default judgment, forming the subject matter of this appeal on the 23rd day September 2014 without serving a notice of set down on the erstwhile Attorneys (Makwela & Mabotja Attorneys) of the Applicant. [4]

[2] 1993(2) SA 508 (TK) at 510g
[3] 2012 (4) SA 143 (GNP) at 153
[4] See Rule 41(4) provides that: 'Unless such proceedings have been withdrawn, any party to a settlement which has been reduced to writing and signed by the parties or their legal representatives but which has not been carried out, may apply for judgment in terms thereof on at least five days' notice to all interested parties.'

9.2. On the 23rd day of September 2014, Booyens Du Preez & Boshoff Inc (Respondent's erstwhile Attorneys), were still attorneys of record of the Respondent. The Respondent's erstwhile Attorneys only withdrew as Attorneys of record for the Respondent on the 26th day of September 2014.

It stands to reason that on the day of seeking and obtaining default judgment by the Respondent's Attorneys, as indicated in para 9.1 supra, the erstwhile Attorneys of the Respondent were still on record as his Attorneys.

It follows that only them (Respondent's erstwhile Attorneys) or any other legal representative acting on their brief had the right to appear and obtain default judgment for the Respondent.

I am alive to the averments by the Respondent, justifying his Attorneys actions but I find the explanation not to be persuasive. [5]

In civil proceedings, an Attorney only ceases to be a legal representative of a party upon filing of a written notice of withdrawal to all interested parties.

[5] At para 32 of answering affidavit Respondent said: "It is true that a formal notice of withdrawal by Booyens du preez and Boshoff Inc was served and filed on the 26th September 2011. However, as early as the early September 2011, the firm Booyens du preez and Boshoff Inc had indicated that they were no longer representing me.''

9.3. On the date of obtaining the default judgment, the Respondent's Attorneys served notice of appointment on the Respondent's erstwhile Attorneys. They, nevertheless, did not serve such a notice on the Appellant's erstwhile Attorneys.

9.4. On the 11th day of September 2014 the Respondent's Attorneys received instruction from the Respondent. On the 12th day of September 2014 the Respondent's Attorneys prepared a settlement agreement for the parties but in the absence of the Appellant and/or her erstwhile Attorneys.

At that stage, the parties had not jettisoned their legal representatives. However the Respondent was the only person who enjoyed the use of legal services. In my view the settlement negotiations were not done at arms length. The Respondent had an upper hand.

9.5. Between the period 12th day of September (date of preparing settlement agreement) and 23 September 2014 (date of obtaining judgment) there lapsed eight (8) days within which a reasonable person would have expected Respondent's Attorneys to draw the

attention of Appellant's erstwhile Attorneys to the settlement agreement before proceeding to have it made an order of Court.

[10] It is crystal clear that the above acts constituting irregularities occurred prior to the granting of default judgment. I am of the view that the above irregularities were not known by Makhafola J before he granted the default judgment.

I am also of the view that, but for lack of knowledge of the above irregularities, the Judge would not have granted default judgment.

Thus, I am persuaded that the judgment was erroneously granted.

[11] Once the court reaches a finding that the judgment or order was erroneously granted, it should proceed to rescind or vary the judgement without conducting further inquiry. *(**Tshabalala v Peer*** [6]*applied in **Topol and others v L S Group Management Services (Pty) Ltd**.* [7]

[12] The default judgment stands to be set aside and in view of the order I have proposed hereunder, the consequences of the default judgment, such as sale of Erf 1358 situated at Bendor extension 18 Polokwane in execution of judgment, have to be set aside too.

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[6] 1979 (4) SA 27 (T) at 30D
[7] 1988 (1) SA 639 (WLD) at 650 D-J

[13] In the result I propose the following order:

1. The appeal is upheld.

2. That the judgment of Tlhapi J in case no: 405/2011 is set aside and substituted with the following :

> "*The application for rescission of judgment or order by Makhafola J on 23 September 2014 is granted. The costs shall be costs in the cause."*

3. Each party shall pay his or her own costs of this appeal.

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M. MADIMA
ACTING JUDGE OF LIMPOPO DIVISION OF THE HIGH COURT

I agree and it is so ordered

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E.M MAKGOBA
JUDGE PRESIDENT OF LIMPOPO DIVISION OF THE HIGH COURT

I agree

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F.E MOKGOHLOA

JUDGE OF LIMPOPO

DIVISION OF THE HIGH

COURT

APPEARANCES:

For Appellant	**:**	**M.S SEBOLA**
Instructed by	**:**	**NCHUPETSANG ATTORNEYS**
For Respondent	**:**	**T.W.G. BESTER SC**
Instructed by	**:**	**MATHIVHA ATTORNEYS**
Hearing Date	**:**	**27 MAY 2016**
Judgment Date	**:**	**10 JUNE 2016**