**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**(MPUMALANGA DIVISION, MBOMBELA)**

(1) REPORTABLE:NO
(2) OF INTEREST TO OTHER JUDGES:YES
(3) REVISED: YES

08/08/2023

[redacted]

**CASE NO: 2702/2021**

In the matter between:

**FLORENCE RASAKANYA** Applicant

and

**PRINCESS ZANDILE MBUYANE** First Respondent

**MINISTER OF HOME AFFAIRS** Second Respondent

*This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 08 August 2023 at 10:00.*

**J U D G M E N T**

**MASHILE J:**

**INTRODUCTION**

[1] On 7 December 2021, this Court per Mashile J refused to grant an order declaring the First Respondent to have been legally married to Freddy Ngwako Motume ("the deceased") by customary law. The Court directed the First Respondent to present affidavits of emissaries from both families who were present at the time when 'lobola' negotiations took place. On 21 December 2021 and ostensibly following compliance with the order of this Court dated 7 December 2021, Roelofse AJ granted an order declaring the customary marriage to be legal and directed the Department of Home Affairs to register it.

[2] This application is aimed at rescinding the order of Roelofse AJ dated 21 December 2021 and it is brought in terms of Rule 42(1) alternatively, Rule 31(2)(b) of the Uniform Rules of Court ("Rules") and/or the common law. Following directly from the prayer for the rescission of the order as described above, the Applicant seeks an order for deregistration of the purported marriage between the First Respondent and the deceased and cancellation of the marriage certificate by the Department of Home Affairs pending the outcome of the referral of this matter for oral evidence. During the hearing of this matter, I was advised that the Applicant was no longer persisting with its relief that the customary marriage existing between the First Respondent and the deceased be declared legally invalid.

**FACTUAL MATRIX**

[3] The factual background is succinctly captured in the heads of argument of the Applicant. To avoid reinventing the wheel and since it is not contested in large part, I will proceed to borrow extensively therefrom. On 5 may 2020 when the deceased died, he was survived by six of his sisters among which is the Applicant. In terms of Clause 3 of his will executed on 2 February 2017, he nominated his sisters and children as beneficiaries of his late estate.

[4] Subsequent to his burial, in June 2020 the Applicant visited the office of the Master of the High Court in Mahikeng ("the Master") to enquire whether one of her family members had, in line with a resolution adopted by the family, opened an estate late file. She was staggered when informed that the First Respondent had, after identifying herself as the wife of the deceased, opened a late estate file. The Applicant was further advised that the Master refused to issue letters of executorship to the First Respondent in the absence of a marriage certificate. During July 2020, a meeting was held in the presence of the First Respondent at the office of Jague Venter Attorneys for the reading of the deceased's last will and testament.

[5] In February 2021, the Applicant was informed by her siblings during a conference call that the First Respondent sought a Court order declaring her to be the lawful wife of the deceased, which order was subsequently granted. The Applicant then approached master of the High Court at Mafikeng and received confirmation that the office of the Master had issued letters of executorship to the First Respondent. The Applicant subsequently, through her attorneys of record, obtained all the papers filed in support of the First Respondents' application seeking to be declared the lawful wife of the deceased.

[6] It is common cause that in her application mentioned above, the First Respondent neither joined the Applicant nor any of the beneficiaries of the estate late of the deceased. This is notwithstanding her knowledge that when she launched her application on 22 September 2020, she was mindful of the existence of the last will and testament of the deceased because she was at the reading of the will in July 2020. Moreover, the First

Respondent was aware of the identity of the deceased's six sisters as well as their respective places of residence before the order was granted on 21 December 2020.

[7] The Applicant alleges that the First Respondent's full knowledge of the existence of the last will and testament of the deceased aside, she failed to alert the Court in her founding affidavit of the existence of beneficiaries of the estate late of the deceased. In fact, at Paragraph 7.9 of her founding affidavit to which she deposed on 11 September 2020, she expressly and unambiguously advises the Court to the contrary - the deceased died without leaving a valid will and testament known to her. As such, she concluded**,** that it was for that reason that until then no executor or executrix had been appointed to administer his estate.

**ASSERTIONS**

[8] The Applicant contended that the Court order of 21 December 2020 was erroneously granted insofar as the Court would not have granted it had it been appraised of all the facts surrounding the matter. Such information, argued the Applicant, pertains to the First Respondent stating under oath that the deceased died intestate when in fact she knew that the opposite was true. The Court would have insisted in the joinder of the beneficiaries because they had a substantial and direct interest in who would be appointed as executor or executrix. The failure to join the beneficiaries would have rendered the application fatal.

[9] To the extent that the First Respondent deliberately misled the Court by informing it that the deceased died without leaving a valid will and therefore intestate, the order of the 21st of December 2021 was fraudulently obtained. The First Respondent intentionally furnished the Court with incorrect information. The information benefitted her as she obtained an order declaring the customary marriage between the deceased and her valid. The Court acted thereupon to the detriment of the Applicants and her siblings who are beneficiaries under the will. The order stands to be rescinded as such.

[10] The First Respondent denies that she was under any obligation to join the beneficiaries as they lack direct and substantial interest in the matter. Their Interest extend to no more than being family of the deceased and the fact that they were also beneficiaries of the deceased's estate is besides the point. In any event, she added, she was married to the deceased and not his family.

[11] In the second place, the First Respondent argues that since the Applicant is not pursuing the prayer declaring her not to have been legally married to the deceased, it is paradoxical and nonsensical to remain persistent with a prayer seeking the Second Respondent to cancel the marriage certificate *pendente lite*. In short, if the First Respondent was not legally married the existence of the marriage certificate is futile because it cannot be evidence of a marriage that does not legally exist. Lastly, the First Respondent contends that her case in the original application has always been that the deceased did not leave a valid will and not that there was no will at all.

**ISSUES**

[12] From the above this Court must determine whether or not:

12.1 the Court would have granted the order of 2 December 2023 had it been mindful of the existence and provisions of the will of the deceased;

12.2 the order of 21 December 2021 was fraudulently obtained;

12.3 The surviving siblings of the deceased have any substantial interest in the deceased's late estate;

12.4 The fact that the Applicant is not persisting in an order declaring the customary marriage between the First Respondent and the deceased illegal renders the relief sought, rescission of judgment, in vain.

**LEGAL FRAMEWORK**

[13] To the extent that one of the grounds upon which the Applicant seeks rescission of the judgment is in terms of Rule 42(1)(a) of the Uniform Rules of Court, it is necessary to reproduce it. The Rule provides that*: "the Court may, in addition to any other powers it may have, mero motu or upon application of any party affected, rescind or vary, an order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby". The jurisdictional factors that ought to be present before the Rule can find application therefore are, (a) the judgement must have been erroneously sought or granted; (b) the judgement must have been granted in the absence of the applicants; and (c) the applicant's rights or interests must be affected by the judgement."*

[14] Another ground upon which the Applicant alleges that the customary marriage stands to be rescinded is the common law. To succeed with rescission of judgment at common law the existence of sufficient cause must first be demonstrated. This must be achieved by showing, (a) reasonable explanation for the default; (b) that the application was made *bona fide*; and (c) the existence of a *bona fide* defense, which *prima facie* has some prospect of success[1].

[15] Other factors which a Court may take into account are whether or not:

15.1 It was, intentional or negligent or blameless;

15.2 the application was made bona fide; and

15.3 The granting of the rescission will result in prejudice to the Respondent.[2]

[16] For an application to succeed on the ground that a judgment be rescinded because of fraud, the following must be alleged and proved:

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[1] De Wet v Western Bank Ltd 1979 (2) SA 1-31 (A) at 1042
[2] Scholtz and Another v Merryweather and Others 2014 (6) SA 90 WWC

16.1 The successful litigant was a party to the fraud;[3]

16.2 The evidence was in fact incorrect;

16.3 It was made fraudulently and with intent to mislead;[4]

16.4 It diverged to such an extent from the true facts that the court would, if the true facts had been placed before it, have given a judgment other than that which it was induced by the incorrect evidence to give[5]; and

16.5 Save for the fraud, the Court would not have granted the judgment.

**ANALYSIS**

Would the Court have granted the order of 2 December 2021 had it been mindful of the existence and provisions of the will of the deceased

[17] Three issues arise under this subject and those are firstly, whether or not the judgment was granted in the absence of people who had direct and substantial interest in the matter, secondly, in their absence and thirdly, they are affected by the outcome. It is unquestionable that the Applicants and her sisters are people who have substantial and direct interest in the matter because they stand to benefit financially under the will of the deceased. As such, they were supposed to have been joined. The First Respondent knew that the Court would be unlikely to declare her legally married to the deceased customarily without the question of inheritance having been resolved with the siblings of the deceased.

[3] Freedom Stationery (Pty) Ltd Freedom Stationery (Pty) Ltd v Hassam 2019 (4) SA 459 (SCA)
[4] Fraai Uitzicht 1798 Farm (Pty) Ltd v McCullough 2020) at para 16
[5] *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 166I

[18] The contention that the First Respondent did not mention the names of the deceased's surviving siblings who also happened to be the heiresses under the will as being irrelevant and without direct and substantial interest must be rejected as disingenuous. Assuming that the customary marriage was legally incontestable, advising the Court that the deceased had a will and that such will mentions other heirs or heiresses, she would stand to inherit part of the deceased's late estate instead of all of it. Had the Court been aware of this, it would have insisted on the joinder of all the other heirs and/or heiresses and in all probabilities would not have granted the order of 21 December 2023. This is the error referred to in Rule 42(1)(a).

[19] Regarding the absence of the siblings in Court at the time when the order was granted, it is clear that the First Respondent deliberately omitted to mention the siblings of the deceased so that the Court could labour under the impression that she was the only person who stood to inherit under the will. It is remarkable that at the time the matter came before Court, she already knew that the siblings were heiresses under the will and yet she told the Court that she was not aware of a valid will and testament left by the deceased. This is dishonest because she was at the reading of the will in July 2020. While she refers to her lack of knowledge of the existence of a 'valid will', it is important to point out that she never raised any concerns about invalidity of the will at any juncture.

[20] To conclude on the Rule 42(1(a), I am satisfied that all the requirements of the Rule have been met. The order was granted in error and in the absence of the Applicant and her sisters. All of them have been affected because of their direct and substantial interest in the matter. The Court would not therefore have granted the order had it been appraised of all the facts that pertained at the time. It is appropriate at this stage to determine whether the Applicant would be entitled to a rescission at common law.

**WHETHER OR NOT FRAUDE INDUCED THE GRANTING OF THE ORDER OF 21 DECEMBER 2021**

[21] Insofar as the establishment of sufficient cause is concerned at common law, I accept as reasonable explanation for the default that the First Respondent deliberately concealed the fact that she was in the process of applying to Court to have her customary marriage with the deceased declared legal. As such, the Court could not have raised the issue of joinder of the Applicant and her siblings as it was ignorant that they stood to benefit under the will. I also agree that there was no manner of the Applicant knowing until the order of 21 December 2021 was exposed. This application is in good faith because all that the Applicant and her siblings are doing is to vindicate their right to benefit under the will of the deceased. Lastly, the Applicant would no doubt have a *bona fide* defense, which on the face of it, would have some prospect of success. It is undeniable that the Applicant and her siblings as heiresses under the will of the deceased have a direct and substantial interest, which would have required them to be joined to any application that would affect their financial interest.

[22] I am in agreement with the Applicant that any prejudice to be suffered by the First Respondent should be perceived to have been self-inflicted. She has intentionally placed false evidence before the Court to the detriment of the Applicant and her siblings. The prejudice to the Applicant and her siblings far outweigh any that may be suffered by her if the order sought is not granted. The First Respondent made her bed and must lie on it.

[23] The First Respondent, with intention to mislead the Court, gave evidence that the deceased left no valid will and testament known to her. This evidence was notwithstanding that two months earlier she had deposed to the affidavit, which ultimately lead to the Court order of 21 December 2020. Moreover and strangely, she admitted having been at the reading of the deceased's last will and testament. She therefore knew that the evidence that she gave was indubitably misleading and incorrect but she went ahead and levied it anyway.

[24] The intention of the First Respondent is unmistakable – Her objective was to mislead and induce the Court to provide her with the relief that she was seeking. I have already stated above that had the First Respondent made a full disclosure, the Court would not have granted the relief without the Applicant and her siblings as beneficiaries in the deceased's late estate having been joined. I am indebted to Counsel for the Applicant's reference to the case of *Kusaga Taka Consulting (Pty) Ltd v Minister of Environmental Affairs*[6], Where the Court held, with regard to disclosures of this nature, that:

> *"The applicant must thus be scrupulously fair in presenting her own case. She must also speak for the absent party by disclosing all relevant facts she knows or reasonably expects the absent party would want placed before the court. The applicant must disclose and deal fairly with any defences of which she is aware or which she may reasonably anticipate. She must disclose all relevant adverse material that the absent respondent might have put up in opposition to the order. She must also exercise due care and make such enquiries and conduct such investigations as are reasonable in the circumstances before seeking ex parte relief. She may not refrain from disclosing matter asserted by the absent party because she believes it to be untrue. And even where the ex parte applicant has endeavoured in good faith to discharge her duty, she will be held to have fallen short if the court finds that matter she regarded as irrelevant was sufficiently material to require disclosure. The test is objective"*

[25] Fraud featured prominently in this matter. The legal position insofar as a transaction tainted by fraud is concerned is that it 'unravels everything.' In this regard, it may be useful to refer to English law and how it has since become infused into our legal system. Beginning with the case of Lazarus *Estates Ltd v Beasley* [7]where Lord Denning had to answer the question whether or not a declaration could be challenged on the ground that it was false and fraudulent. Rejecting the approach that it could not be challenged in the civil Courts at all, even though it was false and fraudulent, and that the

[6] 2019 (3) (SCA) at Paragraphs 45 – 52
[7] [1956] 1 All ER 341

landlords can recover and keep the increased rent even though it was obtained by fraud, he stated the following:

> *"If this argument is correct, the landlords would profit greatly from their fraud. The increase in rent would pay the fine many times over. I cannot accede to this argument for a moment. No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever;"*

[26] Recently, the above passage was quoted with approval in the case of *Esorfranki Pipelines (Pty) Ltd and another v Mopani District Municipality and others*[8]. In another English case, *United City Merchants (Investments) Ltd and others v Royal Bank of Canada and others* [9]Lord Diplock stated that: "'fraud unravels all'. The Courts will not allow their process to be used by a dishonest person to carry out a fraud." Both the Lord Denning judgment and Lord Diplock passages have been referred to and relied upon by South African courts in numerous cases. See in this regard, *Firstrand Bank Ltd t/a Rand Merchant Bank and another v Master of the High Court, Cape Town and others*[10].

[27] If fraud unravels all and that Courts will not allow their process to be used by dishonest persons to carry out fraud, it follows that the fraud perpetrated by the First Respondent cannot be countenanced to benefit her. Her failure to disclose information that could have lead to the joinder of the Applicant and her siblings is adequate for this application to succeed.

**THE FACT THAT THE APPLICANT IS NOT PERSISTING IN AN ORDER DECLARING THE CUSTOMARY MARRIAGE BETWEEN THE FIRST RESPONDENT AND THE**

[8] [2014] 2 All SA 493 (SCA), Paragraph 25
[9] [1982] 2 All ER 720
[10] [2014] 1 All SA 489 (WCC)

**DECEASED ILLEGAL RENDERS THE RELIEF SOUGHT, RECISSION OF JUDGMENT, NUGATORY AND IN VAIN.**

[28] The First Respondent asserted that once the Applicant stops persisting in a declarator to legalize the customary marriage, the rescission becomes moot. I cannot agree with this argument. The abandonment of the declarator has no impact on the prayer for the rescission of the judgment. The declarator was in fact superfluous because the rescission, if granted, will render it futile anyway. I do not see any need to delve into this argument more than I already have.

[29] In the circumstances, I am satisfied that the Applicant has made a case for the rescission of the judgment and order of the 21st of December 2021. In view of the rescission of the 21st of December 2021 order, there is no need for this Court to specifically refer this matter for oral evidence but this does not stop the First Respondent to approach Court to declare the customary marriage legally valid.

[30] In the result, I make the following order:

1. The judgment and order of this Court dated 21 December 2021 is set aside and rescinded;

2. The First Respondent is directed to pay the costs of the Applicant.

**B A MASHILE**
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**
**MPUMALANGA DIVISION, MBOMBELA**

**APPEARANCES:**

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|---|---|
| **Counsel for the Applicant:** | **Adv B Ramela** |
| **Instructed by:** | **Mahowa Inc**<br>**C/O Christo Smith Attorneys Inc** |
| **Counsel for the Respondent:** | **Mr J De Beer** |
| **Instructed by:** | **Nkosi Attorneys & Associates** |
| **Date of Judgment:** | **08 August 2023** |