IN THE HIGH COURT OF SWAZILAND

Held at Mbabane Case No.810/15

In the matter between:

THE ANTI-CORRUPTION COMMISSION Applicant

And

CHIEF JUSTICE MICHAEL M. RAMODIBEDI 1st Respondent

MPENDULO SIMEON SIMELANE 2nd Respondent

In Re:

MICHAEL MATHEALIRA RAMODIBEDI 1stApplicant

MPENDULO S. SIMELANE 2nd Applicant

And

EXPARTE COMMISSIONER OF ANTI-CORRUPTION

COMMISSION 1st Respondent

SIBUSISO MNDZEBELE 2nd Respondent

Neutral citation: *The Anti-Corruption Commission Vs Chief Justice Michael M. Ramodibedi and Mpendulo Simelane In Re: Michael Mathealira Ramodibedi and Mpendulo S. Simelane Vs Exparte Commissioner of Anti-Corruption Commission and Sibusiso Mndzebele (810/2015) [2015] SZHC 111(24th June 2015)*

Coram:	Hlophe J
For the Applicants:	Mr. T. Dlamini
For the Respondents:	Mr. D. Nsebenza S. C. with Miss Gqomfa instructed by Mr. S. S. Mnisi
Date Heard:	17th June 2015
Date Delivered:	24th June 2015

Summary

Application proceedings – Rescission of Judgment - Rule 42 (1) (a) of the High Court Rules the basis of the application – Requirements for the concerned relief – Court entitled to rescind a judgment erroneously sought and/or granted – When judgment erroneously granted – Judgment erroneously granted where it was irregularly granted or where it was legally incompetent to grant same and if at the time of its issue or grant there was in existence an issue of which the court was unaware of, which would have prevented the grant of the order if the court was aware of at the time – Whether the said requirements met in the present matter – Court of the view that the grant of the impugned order was erroneously – Application succeeds with each party bearing its own costs.

JUDGMENT

[1] It is common cause between the parties that on the 17th April 2015 there issued a warrant of arrest against the then Chief Justice of Swaziland and Judge Mpendulo Simelane, it being contended therein that they had committed certain offences. The warrant of arrest in question was issued by the court per the Principal Judge, Justice S. B. Maphalala, following an urgent exparte application instituted by the Anti-Corruption Commission

[2] It is also not in dispute that the learned Judge issued the warrant in question as a sequel to an application brought exparte by the Anti-Corruption Commission which contended that the then Chief justice of Swaziland, acting in cahoots with the second Respondent herein, Judge Mpendulo Simelane, had committed the alleged offences.

[3] Although not common cause between the parties, it is contended by or on behalf of the Applicant that the application resulting in the grant of the warrant of arrest concerned against the Respondent was allocated to the Principal Judge by the Registrar of the High Court, Miss Fikile Nhlabatsi. I say this is in not common cause, because despite the Applicant and the

said Miss Nhlabatsi confirming the foregoing facts, the first Respondent herein maintained in his opposing papers that the principal Judge had not been allocated the matter resulting in the warrant of arrest being issued against him, in terms of Rule 55.

[4] The facts of the matter also revealed that upon learning that a warrant of arrest had issued against him, the former Chief Justice refused to hand himself over to the Police and instead chose to lock himself in his house at his place of residence. It was during this time that he was allegedly joined by Judge Annandale, Judge Simelane and the Registrar of this court, Miss Nhlabatsi where the first Respondent is alleged to have moved an application for an order setting aside the warrant of his arrest. This application was granted by Judge Annandale with the result that the warrant of arrest issued by the Principal Judge was nullified and or set aside.

[5] It is not in dispute that when the warrant was set aside, the other side had neither been alerted of the said proceedings nor were they served with any court papers. Clearly this application had been dealt with exparte, without the Anti-Corruption Commission, in whose favour the warrant sought to be set aside in terms of the said proceedings, had issued.

[6] The process of setting aside the warrant of arrest in the circumstances set out herein above, resulted in all the roll players in the aforesaid proceedings being arrested and charged with certain offences said to be emanating from the setting aside of the said warrant.

[7] It would appear that there were different interpretations of what the meaning of the setting aside or nullification of the warrant of arrest was, with the Applicant apparently seeing it as a non-event while the Respondent saw it as having meant that the warrant of arrest was no longer in place and had been rendered a nullity. It would however seem that the first Respondent was himself doubtful of this when considering that he, after several developments had occurred, including the establishment of an inquiry to enquire into his propriety to remain in office, instituted application proceedings to this court, seeking an order inter alia setting aside the warrant of his arrest, which would be abnormal if the first Respondent had not been in doubt if the setting aside of the warrant of arrest in question had had any effect.

[8] This application was dealt with by Judge Mamba, who dismissed it upon noting that it was, in the then Applicant's own words, been legally set aside by the order granted by Judge Annandale. It was after this judgment by Judge Mamba that the current Applicant instituted these

proceedings seeking inter alia an order of this court rescinding the order by Judge Annandale referred to above which had sought to set aside the warrant of arrest against the Respondent as issued by the Principal Judge. This application was instituted on the 10th June 2015 and had been served on the Respondents on the same day.

[9] In the founding affidavit supporting the application, the basis of the proceedings is apparently that now that the High Court has found that the warrant of arrest in question had already been set aside by Judge Annandale, it then meant that the Applicant, who is apparently intent on executing the warrant of arrest against the first Respondent, could not do so because there was no warrant to execute.

[10] Contending that the setting aside of the warrant of arrest by Judge Annandale was erroneous in so far as it was done in the house of the Chief Justice who by virtue of the charges preferred against him was a suspect or an accused person and the setting aside of the said warrant was dealt with in the absence of the other interested parties against whom, no attempt whatsoever had been made to notify, the Applicant contended that the order setting aside or nullifying the warrant of arrest had to be rescinded and or set aside. The error allegedly committed by this court

per Annandale J when he set aside or nullified the warrant of arrest was said to be contrary to Rule 42 (1) (a) of the Rules of this court.

[11] As this application was instituted as one of urgency, the ground for the alleged urgency was captured as follows in the founding affidavit:-

> *"This matter is urgent in that the 1st Respondent is currently a fugitive of the law and has resisted arrest by the police and the Anti-Corruption Commission's investigators for almost two months now. 1st Respondent had under oath in his Founding Affidavit under High Court Case No. 181/2015 stated categorically that he has been resisting arrest on the strength of the Court order granted by the Honourable Justice Annandale that purportedly set aside the Warrants of Apprehension that had been issued by the Honorable S. B. Maphalala PJ on the 17th of April 2015 and against the 1st and 2nd Respondents.*
>
> *The Applicant herein insists that the Honourable Justice Annandale had no jurisdiction to review and/or set aside the said warrants against the respondents and therefore the order by Justice S. B. Maphalala PJ still subsist. Applicant herein further insists that Justice Annandale erroneously granted the order he did in the absence of the Applicant herein.*

The confusion by the order sought to be rescinded is impacting negatively on the day to day running of the Criminal Justice system. Further to that, Applicant is desirous of proceeding with the arrest of the first Respondent herein sought and the likelihood of the latter absconding cannot be ruled out in the circumstances. Matters pertaining to Warrants of Apprehension are invariably urgent in nature".

[12] The application is opposed by the first Respondent who filed an Answering Affidavit. In his Answering Affidavit the Applicant raised points in limine before seeking to deal with the merits. The points raised by the first Respondent include those on urgency, an alleged failure to comply with rule 42 of the High Court Rules and jurisdiction. In the merits it was contended that the allegations relied upon by the Applicant cannot in law found an application of this nature. It was contended that the Applicant sought to suggest that the error relied upon was in terms of Rule 42 (1) (a), which was allegedly a contention that the Learned Judge who set aside the Warrant of Execution, had committed an error. It was contended that the conduct of a Judicial officer has no bearing in a rescission application.

[13] As regards the issue of urgency, it was contended that the Applicant had failed to make out a case as contemplated by Rule 6 (25) of the Rules of

this Honourable Court. It was contended in this regard that the warrant in question had, in Applicant's own words, been set aside on the 18th April 2015 yet the application challenging this decision was only moved on the 10th of June 2015, a delay of more than a month and some weeks. It was contended further that the delay in question was unreasonable and unexplained. The urgency was, in the circumstances, allegedly self-created.

[14] On the point of an alleged failure to comply with rule 42, it was contended by the Respondents that there was no error because the order granted by Justice Annandale, so as to result in the setting aside of the warrant was issued after the court had carefully considered the applicable rule. It was contended therefore that the order setting aside the warrant of arrest was therefore good and was valid in law such that it could only be interfered with on appeal or by an appellate court's order.

[15] On jurisdiction it was contended that the Applicant was effectively seeking an order reviewing the decision of a court of equal rank which it legally could not do. It was alleged further that one of the grounds relied upon by the Applicant was of a constitutional nature, namely that the warrant of arrest issued by the Principal Judge could not stand because it was issued against sitting judges yet constitutionally that was wrong

because according to Section 141 (1) a Judicial Officer, particularly the Chief Justice had to be impeached first before he could be arrested because doing it otherwise meant that he was being placed under the direction of the police which was prohibited by the section concerned.

[16] The warrant, it was argued could also not stand because, when he issued it for the Respondent's arrest, the principal judge had not been allocated the matter concerned by the Registrar of the high Court in consultation with the chief justice. That the principal judge had not been so authorized to hear and determine the matter therefore and that the warrant had to be set aside for that reason.

[17] In his Replying Affidavit, and in response to the point on urgency taken by the Respondents, the applicant stated that the urgency of the matter was based on the fact that this court, per Judge Mamba had clarified that the Warrant of Arrest had been set aside by Annandale J. In this regard the following excerpt was quoted from Judge Mamba's ruling or judgment:-

> *"Whether or not Justice Annandale had jurisdiction to hear the matter or issue the order he issued is another matter*

entirely different and has not been determined by a court of competent jurisdiction".

By this extract the Applicant sought to show that he had not delayed in bringing about the matter but had done so soon after Judge Mamba's decision on the fate of the warrant of execution.

[18] The question on when a matter can be said to be urgent so as to allow it to be heard as such has been a subject of numerous judgments of this court, the Supreme Court and even of courts of other jurisdictions considered to be of strong persuasive value by this one.

[19] These judgments have made it clear that urgency is not a given, but it has to be pleaded in the Applicant's papers with specific allegations being made. According to Rule 6 (25) (b), a party seeking to institute urgent proceedings should, in his Founding Affidavit, "set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course"

[20] It is also a long standing practice in this jurisdiction that in application proceedings a party stands or falls by his founding papers. This rule of

practice is also supported in the excerpt from rule 6 (25) (b) referred to above in that the circumstances ought to be explicitly set out on why the matter is urgent which ought to be found in the affidavit supporting the application.

[21] I have quoted in extenso herein above what it is that was pleaded by the Applicant in his Founding Affidavit on why he contended the matter was urgent. The excerpt referred to hereinabove mainly seeks to justify why the warrant should be executed, why it should be resuscitated or revived, why it could not be executed before its being set aside and that the Applicant needed to execute same by arresting the Respondent. These in my view are not the circumstances contemplated in terms of Rule 6 (25) (b) which need to be set out explicitly because those circumstances are the ones that should explain why the matter is urgent, and not a justification on why the warrant was still not executed.

[22] A point pleaded by the Applicant which comes closer to meeting the requirements set out in terms of the said rule is the allegation to the effect that “matters pertaining to warrants of apprehension are always invariably urgent in nature”. It however also does not comply with the second part of rule 6 (25) (b) as it is not accompanied by the reasons why the Applicant felt he could not be afforded substantial redress in due course.

The foregoing position is supported by such judgments of this court as ***Humphrey Henwood v Maloma Colliery High Court Civil Case No. 1623/94*** and that of ***Plastic International Ltd t/a Swazi Plastic Industries and Marcus Zbinden and Others Civil Case No. 4364/2001.***

[23] There is no dispute that when the matter was eventually heard before this court all the papers that needed to be filed had been so filed. Whereas in his Answering Affidavit the Applicant indicated it had not been able to say all it wanted to say, it cannot be disputed that there was no interim order issued and that on its first mention in court, the matter was postponed by consent to enable the parties file all the papers they felt they needed to file. It is a fact that Applicant's Attorney had initially indicated a desire to file a supplementary affidavit before the Respondent could file a Replying Affidavit. He was however to later change his mind and said he no longer needed to do so but was going to await the filing of the Replying Affidavit by the Applicant. Except for pleading the extract referred to above on what Judge Mamba had said in his judgment with regards Judge Annandale's order setting aside the warrant of arrest aforesaid, there was no request by the Respondent, at least in the interests of Justice, being afforded an opportunity to file a Supplementary Affidavit.

[24] I have already alluded to the fate of the said excerpt when I referred to the principle or rule of practice that all the allegations a party seeks to rely upon ought to be contained in the founding Affidavit and that since that is not the case with regards the concerned excerpt, it cannot at this stage be used to found urgency.

[25] The hearing or otherwise of a matter on the basis of urgency is a discretionary issue which I am however alive to the fact that it ought to be exercised judiciously. All papers that needed to be filed had already been filed as at the time the matter was heard in court such that there is no prejudice suffered by any of the parties. In any event the merits of the matter seem to me to be merely a legal one namely whether there is in law, a basis for the rescission sought in terms of Rules 42 (1) (a) of the High Court Rules.

[26] On the exercise of this court's discretion in favour of hearing a matter as an urgent one where all pleadings had already been filed, despite that urgency as pleaded had not met all the strictures of the governing rule, the position of our law has now crystalized and is now covered in numerous judgments of this court and the Supreme Court.

[27] It follows therefore that since there is no prejudice shown as having been suffered by the Applicant despite a failure to perfectly comply with all the strictures of Rule 6 (25) (b), with all the papers that could be filed having been so filed and the point on which the matter really turns, being a legal one which has been well canvassed on the papers before court, I am convinced that the Applicant's shortcomings on urgency ought not signal the end of the matter. Consequently this court does not dismiss the application but allows the merits of it to be argued in exercise of its discretion as supported by the foregoing reasons.

[28] I must say that when I look closely at the matter and the points raised, a legal point in limine of substance was in reality that of urgency which has just been disposed off. The one relating to jurisdiction is in my view brief and would have to be disposed off through an acknowledgment that the order sought herein is a rescission of an order or judgement of this court and it certainly not a review by the same court of its earlier judgment. Such a relief is no doubt conceivable and is competent in terms of the rules of this court. The question is only whether the requirements of that rule are met which is in my view not a point in limine but one that goes to the core of the application given Applicant's confirmation that the ground for rescission he sought to rely upon was

Rule 42 (1) (a); the court having allegedly committed an error when it set aside the warrant of arrest.

[29] It was further suggested by the Respondent in his papers that the matter is a constitutional one being whether a sitting Chief Justice can be arrested without first having been impeached and that arresting him without having done so was a violation of Section 141 (1) of the Constitution of Swaziland. This issue in my view goes to the question of whether the warrant in question is valid or not and not whether the decision purporting to set same aside can be rescinded on the grounds of error. It is not necessary for me in proceedings of this nature to decide on the validity or otherwise of the warrant of arrest. It is only the court that would determine the question of the validity of the warrant that would have to grapple with the alleged violation of the concerned section of the Constitution. Whatever views I may have at this point do not count as that question is irrelevant before me for purposes of this matter.

[30] An order or judgment of the High Court sought or granted in error can be rescinded by this court in terms of rule 42 (1) (a). This is provided for in the rule itself, which is couched in the following terms:-

> *"42 (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 granted in the absence of any party affected thereby".*

[31] It is common cause that the Applicant was not present when the order setting aside the warrant of his arrest was made or granted. In fact the Applicant had not been served at all. The only issue to grapple with is whether the exercise of that power by the court (in setting aside the warrant of arrest) was erroneous. According to a commentary by H. J. Erasmus in his book, **Superior Court Practice, 1996 Edition, Juta and Company** at page B1-308, an order or judgment;

> *"…is erroneously granted if there was an irregularity in the proceedings or if it was not legally competent for the court to have made such an order, or if there existed at the time of its issue a fact of which the Judge was unaware, 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".*

[32] It seems to me that the manner in which the warrant of arrest was set aside was irregular. The application resulting in its being set aside was heard in the absence of the Applicant as an interested party; in circumstances where it had neither been served with same nor notified of the proceedings. It complicates the situation further for the Respondents herein that the hearing itself was heard in the house of the Chief Justice against whom the warrant had issued and who was therefore an accused person as at that stage. The learned Judge who made the order setting aside the warrant did himself acknowledge that an error had been committed when dealing with the matter in the manner he did. He said in a statement attributed to him and annexed to the papers, of which no issue was made, that with the benefit of hindsight, he noted that he should not have dealt with the matter in the manner he did. He was in my view correct in saying that he should at least have issued a rule nisi calling upon the other side to show cause on a later date why the warrant should not be set aside, which no doubt would have taken care of the interests of the other side.

[33] That an order granted in the absence of a party and attended by an irregularity is an error in itself has been a subject of several judgments of this court and the South African Courts which are persuasive. These include such judgments as ***Allen Mango vs Edward Alexander Hamilton***

High Court Civil Case No. 1784/2004 and that of **The President of the Republic of South Africa vs Eusenberg & Associates** ***2005 (1) SA 247 at 264***

[34] The position of our law is now settled that in matters of rescission of judgments or orders under Rule 42 (1) (a) once the court finds that there was an error in the grant of the judgment or order concerned it should without further enquiry rescind or vary the order and it is not necessary for a party to show good cause. See in this regard the commentary by H. J. Erasmus, **The Superior Court Practice (Ibid)**

-

[35] I am convinced that on the basis of the foregoing paragraphs the order setting aside the warrant of arrest cannot stand. I therefore do not find it necessary to decide the question whether or not the setting aside of the warrant of arrest was legally competent. What cannot be disputed is that the matter was dealt with irregularly and therefore erroneously which in law founds a rescission.

[36] In the circumstances I cannot help but grant an order rescinding the order setting aside the warrant of arrest. Should the Respondents see the need to pursue their application to try and set aside the warrant of arrest, the latter would have to serve proper court papers on all the interested parties,

provided it is still opened to them in law and in the rules of this court, to do so.

[37] Consequently, the Applicant's application succeeds with the result that the order setting aside the warrant of arrest is hereby rescinded. In view of my findings with regards the manner in which the issue of urgency was pleaded in this matter, I am of the view that it would be fair that each party bears its own costs as that issue alone could have prompted the opposition of this application.

N. J. HLOPHE
JUDGE - HIGH COURT