



Reportable:	<u>YES</u> / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION: MAHIKENG**

CIV NO: CIV APP/RC07/18

In the matter between:

PAULINE MASIBE MSAKO

Appellant

and

MOLEFE STEPHENS MSAKO

1ST Respondent

ELSEPH NOMAHLUBI BELINDA KHWINANA

2nd Respondent

In re:

CASE NO: NW/ODO/RC256/16

MOLEFE STEPHENS MSAKO

Applicant

and

PAULINE STEPHENS MSAKO

Respondent

CIVIL APPEAL

DJAJE J & NOBANDA AJ

JUDGMENT

NOBANDA AJ

Introduction

- [1] The appellant brought an application for the rescission of judgment granted by default on 3 October 2018 in the Magistrate Court in terms of Rule 49(1) of the Magistrates' Court Rules.
- [2] The respondent raised a point in *limine* that the deponent to the founding affidavit, who was the appellant's attorney, did not have *locus standi* to bring the application as the attorney was not affected by the judgment nor had a substantial interest in the main application as envisaged by the empowering provisions. The Magistrate upheld the point in *limine* thereby dismissing the application.
- [3] The appellant is appealing that judgment on the basis that the Magistrate erred in applying the provisions of section 36(1) of the Magistrates' Court Act 32 of 1944 as amended (the Magistrates Court Act) when the application itself was brought in terms of Rule 49(1). The respondent is not opposing the appeal.

Applicable Legal Framework and Legal Principles

- [4] Rule 49 of the Magistrates Court Rules provides:-

*“(1) A **party** to proceedings in which a default judgment has been given, **or any person affected by such judgment**, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for a rescission or variation of the judgment and the court may, upon good cause shown, or if it is satisfied that there is good reason to do so, rescind or vary the default judgment on such terms as it deems fit: Provided that the 20 days' period shall not be applicable*

to a request for rescission or variation of judgment brought in terms of sub-rule (5) or (5A)” (my emphasis).

While section 36 provides:-

“36 what judgments may be rescinded

*(1) The court may, upon application by **any person affected thereby**, or, in cases falling under paragraph (c), suo motu –*

(a) rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted;

(b) rescind or vary any judgment granted by it which was void ab origine or was obtained by fraud or by mistake common to the parties;

(c) correct patent errors in any judgment in respect of which no appeal is pending;

(d) rescind or vary any judgment in respect of which no appeal lies.

(2) ...” (my emphasis)

- [5] The appellant contends that although section 36(1) refers only to persons affected by the judgment, Rule 49(1) in addition, refers also to a ‘party’ to the proceedings as other persons entitled to bring an application for rescission. As such, the appellant contended, an attorney can bring the application on behalf of his or her client in line with the definition of a ‘party’ in Rule 2(1) which includes “an attorney or an advocate”. Accordingly, that the appellant’s attorney was entitled to bring the application as she was a ‘party’ to the proceedings by virtue of having been instructed by the appellant to represent her in the proceedings.

- [6] The appellant's contention is flawed in many respects. The word 'party' cannot be read in isolation to the context. Rule 49 deals with applications for rescission or variation of judgments granted by default. The purpose of the Rule is to provide a remedy for persons '**against whom judgments**' had been granted in their absence (**my emphasis**). To that end, the Rule provides for categories of such persons, namely "*a party to the proceedings*" or '*any person affected*' by that judgment.
- [7] The persons are either litigants themselves or any other persons who were not litigants but the judgment itself directly affects them. Hence the words '*or any person affected*' thereby. The persons have to have a legal interest in the matter. A legal interest is an interest in the subject matter of the action the judgment of which is directly prejudicial to the person concerned.
- [8] An attorney or advocate does not have a 'legal interest' but a general interest in the matter to advance their client's case and to bring it to a successful conclusion. They have no direct but indirect interest in the matter. As such, to read the Rule as meaning attorneys and advocates have a direct legal interest in the subject matter of the action as if a party to the proceedings would be unreasonable.
- [9] In my view, the reference to a 'party' in the Rule to include an attorney or advocate was not meant to relate to the substantive law on *locus standi* but procedural law on what qualifies as default judgment. The authors **Erasmus and Van Loggerenberg, Jones & Buckle: The Civil Practice of the Magistrates' Courts in South**

*Africa*¹ comment that the difference between the Rule and section 36(1)(a) relates to a distinction between default judgments. A ‘party’ referred to in Rule 2(1) includes an attorney or advocate appearing for that party. In that instance, the judgment will not be regarded as having been granted by default in terms of Rule 49 if the attorney or advocate of that party was present in court when the judgment was granted. On the other hand, section 36(1)(a) refers to categories of judgments granted ‘*in the absence of a person*’ and not of a ‘party’ as provided in the Rule. In those circumstances, even if the attorney or advocate was present in court, the affected party may apply for rescission if he or she was not personally present in court. That is the extent of the difference between the two provisions.

- [10] In any event, to read the Rule to include an attorney or an advocate as persons who have a direct and substantial interest in the subject matter of the proceedings would be contrary to the provision of section 36(1)(a) which the Rule is derived from. Section 36(1)(a) requires the applicant to have been ‘affected’ by such a judgment. “Affected party” is defined by **Erasmus**² as *[a person who] has an interest in the subject matter of the judgment or order sufficiently direct and substantial to entitle him to intervene in the original application upon which the judgment was given or granted. He must have a legal interest in the subject matter of the action which could be prejudicial to the judgment of the Court.’*

¹ RS19, 2019 Rule-p49-4.

² Superior Courts Practice at RS9, 2019, D1-566.

- [11] Magistrates are creatures of statutes. The Magistrate derives his or her powers to rescind judgments from the provisions of section 36. To that end, if the Rule intended to extend the meaning of ‘affected party’ beyond what section 36(1) intended, as implied by the appellant, the Magistrate is behoved to apply the meaning intended by the empowering section and not the Rule. In any event, it is trite that an Act of Parliament supercedes the Rule in case of conflict.
- [12] Resultantly, the appellant’s Counsel criticism that the Magistrate erred in relying on section 36(1) when the application was brought in terms of Rule 49(1) is unmerited. The Magistrate was obliged to consider and apply the empowering section above the Rule.
- [13] Accordingly, the attorney Ms Moduka did not have *locus standi* to bring the application without being authorised to do so by the appellant.³ In ***Mopicon Construction CC v Van Jaarsveld and Heyns***⁴ where the Court was dealing with the date when the appellant became aware of the judgment, Motata J found that although the word “party” in Rule 49 includes a legal representative, the 20 day period only started running when the appellant and not the appellant’s attorney became aware of that judgment because the decision to apply for rescission did not lie with the attorney but the appellant himself. Accordingly, the Court held that the attorney’s knowledge of the judgment could not be attributed to the appellant.

³ Legal Expenses Insurance Southern Africa Ltd v Du Randt & Louw Ing 2001(1) SA 667(O).

⁴ 2004 (3) SA 215(T) at 219.

[14] In *casu*, notwithstanding the respondent's objection to the attorney's *locus standi*, the appellant still failed to file an affidavit confirming that she had authorised the attorney to bring the application on her behalf. This would have dealt with the objection raised.⁵

[15] In the premises, I agree with the findings of the court *a quo* that the attorney lacked *locus standi* to bring the application for rescission in the absence of authorisation by the appellant.

ORDER

[16] In the circumstances, I make the following order:-

- a) The appeal is dismissed.

⁵ Op cit

P.L. NOBANDA
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION: MAHIKENG

I agree

T.J. DJAJE
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION: MAHIKENG

APPEARANCES

DATE OF HEARING : 06 MARCH 2020

DATE OF JUDGMENT : 26 MARCH 2020

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FOR THE RESPONDENT : No Opposition

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