THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1024/2018

In the matter between:

NW CIVIL CONTRACTORS CC **APPELLANT**

and

ANTON RAMAANO INC **FIRST RESPONDENT**

SHERIFF THOHOYANDOU **SECOND RESPONDENT**

and

Case No: 1076/2018

and in the matter between:

NW CIVIL CONTRACTORS CC **APPELLANT**

and

ANTON RAMAANO INC **FIRST RESPONDENT**

SHERIFF THOHOYANDOU **SECOND RESPONDENT**

Neutral citation: *NW Civil Contractors CC v Anton Ramaano Inc & another* (1076/2018 and 1024/2018) [2019] ZASCA 143 (14 October 2019)

Coram: Ponnan, Swain, Zondi and Mocumie JJA and Dolamo AJA

Heard: 03 September 2019

Delivered: 14 October 2019

Summary: Section 41(1) of the Attorneys Act 53 of 1979 – attorney not in possession of a valid fidelity fund certificate – whether proceedings are void ab initio.

ORDER

On appeal from: Limpopo Division of the High Court, Thohoyandou (Phatudi J sitting as court of first instance):

1. Both appeals are upheld with costs.
2. The order of the court a quo in each instance is set aside and substituted with the following:

2.1 Under case no 1024/2018 –

'The application is dismissed with costs.'

2.2 Under case no 1076/2018 –

'(a) The application succeeds with costs.

(b) The judgment of Mushasha AJ granted by default on 11 August 2016 is rescinded.'

JUDGMENT

Ponnan JA (Swain, Zondi and Mocumie JJA and Dolamo AJA concurring):

[1] Two appeals serve before us. Both, involving the same parties, are against judgments of the Limpopo Division of the High Court, Thohoyandou (per Phatudi J). The first, under case number 1024/2018, is an appeal against a judgment which set aside three orders previously granted in that division, on the basis that the attorney acting for the appellant in those matters was not possessed of a fidelity fund certificate. The second, under case number 1076/2018, is an appeal against the dismissal of an application by the appellant for the rescission of a judgment, granted by default against it by Mushasha AJ on 11 August 2016. Both appeals are with the leave of this court.

[2] The litigation stems from a dispute between the parties over legal fees that Anton Ramaano, who practises as an attorney under the name and style of Anton Ramaano Inc (the first respondent), maintains is owed to him by the appellant, NW Civil Contractors CC. The first respondent had represented the appellant in litigation against a local municipality. That matter was eventually settled on 7 March 2015, when the municipality agreed to pay the appellant the sum of R14 million. When the first respondent's fees for the rendition of those services remained unpaid, it issued summons against the appellant for payment of its taxed costs in the sum of R1 305 459.06. After service of the summons, the appellant entered an appearance to defend the action, but failed to timeously file its plea, with the result that it was subsequently *ipso facto* barred from pleading. On 11 August 2016 default judgment was granted against the appellant. On 30 August 2016 the appellant applied to have the judgment rescinded on the basis that it did not owe any money to the first respondent and that the latter's bill of costs had been erroneously taxed in the absence of the appellant (the rescission application).

[3] Whilst the rescission application was pending, the parties became embroiled in further litigation in respect of a number of interlocutory matters. First, on 23 August 2016 the Sheriff, Thohoyandou (the second respondent) had attached and removed some of the appellant's goods, pursuant to a writ of attachment, which had been obtained by the first respondent some four days earlier. The appellant accordingly sought urgent interim relief pending finalisation of the rescission application (the first application). The first application succeeded before Kganyago AJ on 22 September 2016. It was thus ordered that, pending finalisation of the rescission application: the execution of the default judgment is suspended; the warrant of execution against the property of the appellant is stayed; and the goods of the appellant that had been attached and removed are forthwith to be returned to the appellant (the first order). Second, in the meanwhile and on 14 September 2016, the first respondent brought an application for the recusal of Kganyago AJ (the second application). This application was dismissed (the second order). Third, aggrieved at the failure of the recusal application, the first respondent applied for leave to appeal the dismissal of the recusal application (the third application). This application was also refused on 22 September 2016 (the third order).

[4] On 28 September 2016 the first respondent filed what was described as a 'Notice of application for rescission and/or setting aside of judgments/rulings in terms of the common law and/or appropriate relief in terms of section 38 and/or 173 of the Constitution of the Republic of South Africa Act 108 of 1996'.

The application read:

'Kindly take notice that the 1st Respondent intends to make an application to the above Honourable Court on a date and time to be allocated by the registrar for an order in the following terms:

1.1 That the following Court orders granted by the Honourable Judge, Judge M.F Kganyago be rescinded and/or set aside:

1.1.1 Court order granted on the 14th day of September 2016 by Judge M.F Kganyago on the issue of recusal.

1.1.2 Court order granted on the 22nd day of September 2016 on the 1st Respondent's application for leave to appeal and

1.1.3 Court order granted on the 22nd day of September 2016 on the main application.

1.2 Alternatively, that the 1st Respondent be granted appropriately relief in terms of Section 38 and/or 173 of the Constitution of the Republic of South Africa Act, 108 of 1996

1.3 That the costs of this application be paid by any party which/who opposes same.'

[5] The basis of the application was that, unbeknown to the parties and the court, the appellant's attorney of record in all three applications, Mr Vhutshilo Nange, was not possessed of a valid fidelity fund certificate. The first respondent thus contended that, because Mr Nange did not have a valid certificate, the three orders granted were void ab initio or invalid. It was further contended that each of the orders granted fell to be rescinded on the basis that, inasmuch as Mr Nange had represented the appellant without being in possession of such a certificate, they were obtained by fraud or misrepresentation.

[6] It is difficult to discern precisely what case the appellant was being called upon to answer. It seems to me that what passed for the notice of motion in the matter was so vague as to render any relief sought thereunder incompetent. Insofar as prayers 1.1.1 and 1.1.2 are concerned, it is unclear how the mere setting aside of the second and third orders could possibly advantage the first respondent or advance its case. If those orders were simply to be set aside, without more, would it mean that Kganyago AJ was obliged to re-adjudicate the second and third applications and rule on them afresh? In the ordinary course, what avails a litigant, aggrieved by a dismissal of an application for leave to appeal by the high court, is a petition to this court in terms of s 17(2)*(b)* of the Superior Courts Act 10 of 2013, not an application such as this, the novelty of which appears to be surpassed only by its lack of substance.

[7] None of this, however, occasioned Phatudi J any difficulty. He did not content himself with merely setting aside the three orders granted by Kganyago AJ. He went much further and granted an order in these terms:

'20.1 The first respondent's application is upheld

20.2 The proceedings initiated and executed by Vhutshilo Licollin Nange who practised or purported to have practiced as such under the name and style Vhutshilo Nange Attorney are declared null and void ab initio and are set aside.

20.3 All rulings and judgments handed down occasioned by the proceedings set aside in the order 20.2 above are declared null and void and set aside.

20.4 The applicant is ordered to pay the costs of this application including all reserved costs.

20.5 The applicant's legal representatives of record including Counsel are precluded from levying and claiming any fees including Counsel Fees incurred from 24 April 2018 from the applicant.'

[8] Self-evidently, the relief granted by Phatudi J was never sought by the first respondent. Nor was it foreshadowed in the papers. What is more, paragraph 20.2, facially at least, purports to extend to all 'the proceedings initiated and executed' by Mr Nange, not just those that served before Kganyago AJ. Precisely what those proceedings are, one does not know. The same holds true for paragraph 20.3. The declaratory orders granted by Phatudi J are far-reaching. They purport to put a red line, not just through all proceedings 'initiated or executed' by Mr Nange, but also, and more importantly, all 'rulings and judgments'. Leaving aside the terminological and conceptual difficulties that the employment of words 'initiated' or 'executed' engender, there remains the scope and extent of the order, namely when Mr Nange 'practised' or 'purported to' do so. Assuming that the absence of a fidelity fund certificate, could legitimately ground such far-reaching relief, the orders granted are in no ways defined or limited by the absence of such a certificate. Moreover, interrogating the orders leads one ineluctably to the conclusion that they are indeterminate, open ended and irredeemably vague.[1]

[9] It seems to me that it would be well-nigh impossible for any litigant to know with any measure of confidence what the order obliges them to do. At the risk of being in contempt of court, litigants are required to comply with court orders and are thus obliged to know, with clarity, what is required of them.[2] It follows that a litigant has to know where its obligations start and end. It does seem to me to be difficult in the extreme for anyone to know with any measure of confidence precisely what steps are required to be taken to comply with the order. How, it must be asked, is the order to be enforced and, by whom? Moreover, was it competent for a single judge to appropriate to himself the power to simply set aside 'all rulings and judgments' that had previously issued in that court? What of other litigants who may have been

[1] *Minister of Water and Environmental Affairs v Kloof Conservancy* [2015] ZASCA 177; [2016] 1 All SA 676 (SCA) paras 13 and 14 and the cases there cited.
[2] *Minister of Home Affairs & others v Scalabrini Centre, Cape Town & others* [2013] ZASCA 134; 2013 (6) SA 421 (SCA) para 77.

affected by those orders? What of orders that may already have been implemented? These questions are by no means exhaustive. An array of others spring to mind. In short, how does one in each instance unscramble the egg?

[10] An order or decision of a court binds all those to whom it applies. All laws must be written in a clear and accessible manner. Impermissibly vague provisions violate the rule of law, which is a founding principle of our Constitution. Orders of court must comply with this standard.[3] The orders of Phatudi J fails this test and it may well be that for this reason alone they fall to be set aside.

[11] The judgment of Phatudi J fails at yet a further leg. He reasoned:

'Seeing that the attorney *in casu* confirmed that he practiced as such without the fidelity fund Certificate notwithstanding being barred as provided for in terms of section 41 (1) of the Attorneys' Act, the attorney's work done in executing or purporting to execute the applicant's mandate, was rendered a nullity *ab initio*. Put differently, all that which was done or performed or executed or purported to have been done or performed or executed by the practitioner is in my view, a nullity. The notice of motion drawn and signed by the attorney (Mr Nange) initiating the proceedings forming the subject matter including the ruling(s) and judgments handed down must, in my view, be regarded as *pro non scripto*. In short, all that which the attorney did in the execution or performance of the mandate in this matter must be regarded as not having been done. This translates in the notice of motion, the court's ruling and judgments handed down pursuant thereto being set aside.'

[12] It is not controversial in this case that in terms of s 41(1) of the Attorneys Act 53 of 1979 (the Act):

'A practitioner shall not practise or act as a practitioner on his [or her] own account or in partnership unless he [or she] is in possession of a fidelity fund certificate.'

What is controversial is the consequence that flows from such non-complaince. One of the earliest cases to consider the consequence for the validity of an act in conflict with a statutory prohibition was *Schierhout v Minister of Justice*,[4] in which Innes CJ said: 'It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect.' But that will not always be so. Whether

[3] *Minister of Water and Environmental Affairs v Kloof Conservancy*, fn 1 above, para 14.
[4] *Schierhout v Minister of Justice* 1926 AD 99 at 109.

that is so, as later cases have made clear, will depend upon a proper construction of the legislation in question.[5]

[13] As was explained by Solomon JA in *Standard Bank v Estate Van Rhyn*:[6]

'The contention on behalf of the respondent is that when the Legislature penalises an act it impliedly prohibits it, and that the effect of the prohibition is to render the [act] null and void, even if no declaration of nullity is attached to the law. That, as a general proposition, may be accepted, but it is not a hard and fast rule universally applicable. After all, what we have to get at is the intention of the Legislature, and, if we are satisfied in any case that the Legislature did not intend to render the [act] invalid, we should not be justified in holding that it was.'[7]

[14] An attorney is obliged to apply to the secretary of the relevant law society for a fidelity fund certificate. If the secretary is satisfied that the attorney has discharged his or her liabilities to the society in respect of the contribution to be made, and has complied with any other lawful requirement of the society, a fidelity fund certificate must be issued to the attorney concerned. The primary purpose of the fidelity fund is to reimburse clients of legal practitioners who may suffer pecuniary loss due to the theft of money or property that they had entrusted to an attorney. That protection encourages the public to use the services provided by legal practitioners with confidence. Section 41(1) thus exists in the public interest. By prohibiting legal practitioners from acting unless in possession of a valid fidelity fund certificate, the legislature seeks to ensure that an attorney is not let loose on an unsuspecting member of the public.

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[5] As Corbett AJA put it in *Swart v Smuts* 1971 (1) SA 819 (A) at 829C-G:
'Die regsbeginsels wat van toepassing is by beoordeling van die geldigheid of nietigheid van 'n transaksie wat aangegaan is, of 'n handeling wat verrig is, in stryd met 'n statutêre bepaling of met verontagsaming van 'n statutêre vereiste, is welbekend en is alreeds dikwels deur hierdie Hof gekonstateer (sien *Standard Bank v Estate Van Rhyn* 1925 AD 266; *Sutter v Scheepers* 1932 AD 165; *Leibbrandt v South African Railways* 1941 AD 9; *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (AD); *Pottie v Kotze* 1954 (3) SA 719 (AD), *Jefferies v Komgha Divisional Council* 1958 (1) SA 233 (AD); *Maharaj and Others v Rampersad* 1964 (4) SA 638 (AD)). Dit blyk uit hierdie en ander tersaaklike gewysdes dat wanneer die onderhawige wetsbepaling self nie uitdruklik verklaar dat sodanige transaksie of handeling van nul en gener waarde is nie, die geldigheid daarvan uiteindelik van die bedoeling van die Wetgewer afhang. In die algemeen word 'n handeling wat in stryd met 'n statutêre bepaling verrig is, as 'n nietigheid beskou, maar hierdie is nie 'n vaste of onbuigsame reël nie. Deeglike oorweging van die bewoording van die statuut en van sy doel en strekking kan tot die gevolgtrekking lei dat die Wetgewer geen nietigheidsbedoeling gehad het nie.'

[6] *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 274.

[7] See also, for example, *Sutter v Scheepers* 1932 AD 165 at 173-174; *Swart v Smuts* 1971 (1) SA 819 (A) 829C-830C; *Oosthuizen & another v Standard Credit Corporation Ltd* 1993 (3) SA 891 (A) 902H-903F and the authorities there cited.

[15] Here, the legislature expressly provides for two consequences for the conduct complained of. First, s 41(2) provides that '[a]ny practitioner who practices or acts in contravention of subsection 1 shall not be entitled to any fee, reward or disbursement in respect of anything done by him [or her] while so practicing or acting'. And, second, s 83 (10) of the Act provides:

'Any person who directly or indirectly purports to act as a practitioner or to practice on his [or her] own account or in partnership without being in possession of a fidelity fund certificate, shall be guilty of an offence and on conviction liable to a fine not exceeding R2 000 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.'

[16] It is so that in *S v Theledi*[8] the court held that it was not an offence for a practitioner to practice without a fidelity fund certificate. It concluded that s 83(10) applies only to a non-practitioner. Roux J (Strydom J concurring) reasoned:

'In attempting to understand s 83(10) it is important to note the use of the word "person" as opposed to "practitioner" in one sentence. As I have pointed out earlier "practitioner" is defined in s 1 of the Act. A "practitioner" is an "attorney". An "attorney" is "any person duly admitted to practise as an attorney in any part of the Republic". The "person" referred to in s 83(10) is not a practitioner as defined in the Act. I hold this to be so because the following subsections of s 83, namely ss (1), (2), (3), (5), (6), (7) and (8), all use the word "person" to distinguish such a person from a "practitioner" or an "attorney".'[9]

[17] *Theledi* has not escaped criticism. In *Law Society of the Cape of Good Hope v Adams*,[10] Rogers J (Traverso DJP concurring) had this to say:

'This conclusion appears to me, with the greatest of respect, to be untenable. Section 83(10) plainly envisages that the persons at whom the prohibition is directed are persons who could notionally obtain a fidelity fund certificate. Only an admitted practitioner can obtain such a certificate. The offence which the Act creates in respect of non-practitioners who purport to practise as practitioners (ie without being an admitted attorney, notary or conveyancer) is contained in s 83(1). If s 83(10) applied only to non-practitioners, it would add nothing to section 83(1) and the reference therein to the absence of a fidelity fund certificate would in

[8] *S v Theledi* 1993 (2) SA 403 (T).
[9] At 403I-404B.
[10] *Law Society of the Cape of Good Hope v Adams* [2013] ZAWCHC 87; 2013 (2) SACR 480 (WCC) para 19.

addition be nonsensical. Roux J, with whom Strydom J concurred, acknowledged in *Theledi* that his interpretation was 'absurd'. I see no reason to adopt an interpretation which is both nugatory and absurd. Although it may have been more felicitous for s 83(10) to have referred to any practitioner who acts as such, I see no particular difficulty in interpreting the words "any person who... purports to act as a practitioner" as referring to a practitioner practising without a fidelity fund certificate, ie a practitioner who practices despite the fact that in terms of s 41 he or she may not lawfully do so. In a number of subsequent cases, including cases decided by the Supreme Court of Appeal, it has been taken for granted that an attorney who practices without a valid fidelity fund certificate contravenes section 83 (10).'[11]

[18] Two of the cases referred to by Rogers J are *Summerley v Law Society, Northern Provinces*[12] and *Law Society of the Northern Provinces v Mamatho*,[13] both of which are judgments of this court. In the former, Brand JA stated: 'The appellant was therefore practising for his own account without the required certificate, which, in itself constituted a criminal offence under s 83(10) of the Act'.[14] In the latter, Scott JA observed: 'An audit certificate is a requirement for the issue of a fidelity fund certificate. Practising without the latter is a criminal offence and a serious breach of an attorney's duty'.[15] It follows that the correctness of *Theledi* cannot be endorsed.

[19] The Act therefore prescribes two consequences for practicing without a fidelity fund certificate, namely, disentitlement to a fee for the work done and a criminal conviction. It does not contemplate a visitation of nullity. In *Oilwell (Pty) Ltd v Protec International Ltd*,[16] Harms DP referred to J Voet *Commentarius ad Pandectas* 1.3.16 (Gane's translation), who said this:

'"Things done contrary to the laws are not *ipso jure* null if the law is content with enacting a penalty against transgressors.

. . .

Nay indeed there is no lack of laws which forbid, and yet do not invalidate things to the contrary, nor impose any penalty upon them. Hence came into vogue the famous maxim 'Many things are forbidden in law to be done which yet when done hold good.'"

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[11] Citations omitted.
[12] *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 (SCA).
[13] *Law Society of the Northern Provinces v Mamatho* 2003 (6) SA 467 (SCA) para 4.
[14] *Summerley*, fn 12 above, para 4.
[15] *Mamatho*, fn 13 above, para 1.
[16] *Oilwell (Pty) Ltd v Protec International Ltd & others* 2011 ZASCA 29; 2011 (4) SA 394 (SCA) para 19.

Harms DP added:

'This approach has been adopted in many judgments, more particularly in the leading case of *Standard Bank v Estate van Rhyn* 1925 AD 266 at 274, where Solomon JA also referred to a further statement by Voet (not as translated by Gane), that an important consideration is whether "greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law". Voet concluded this section with a reference to H De Groot (Grotius to some) *Inleidinge* 1.2.2, where the author, dealing with the same subject, said that things done contrary to law are only void if the law so expresses itself ("de wet sulcks uytdruckt"), or if someone's ability to perform the act has been curtailed, or if the deed "heeft een gestadigde onbehoorlickheid" (translated by Gane via Voet, as "if the act performed suffers from some obvious and ingrained disgrace", but more correctly from some "unremitting impropriety").'

These comments are particularly apposite to the present case. I find it difficult to conceive that the Legislature had any intention in enacting s 41 other than that of punishing the attorney who did not comply therewith. I have already alluded to the 'greater inconvenience and impropriety' that would follow if the setting aside of the orders of Kganyago AJ were allowed to stand. It does not seem to me that, in addition, the legislature also intended that nullity should follow.

[20] It follows that the judgment and order issued by Phatudi J under case number 1024/2018 cannot stand. To uphold the approach of Phatudi J would undermine the primary purpose of the Act, which is to protect the public and would have grave consequences for the administration of justice, the rule of law and legal certainty. It remains to be said that in this matter the Legal Practitioners Indemnity Insurance Fund NPC sought and, despite opposition from the first respondent, obtained the leave of this court to be admitted as an amicus curiae. The amicus provides professional indemnity insurance cover to all attorneys practicing in South Africa. It filed heads of argument and instructed counsel to address us from the bar. In supporting the upholding of the appeal, it contended that Phatudi J had erred in the interpretation placed on s 41(1) of the Act. The arguments advanced were of great value in deciding the matter. As no costs were sought by the amicus, nothing further need be said about them.

[21] As to the second appeal: A day after issuing the orders, the subject of the first appeal, Phatudi J heard the appellant's application for rescission of the default judgment granted by Mushasha AJ on 11 August 2016 and summarily dismissed it. In his reasons, which were handed down later, he held that the appellant had failed to give a reasonable explanation for the delay, did not advance any bona fide defence, and that the defences raised enjoyed no prospects of success. In entering into the substantive merits of the rescission application, Phatudi J did not consider himself bound by his reasoning under case number 1024/2018, that 'the attorney's work done in executing or purporting to execute the applicant's mandate, was rendered a nullity *ab initio*' or that '[t]he notice of motion drawn and signed by the attorney (Mr Nange) initiating the proceedings . . . must . . . be regarded as *pro non scripto*'. In this instance, also, Mr Nange had acted without a valid fidelity fund certificate. Consistency dictated that the rescission application ought to have suffered the same fate as the other applications under case number 1024/2018. As with the other applications, this application ought to have been 'declared null and void ab initio'. That aside, the conclusion of Phatudi J that the rescission application fell to be dismissed cannot be supported.

[22] It is common cause that the appellant's plea was filed a day late. According to the appellant, the notice of bar in the matter was received by Ms E Munzhedzi, a legal secretary. She, however, did not bring it to the attention of the appellant's attorney but filed it away. When the notice of bar was fortuitously discovered later, on that very day the appellant's attorney hastily drafted, served and filed a plea. Thereafter, despite the appellant's attorney indicating that an application would be launched to uplift the bar, the first respondent proceeded, despite opposition, to obtain a judgment by default. There is simply nothing to gainsay the version advanced by the appellant, which must be accepted. The appellant denied being indebted to the first respondent. It asserted that it had an agreement with Mr Anton Ramaano that, in return for the legal services rendered, it would undertake certain construction work at the first respondent's property. In substantiation of this defence the appellant pointed out that the first respondent had never rendered an invoice for legal fees since first being instructed in 2009. The appellant further asserted that what was owed to it exceeded the amount now claimed by the first respondent as legal fees. It follows on the evidence that not

only was there no wilful delay, but also that a bona fide defence had been established. The application for rescission ought therefore to have succeeded.

[23] In the result:

1. Both appeals are upheld with costs.

2. The order of the court a quo in each instance is set aside and substituted with the following:

2.1 Under case no 1024/2018 –

‘The application is dismissed with costs.’

2.2 Under case no 1076/2018 –

‘(a) The application succeeds with costs.

(b) The judgment of Mushasha AJ granted by default on 11 August 2016 is rescinded.’

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V M Ponnan

Judge of Appeal

APPEARANCES:

For Appellant:	N Ferreira (with him A Armstrong)
	Instructed by: M & M Maiwashe Attorneys, Polokwane Matsepes Inc., Bloemfontein
For Respondent:	KM Moketedi (with him L Pasha)
	Instructed by: VM Netshipale Inc., Thohoyandou Webbers, Bloemfontein
For the amicus curiae:	E Botha (with him T Mogale) Instructed by: Gildenhuys Malatji Attorneys Honey Attorneys, Bloemfontein