THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)

In the matter between:

Case no: 1552/13

MAKAZIWE PUMLA MANDELA	**1ST APPLICANT**
NDILEKA MANDELA	**2ND APPLICANT**
NANDI MANDELA	**3RD APPLICANT**
TUKWINI NOBUHLALI MANDELA	**4TH APPLICANT**
NDABA MANDELA	**5TH APPLICANT**
DOROTHY ADJOA AMUAH	**6TH APPLICANT**
KWEKU GLADIEL MANDELA	**7TH APPLICANT**
MBUSO MANDELA	**8TH APPLICANT**
ANDILE MANDELA	**9TH APPLICANT**
THEMBELA MANDELA	**10TH APPLICANT**
HLANGANANI MANDELA	**11TH APPLICANT**
PUMLA DEBORAH MANDELA	**12TH APPLICANT**
GRACA SIMBINE MACHEL-MANDELA	**13TH APPLICANT**
ZENANI DLAMINI-MANDELA	**14TH APPLICANT**
ZINDZISWA MANDELA	**15TH APPLICANT**

And

ZWELIVELILE MANDLE SIZWE DALIBHUNGA

(ALSO KNOWN "MANDLA" MANDELA) **1ST RESPONDENT**

THE MEMBER OF THE EXECUTIVE COUNCIL: EASTERN CAPE DEPARTMENT OF HEALTH **2ND RESPONDENT**

THE PREMIER, EASTERN CAPE. **3RD RESPONDENT**

JUDGMENT

PAKADE, ADJP:

BACKGROUND

[1] The sequel to this hearing is the final Order that was issued by this Court on Friday, 28 June 2013 in the absence of the respondents .

[2] Subsequent thereto, three applications served before me yesterday. The first and second applications (herein after referred to as the Variation and the Striking off applications) were brought by the applicants on Monday , the 1st July 2013 and the third application (herein after referred to as the rescission application) was brought by the first respondent orally from the bar yesterday .

[3] The variation application was brought in terms of Rule 42(1) of the Uniform Rules of the High Court to correct " Saturday, 29th July 2013, to

read Saturday , 29th June 2013" in paragraph 4 of the Order issued on the 28 June 2013 .

[4] In the Striking out application, the nature of the relief sought by the applicants is an order striking out averments contained in certain paragraphs of the answering affidavit to the variation application on the ground that they are irrelevant, vexatious and scandalous. The striking out application is brought in terms of Rule 6(15) of the Uniform Rules.

[5] The rescission application is brought in terms of Rule 42 (1) (a) of the Uniform Rules on the ground that the Order of the 28 June 2013 was erroneously sought and erroneously granted in the absence of the first respondent.

[6] Before the commencement of the hearing of the three applications referred to above, Mr Smith, Counsel for the applicants, moved an application from the bar for the amendment of the Notice of Motion to be in accord with the variation order sought. After brief submission from Mr Zilwa, Counsel for the first respondent, I granted the amendment to the Notice of Motion in the following terms:

> "4A: That in the event of the First Respondent failing to immediately return the remains, but no later than Wednesday 3 rd July 2013 at 15:00, the Sheriff of this Court, or his Deputy, (or nominee) performs, subject to the fulfillment of the medical protocols by a medical practitioner, the exhumation of the remains on the First Respondent's

property, for reburial at the applicants' family homestead (farm) situated at Qunu, Mthatha, Eastern Cape ".

[7] In view of the fact that all the three applications are interlinked and factually overlapping, I granted leave for them to be heard simultaneously so that I give one judgment encompassing all of them. I will now herein after deal with the applications in turn, starting with the striking out application.

STRIKING OUT APPLICATION

[8] The striking out application is directed at paragraphs 3-23 of the answering affidavit which Mr Smith submitted are irrelevant, scandalous and vexatious. Mr Zilwa countered Mr Smith's submission that these paragraphs are not irrelevant scandalous and vexatious. He submitted that the averments embodied therein are relevant because they support the first respondent's application for rescission which he has orally brought in terms of Rule 42 of the Uniform Rules. The submission goes on to say that the averments show that the first respondent was denied *audi alteram partem* before the order was granted last Friday.

[9] A reading of paragraphs 3-11 reveals that the averments stated therein are confined to the lack of service of the application to the first respondent before the issue of the order while paragraphs 12 - 17 deal with the issue of urgency, paragraphs 18-20 relate to the rightful person to bury former President Mr Nelson Mandela and paragraphs 22 and 23 deal briefly with the person entitled to the remains of the threesome. On these averments, Mr Zilwa urged this Court to rescind the order issued on the 28 June 2013.

[10] Rule 6(15) , reproduced in relevant parts , enjoins the court to strike out from an affidavit any matter which is scandalous , vexatious or irrelevant with an appropriate costs order. The meaning of these terms has been stated as follows:

> (a) scandalous matter -means allegations which may or may not be relevant but which are so worded as to be abusive or defamatory ;
>
> (b) Vexatious matter -means allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy, and
>
> (c) Irrelevant matter -means allegations which do not apply to the matter in hand and do not contribute in one way or the other to a decision of the matter (see cases cited in footnote 8 in Erasmus B1-57 , see also the unreported judgment of this Court in **Baphathe Fana Makaula and Another v Mzimvubu Municipality and 5 Others** , Case No.367/2005(1333/06). Again in its interpretation of Rule)(15) the Court in **Vaartz v Law Society of Namibia , 1991(3) SA 573** (Nm HC) while reaffirming the meaning ascribed to these terms also added the requirement of prejudice to the other party if the material is allowed to remain in the affidavits . This means ,in my view , that even if the material is irrelevant , scandalous or vexatious the court may hesitate to strike it out unless the other party would be prejudiced if it were to be allowed to remain in the affidavit . If the court allows it to remain in the affidavit on the ground that it is not prejudicial to the other party the material may be relevant on the issue of costs and the deponent to the material may be punished by an order for costs .This is the basis upon which the irrelevant scandalous and vexatious

material was considered in **Mzimvubu Municipality v Certain Occupiers of Immovable Property** , known as Remainder of Erf 351 Mount Frere Southern Side Near the **Reservour v Mzoli Diko and 6 Others** , unreported case no.845/2002 of this Court .

[11] To the extent that the averments in the first respondent's answering affidavit are directed at the rescission application, on the contention of Mr Zilwa, they are irrelevant to the striking out application because the order to which they are directed to rescind is a final order to which the court is *functus officio*. This is so because under common law the general rule is that a Judge has no authority to amend the substantive content of his or her own order. The rationale for this principle is twofold. In the first place he or she is *functus officio* and secondly, there is a public interest element in the finality of litigation (**Zondi v MEC Traditional And Local Government Affairs 2006 (3) SA CC**1 at par .[28] . This is unlike interlocutory orders which stand on a different footing. These can be rescinded, reconsidered or varied on good cause shown. The rationale for interlocutory orders to be subject to variation is that they do not dispose of any issue or any portion of the issue in the main application or action.

[12] These averments are, in my view neither relevant to the striking out application nor to the variation application. Now having said this, I now consider the variation application.

VARIATION APPLICATION

[13] Rule 42(1) in terms whereof the application for the variation of the order of the 28 June 2013 is premised provides in relevant parts relied upon by the applicants that :

> " 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) .....
>
> (b) an order or judgment in which there is an ambiguity , or a patent error or omission, but only to the extent of such ambiguity or , error or omission ;
>
> (c) an order or judgment granted as the result of mistake common to the parties".

[14] This rule contemplates final orders in which variation is sought on purely procedural grounds or grounds incidental thereto, in instances where fresh facts have arisen since the granting of the order and where the order does not reflect the intention of the applicant or serve the object for which it was sought.

[15] The Court was approached as a matter of urgency on Friday, the 28 June 2013 to issue an order which would be executed on the following day, Saturday, the 29 June 2013. The court intended to issue an order which would be executable on the following day, Saturday, 29 June 2013 and in no other day. The applicants sought that order and the 2nd, 3rd respondent and the Court understood the object of the order sought to be that. The applicants never sought and the court did not grant an order to be executed on the 29 July 2013. That was a clear typographical error on which no one could climb on and sought to build his opposition on. Having said this, I accordingly find

that any opposition of the variation of this patent error was frivolous and should not have been undertaken in the light of the clear intention of the parties who were present when the order was granted. No factual opposition could have been averred by the first respondent because he was not present when the order was granted and that is the reason his affidavit is pretty lacking material on variation.

RESCISSION APPLICATION

[16] Mr Zilwa premised his rescission application on Rule 42(1) (a) that the order was sought and granted erroneously in the absence of the first respondent . He submitted that on the basis that the first respondent was not served with the application papers before the order was granted coupled with the fact that the Court's Directive to the applicants to bring the application on notice to the respondents was not heeded to by the applicants, the court should dismiss the application *mero motu* .No notice of this application was given to the court and as submitted by Mr Smith a few minutes notice was given to him. This was improper.

Rule 42 (2) provides in peremptory language that a party seeking relief under this rule shall make an application therefor upon notice to the parties whose interests may be affected by the variation sought .The first respondent has used the contents of the answering affidavit to the variation application as grounds for rescission . I have already alluded to the fact that the order sought to be rescinded is final and that the court is *functus officio*. The court sitting here is not considering the merits of the application as those merits have been disposed off.

It is trite that a judgment or order is erroneously granted 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 or order and which would have induced the judge, if aware of it, not to grant the judgment or order . When relying on the rescission *mero motu* by the court the first respondent had to show good cause which is lacking in his answering affidavit.

[17] The order of the 28 June 2013 restores *ante omnia* the remains of the three deceased persons to the applicants to be reburied in Qunu . The nature of the proceedings which gave birth to that order is mandament *van spolie* in terms whereof the spoliated goods have to be returned to the applicants speedily and *ante omnia.* The spoliation proceedings do not involve the hearing on the merits of the dispute. The first respondent has been given an opportunity to say something in his defence but has only raised irrelevant material to the spoliation. He does not deny possession of the remains of the deceased. He does not deny that he took them from Qunu to rebury them in his place in Mvezo Great Place. He failed to raise any defence relevant to spoliation. The material embodied in his answering affidavit is directed at achieving the results of an appeal improperly on a rescission application and on an application which is no longer before the court. It is directed at prejudicing the applicants who have already got the relief against the first respondent. In that respect the material on paragraphs 3-23 in the answering affidavit is scandalous and vexatious and has to be stuck out. Much as the order of the 28 June 2013 is the order issued in spoliation proceedings, the said paragraphs are on irrelevant to those proceedings .As already said, no defence relevant to the spoliation has been tendered by the first respondent. Therefore, he must restore possession of the remains to the applicants

forthwith speedily and *ante omnia*. That is the object of the order of the 28 June 2013.

COSTS

The salutary principle's that costs should follow the event. This means that the successful party must get its costs. In my view the applicants have achieved substantial success in all the applications which they had instituted against the first respondent and have successfully defended his rescission application.

ORDER:

In the result I make the following Order:

1. The Striking out application succeeds and paragraphs 3-23 of the answering Affidavit are struck out as irrelevant, scandalous and vexatious;

2. The Variation of the Order issued on the 28 June 2013 is granted in the following terms:

2.1." Saturday 29 July 2013 is amended to Saturday, 29 June 2013";

2.2. By the addition of sub paragraph 4A: That in the event of the first respondent failing to immediately return the remains , but not later than Wednesday 3 rd July 2013 , at 15:00, the Sheriff or his Deputy , (or such nominee) performs , subject to the fulfillment of the medical protocols by a

medical practitioner , the exhumation of the remains on the first respondent's property , for reburial at the applicants' family homestead (farm) situated at Qunu, Mthatha, Eastern Cape .

3. That the rescission application is dismissed with costs, such costs to be taxed on the opposed scale;

4. That the first respondent shall pay costs of the striking out application such costs to be taxed on the opposed scale;

5. The first respondent shall pay costs of the variation application, such costs to be taxed on the opposed scale.

LP PAKADE
ACTING DEPUTY JUDGE PRESIDENT

For **the Applicant**	:	**Adv Smith**
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For Respondent	:	**Adv Zilwa with Adv Mpahlwa**
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Date Heard	:	**02 July 2013**
Date Delivered	:	**03 July 2013**