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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 10/30611

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

.....
DATE

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SIGNATURE

In the matter between:

NOMSA DLAMINI

First Applicant

And

BRIAN MOLEFE MOLOISANE

Respondent

J U D G M E N T

KEIGHTLEY, AJ:

INTRODUCTION

- [1] In this matter the applicant, Ms Dlamini, applies for rescission of a judgment and order of her Ladyship Madam Justice Victor that was granted on 9 December 2010. In terms of the judgment, the court ordered the eviction of Ms Dlamini, and all persons claiming any right or interest to the occupation under Ms Dlamini, from premises situated at [Erf 1.....], Zone 1, [D.....] [S.....] ([“Erf 1.....”], or “the property”).
- [2] The present respondent, Mr Moloisane, was the applicant in the eviction proceedings giving rise to the judgment. At that time, he was the registered owner of [Erf 1.....], having purchased the property from the previous titleholder, Ms Molebatsi.
- [3] Ms Molebatsi was awarded ownership of [Erf 1.....] by virtue of a decision dated 11 April 2007 under the procedure laid down in section 2 of the Conversion of Certain Rights into Leasehold or Ownership Act.¹ The City of Johannesburg previously owned the property, and Ms Dlamini’s father was the permit holder entitled to occupation. Both he and his last wife, Ms Molebatsi’s mother, had subsequently passed away. This led to competing claims for the property. Ms Dlamini was one of the competing claimants, but at that stage, Ms Molebatsi’s claim prevailed, and she became the registered owner consequent on the April 2007 award.

¹ Act 81 of 1998

- [4] Notwithstanding the award of the property to Ms Molebatsi, and its subsequent transfer to Mr Moloisane, Ms Dlamini and her family members remained in occupation of the property. This situation persists to the present.
- [5] Before considering Ms Dlamini's application for rescission of the judgment, it is necessary for me to set out a time line of relevant events preceding its institution:
- [5.1] Ms Molebatsi became the registered titleholder of [Erf 1.....] in 2007.
- [5.2] On 3 February 2010 Mr Moloiane became the registered owner of the property under Deed number [T.....].
- [5.3] The judgment and order of Victor J were granted on 9 December 2010, following eviction proceedings instituted by Mr Moloisane.
- [5.4] Ms Dlamini applied for leave to appeal against the judgment. This was dismissed on 10 May 2012.
- [5.5] Thereafter, Ms Dlamini filed a special application for leave to appeal to the Supreme Court of Appeal. This, too, was dismissed on 15 August 2012.
- [5.6] Ms Dlamini took no further steps to appeal the judgment.
- [5.7] In the interim, Mr Moloisane sold [Erf 1.....] to a third party, Ms Sauhatse ("the current registered owner"). The transfer was effected on 30 August 2012.

- [5.8] In September 2012, Ms Dlamini instituted review proceedings in the North Gauteng High Court. She sought a review and setting aside of the decision of April 2007 in terms of which the property had been awarded to Ms Molebatsi.
- [5.9] The review application was served on the attorneys who had represented Mr Moloisane in the eviction proceedings. However, Mr Moloisane was not served with a copy of the application for review. He took no part in the proceedings.
- [5.10] The current registered owner was neither cited, nor served in the review proceedings. She played no part in those proceedings either.
- [5.11] I was advised from the Bar that the Department of Co-Operative Governance and Human Settlements of the Gauteng Province initially opposed the review application, but this opposition was not sustained.
- [5.12] On 27 March 2013, a draft order was made an order of court in the review proceedings (“the review order”). It was granted on an opposed basis. The terms of the order were as follows:

“1. The transfer of the property situated at [Erf 8....], [D.....] Zone 1, Soweto (“the property”) to the Second Respondent (Ms Molobatse) on 20 July 2007 is declared void and of no force and effect;

2. *The Fifth Respondent (the Registrar of Deeds) is directed to cancel the Deeds of transfer of the Second and Third Respondent (Mr Moloisane) and to reflect that the Fourth Respondent (the City of Johannesburg) is the owner of the property;*
3. *The Fourth Respondent (the City of Johannesburg) is directed to deal with the property in accordance with the adjudication award that had been made on 3 May 2002 in accordance with Section 2 of the Conversion of Certain rights into Leasehold or Ownership Act, No 81 of 1998;*
4. *The First Respondent is ordered to pay the costs of this application.” (emphasis added)*

[5.13] I will deal with the underlined aspects of the review order in due course.

[5.14] As I will explain shortly, the review order forms the cornerstone of Ms Dlamini's application for rescission of Victor J's order and judgment. However, despite obtaining the review order in March 2013, Ms Dlamini did not institute the rescission proceedings until December 2014. It was only then that the application for rescission was served on Mr Moloisane. This was:

- 5.14.1. four years after the eviction judgment and order were granted;
- 5.14.2. more than one-and-a half years after the review order was granted; and
- 5.14.3. more than two years after [Erf 1.....] had been transferred to the current owner.

[6] As far as the underlined portions of the review order are concerned, it should be noted that the property description in the order does not accord with the property description in Victor J's eviction order. The review order describes the property as being [Erf 8.....], whereas the eviction order describes the property as being [Erf 1.....]. As I will indicate shortly, this caused some complication in the application before me and formed the basis of an averment by Ms Dlamini that Mr Moloisane had attempted fraudulently to mislead the court in the eviction proceedings.

[7] The second point to note is that in her review application, Ms Dlamini relied on a previous award by the Department, dated 2002, in which she was awarded rights in the property. From the record of the eviction application, Ms Dlamini did not refer to this award in opposing the eviction application. Because the review order was made without the benefit of any judgment, we do not know what the facts and circumstances are regarding that award. Nor do we know what facts and averments Ms Dlamini relied on in her review application.

THE CASE FOR RESCISSION

[8] In her founding affidavit, Ms Dlamini based her application for rescission on the following averments:

[8.1] the review order declared that the transfer of the property to Ms Molebatsi and any others was void *ab initio*;

[8.2] the 2002 adjudication award indicates that the property is to be registered in Ms Dlamini's name and that of her sister; and

[8.3] thus, the eviction order should be set aside as Ms Dlamini is the lawful owner of the property.

[9] I pause to point out in this regard that the latter averment is not strictly speaking accurate. The review order did no more than grant Ms Dlamini a right to acquire the property. Until registration in her name, which I understand has not occurred, she is not the registered owner. However, this inaccuracy does not affect the issues before me in any material way.

[10] In her replying affidavit, Ms Dlamini added that the purpose of the rescission application was to revisit the eviction order in light of the legal position that was subsequently made clear by the review order, in terms of which the transfer of the property was to be effected to Ms Dlamini and her sister. Ms Dlamini submitted in this regard that "*the correct legal position was therefore at all material times that (Mr Moloisane) did not acquire legal ownership of*

the property and therefore enjoyed no locus standi to evict anyone” from the property.

- [11] In addition, Ms Dlamini sought to expand her grounds for rescission with reference to the two different property descriptions contained in the eviction order, on the one hand, and the review order, on the other.
- [12] In this regard, she averred that the property to which she claimed ownership, and which her family had always occupied, was “[Erf 8....] [D...] Ext 1”, i.e. the property described in the review order. She averred further that the title deed in terms of which Mr Moloisane had claimed to acquire ownership referred to a different property altogether, viz. “[Erf 1.....] [D.....] Township”.
- [13] On this basis, she contended that Mr Moloisane had perpetrated a fraud on the court in the eviction proceedings by seeking to evict Ms Dlamini from a property that he had never owned, viz. [Erf.....]. I return to this issue shortly.
- [14] In neither of her affidavits filed in support of her application for rescission did Ms Dlamini identify the legal basis for the rescission. In the heads of argument filed on her behalf, the legal bases were identified as Rule 31(2)(b) and Rule 42 of the Uniform Rules of Court. Clearly the former has no application in the present case, as the eviction order was sought and granted on a fully opposed basis.
- [15] At the hearing before me, counsel for Ms Dlamini, submitted that his client intended relying on the common law, and on Rule 42(1)(c) as the bases for

application for rescission. He explained further that his client's case rested in this regard on two alternative legs:

[15.1] First, fraud on the part of Mr Moloisane.

[15.2] Alternatively, common mistake under Rule 42(1)(c), or, in terms of the common law, *justus error*, or *justa causa*.

[16] As far as Mr Moloisane's opposition to the application is concerned, in addition to taking issue with Ms Dlamini on the merits of the application, he raised a point in *limine*. Mr Moloisane submitted that in view of the appeal route having taken its full course, the judgment and order were final and it was "legally incompetent" for Ms Dlamini to seek rescission of them.

[17] This issue was not strongly pressed at the hearing before me. I do not think there is any merit in the submission. While it may be unusual for a party to apply for rescission after the full appeal process has ended unsuccessfully, she is not prohibited as a matter of law from doing so. As I discuss in more detail shortly, rescission is an exception to the general rule that judgments are final, and that a court may not alter or reverse its own judgments once they are granted. Moreover, appeal and rescission serve different purposes. Therefore, even though a judgment may be "fully finalised" from an appeal point of view, this does not preclude a party from pursuing an application for rescission.

[18] For these reasons, I conclude that the point *in limine* cannot succeed.

[19] I turn to the substance of the application for rescission by considering each of the two legs relied on by Ms Dlamini in turn.

FRAUD

[20] Ms Dlamini's reliance on Mr Moloisane's alleged fraud in misleading the court in obtaining the eviction order can be disposed of without much ado.

[21] As I noted earlier, Ms Dlamini's claim is that Mr Moloisane fraudulently misled Victor J by claiming that he was the owner of [Erf], [D.....] Ext 1, when he was not the owner of that property. She claims that this is the property that she and her family occupied. Thus, so the argument goes, Mr Moloisane sought to evict her and her family from a property that he did not even own.

[22] In my view, Ms Dlamini's contentions are misguided. It is common cause that Mr Moloisane's title deed described the property of which he was the registered owner, and in respect of which he sought the eviction order as "[Erf 1.....]", not "[Erf]". The confusion seems to have crept in due to the fact that the property has previously been described at various times and in various documents through its history as being "stand 897" or "previously [Erf 8....]". However, there can be no confusion that the property was held by Mr Moloisane under a deed of title which described the property as being "[Erf 1.....]".

[23] It is on the basis of this description and title that Mr Moloisane asserted his right of ownership and sought the eviction of Ms Dlamini and her family

members. From the judgment of Victor J, it is clear that Ms Dlamini did not raise as a defence that she and her family were not in occupation of Mr Moloisane's property. Moreover, the eviction order describes the property in question as being "[Erf 1.....]".

[24] Thus, it is quite clear that all of the parties and the court were of the same mind when it came to the identity of the property that was the subject matter of the eviction order. Mr Moloisane did not mislead the court in this regard. Nor did he deliberately try to perpetrate a fraud on the court by misrepresenting that he owned the property when, as Ms Dlamini now claims, he actually owned an entirely different property.

[25] If there is any remaining confusion in this regard, then the responsibility for this would seem to rest with Ms Dlamini. It was she who described the property as being "[Erf 8.....]" in her subsequent review application, and who obtained an order relating to the property so described. Consequently, it can never be inferred from the confusion that has resulted that it was deliberately caused by Mr Moloisane as part of a fraudulent plot to mislead the court in the eviction proceedings.

[26] Therefore, I conclude that there is no merit in Ms Dlamini's assertion that she is entitled to a rescission of the eviction order on the basis that it was tainted by fraud on the part of Mr Moloisane.

THE ALTERNATIVE BASIS: ERROR OR *JUSTA CAUSA*

- [27] As far as the question of whether Ms Dlamini is entitled to rescission on her alternative basis, I begin by setting out the relevant principles.
- [28] The well-established rule is that once a court has ruled finally on a matter, it is *functus officio*, and may not revisit its decision. The rule favours certainty and finality in orders granted by courts.² It is in the interests of justice that there should be relative certainty and finality as soon as possible concerning the scope and effect of orders.³
- [29] Whether at common law, or under Rule 42(1), the court's power to rescind a final order is limited, and the circumstances within which the power may be exercised fall within a relatively narrow ambit.⁴ This is because rescission may only be granted in circumstances where the common law or the Rules of court specifically permit it.⁵

² *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173; *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at 5I–G; *De Villiers and Another NNO v BOE Bank Ltd* 2004 (3) SA 459 (SCA) at 462H–463F; *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1 (CC) at 12F–G; *Minister of Social Development, Ex parte* 2006 (4) SA 309 (CC) at 318F

³ *First National Bank of Southern Africa Ltd v Van Rooyen N.O. & Others; In re First National Bank of Southern Africa Ltd v Jurgens & Others* 1994 (1) SA 677 (T) at 681E–G

⁴ *Childerley Estate Stores v Standard Bank of SA Ltd* 124 OPD 163 at 166, referring to the common-law position

⁵ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 550H

[30] As far as the common law is concerned, rescission is permissible only on the basis of fraud, *justus error* (in exceptional cases), where new documents are discovered (again, in exceptional cases), where judgment was granted by default, and on the basis of *justa causa*, in circumstances where there is an absence of a valid agreement between the parties to support the judgment.⁶

[31] As far as Rule 42(1) is concerned, in the frequently cited decision of the Supreme Court of Appeal in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)*,⁷ the court emphasised that:

“Rule 42 is confined by its wording and context to the rescission or variation of an ambiguous order or an order containing a patent error or omission (Rule 42(1)(b)); or an order resulting from a mistake common to the parties (Rule 42(1)(c)); or ‘an order erroneously sought or erroneously granted in the absence of a party affected thereby’ (Rule 42(1)(a)). ... The trend of the Courts over the years is not to give a more extended application to the Rule to include all kinds of mistakes or irregularities.” (emphasis added)

[32] It is important to bear in mind that the purpose of Rule 42(1) is “*to correct expeditiously an obviously wrong judgment or order*”,⁸ and that the power to grant rescission under Rule 42(1) is discretionary.⁹

[33] As far as Rule 42(1)(c) is concerned, a “mistake common to the parties” bears the same meaning as is accorded to the concept of common mistake in the law of contract. This occurs where both parties are of one mind and

⁶ See the authorities cited in Erasmus Superior Court Practice RS39, B-307
⁷ 2003 (6) SA 1 (SCA) at paras 6-7

⁸ *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471E–F;
Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz 1996 (4) SA 411 (C) at 417B–I

⁹ *Tshivhase Royal Council and Another v Tshivhase and Another*;
Tshivhase and another v Tshivhase and Another 1992 (4) SA 852 (A) at 862G; *First National Bank of Southern Africa Ltd*, above, at 681G

share the same mistake.¹⁰ There must be a causative link between the mistake and the granting of the order or judgment. In other words, the mistake must be relevant to the questions that were required to be determined by the court.¹¹

[34] A unilateral error by one party would not provide a basis for rescission under this rule.

[35] In terms of the common law, (and outside the scope of common mistake) where the court has given judgment on mistaken facts, it is only where this was caused by a fraudulent misrepresentation on the part of one of the parties that rescission would be permissible on the basis of *justus error*. Where the mistake was as a result of innocent misrepresentation, generally rescission would not be permissible unless exceptional circumstances exist.¹² Rule 42(1)(c) does not change this position.¹³

[36] Whatever the cause of action supporting the application for rescission is, it must have existed at the time the judgment sought to be rescinded was granted. This principle was laid down by the Appellate Division in the case of *Swadif (Pty) Ltd v Dyke N.O.*¹⁴

[37] That case involved an application by a liquidator of a company placed in liquidation to have a judgment granted against it rescinded on the grounds of *justa causa* under the common law. The judgment was based on a mortgage

¹⁰ *Tshivhase Royal Council*, above, at 863A

¹¹ *Tshivhase Royal Council*, above, at 863C-D

¹² *Childerley Estate Stores*, above, at 166

¹³ *Dear v Deary* 1971 (1) SA 227 (C) at 230

¹⁴ 1978 (1) SA 928 (A)

bond passed by the company over its property more than two years prior to the winding up of the company. The liquidator averred that the passing of the mortgage bond amounted to a disposition without value under section 26 of the Insolvency Act 24 of 1936. Further, that because of this he was entitled to a rescission of the judgment under the common law on the broad ground of *justa causa*.

[38] It is important to note that the judgment in question had been granted before the company was placed in liquidation. While section 26 of the Insolvency Act permits a court to set aside a disposition without value, it does not give a court the power to set aside a judgment that has been granted to enforce a creditor's rights under such a disposition. It was for this reason that the liquidator sought to rely on the common law as a means of achieving, through rescission, what could not be achieved under section 26.

[39] In dismissing the application, the court said the following:

“... it is abundantly clear that at common law any cause of action, which is relied on as a ground for setting aside a final judgment, must have existed at the date of the final judgment. There must be some causal connection between the circumstances which give rise to the claim for rescission and the judgment and, according to the allegations in the particulars of claim, that is not the position in the present instance. If a judgment is obtained in respect of a disposition not for value, no ground exists for setting aside such judgment merely because the disposition was not made for value and it is proved that, immediately after such

disposition, the judgment debtor's liabilities exceeded his assets. It is only if insolvency or liquidation supervenes that such a disposition acquires legal significance by reason of the provisions of sec. 26 of the Act. But it does not follow that a judgment in respect of such a disposition can on that account be set aside under common law, for, when the judgment was granted, no grounds existed for setting it aside. The Court was fully entitled to grant the judgment on all the facts, and the causa, which existed at the date of the judgment."¹⁵ (emphasis added)

[40] In terms of the principle laid down in *Swadif*, rescission cannot be granted if the ground of rescission relied upon only came into existence subsequent to the judgment. The question is whether the court was entitled to grant the judgment on the basis of the circumstances that existed at that time, albeit that the court or the parties did not then know of their existence. If the court was so entitled, then the underlying principle of finality of judgments must be upheld, and rescission is not permissible.

[41] Although the principle in *Swadif* was stated with specific reference to the common law, it must apply also in the context of Rule 42(1).

[42] Ms Dlamini's case is that there was a common mistake on the part of both parties that was fundamental to the decision by Victor J to grant the eviction order. She says that both parties assumed at that time that Mr Moloisane was the lawful owner of [Erf 1.....]. However, although he was the

registered owner at the time of the judgment, the subsequent review order granted by the Pretoria court changed this. It declared that the original transfer to Ms Molebatsi was “*void and of no force or effect*”. Accordingly, so her argument goes:

[42.1] the declaration rendered the original transfer of the property void *ab initio*, with retrospective effect;

[42.2] consequently, the transfer of the property to Mr Moloisane, which was dependent on Ms Molebatsi’s rights in the property, was also rendered void *ab initio*, with retrospective effect;

[42.3] therefore, although Mr Molebatsi was recorded as the registered owner of the property at the time of the eviction order and judgment, he was not the lawful owner;

[42.4] at the time of the judgment the parties’ operated on the common, but mistaken assumption that Mr Molebatsi was the lawful owner, and was thus entitled to apply for an eviction order;

[42.5] in the circumstances, the court was not entitled to grant the order as, unbeknown to everyone, Mr Molebatsi did not have any rights of ownership capable of being vindicated by an eviction order; and

[42.6] on this basis, Ms Dlamini submits that she is entitled to a rescission of the judgment.

[43] A critical feature of the case is that the review order, upon which Ms Dlamini relies as the foundation for her argument, was granted some two years after

the judgment and order of Victor J. This, then, is not a case where the common mistake of the parties related to circumstances that actually existed at the time. At the time of the judgment, their common assumption, viz. that Mr Moloisane was the owner of [Erf 1.....], was in accordance with the circumstances that then existed. Does this mean that on the principle set out in *Swadif* rescission is not permissible for the reason that the *causa* for the rescission (i.e. the re-alignment of the legal position regarding ownership by virtue of the review order) did not exist at the time of the judgment?

[44] Ms Dlamini's case is that the answer to this question is no. She relies in this regard on the retrospective nature and effect of the review order. She submits that for this reason, the question of rescission must be dealt with as if, at the time of Victor J's judgment, Mr Moloisane was not the owner.

[45] I was referred to the case of *Menqa and Another v Markom and Others*¹⁶, dealing with the effect on ownership of property acquired following a sale in execution where the warrant of execution subsequently was declared void. The cause of the invalidity of the warrant was that it had been issued by the Clerk of the Magistrates' Court without judicial oversight, contrary to the ruling in *Jafta v Schoeman and Others; Van Rooyen v Stoltz and Others*.¹⁷ The Supreme Court of Appeal held in *Menqa* that the effect of this was to invalidate the transfer of the property not only to the purchaser who had obtained it at the sale in execution, but also to the subsequent *bona fide* purchasers of that property.

¹⁶ 2008 (2) SA 120 (SCA)

¹⁷ 2005 (2) SA 140 (CC)

- [46] It was submitted on behalf of Ms Dlamini that the same situation prevails in the present case. The review order set aside the decision by the MEC to award [Erf 1.....] to Ms Moloisane. It was on this basis that the court issued the declarator to the effect that the transfer of the property to her was void. It was submitted that the *Menqa* judgment demonstrates the retrospective effect of orders of this nature.
- [47] *Menqa* clearly lays down that the setting aside of administrative action that results in the sale and transfer of property to a third party unravels the chain of transfer of ownership, and that it does so with retrospective effect. Overlooking for the moment the fact that the review order does not describe the property as “[Erf 1.....]”, I accept that that order retrospectively relieved Mr Moloisane of his ownership of the property. Consequently, in the context of the law of property, the registration of the transfer of the property to him did not have legal effect.
- [48] However, it does not follow that this also had the legal effect of establishing, retrospectively, a *causa* for Ms Dlamini’s rescission.
- [49] As I indicated earlier, for purposes of rescission, the question to be determined is whether Victor J was entitled to give the judgment and order that she did at the time she did so. If so, then rescission must be refused.
- [50] At the time of judgment, the MEC’s award of the property to Ms Molebatse had not been set aside. Even though it was subsequently found to be unlawful, the established principle in our law is that unlawful administrative

action is effective until it is set aside.¹⁸ Mr Moloisane was the registered owner of Erf13449 at the time of judgment. It is so that this position was reversed subsequently, with retrospective effect on his property rights. However, the critical point in my view is that, in the circumstances that existed at the time that Victor J gave judgment, he was the lawful, registered owner.

[51] It was only subsequently that this was held to be otherwise. Even though the review order had retrospective effect for purposes of unraveling the chain of transfer of ownership, it could not change retrospectively the circumstances that actually existed at the time of, and that formed the basis for, Victor J's judgment.

[52] At the relevant time the parties were not mistaken. Their assumption that Mr Moloisane was entitled to seek to enforce his rights of ownership by applying for an eviction order were correct. There was no mistake, and hence no *causa* for rescission at the time of the judgment.

[53] It follows that Victor J was entitled to grant judgment in those circumstances. Regardless of whether the case is considered on the basis of *justus error* or *justa causa* under the common law, or under Rule 42(1)(c), the result is the same. Ms Dlamini's cause of action for rescission did not exist at the time of the judgment, and for this reason the rescission must be refused.

¹⁸ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) 222 (SCA)

- [54] This does not leave Ms Dlamini without a remedy to protect her rights. It is simply that, in my view, rescission is not the proper remedy on the facts before me.
- [55] In the absence of rescission of the order, Ms Dlamini would be entitled to apply for an interdict to prevent the execution of the warrant of eviction on the basis that a subsequent court order has found that Mr Moloisane is not the owner, and accordingly has no standing to enforce the warrant.
- [56] However, on the facts in the present case, it seems to me that there is no more than a theoretical possibility that Ms Dlamini would have to go to these lengths. Mr Moloisane is no longer even the registered owner of the property. Ms Sauhatse is the current registered owner. Therefore, quite apart from the review order, Mr Moloisane would, for this reason alone not be entitled to execute the warrant. There is nothing on the papers to indicate that he has any interest anymore in the property, or in seeking the eviction of Ms Dlamini.
- [57] As far as Ms Sauhatse is concerned, I agree with the submissions made by counsel for Ms Dlamini. In the absence of a cession of Mr Moloisane's rights under the eviction order, Ms Sauhatse would have no standing to enforce it. The eviction order gave Mr Moloisane a personal right to enforce the eviction of Ms Dlamini and her family members. It was common cause before me that there had been no cession of this right between Mr Moloisane and Ms Sauhatse.
- [58] Our law recognises that a new owner of property may automatically step into the shoes of the previous owner in the sphere of personal rights. This is the

effect of the *huur gaat voor koop* rule. In terms of this rule a new owner steps into the shoes, and assumes the personal rights and obligations of the previous owner flowing from an existing lease agreement. However, this rule is restricted to the lessor-lessee context. The *huur gaat voor koop* rule is *sui generis*. It was introduced under Roman Dutch law as a specific departure from the existing law, with a view to safeguarding the position of lessees.¹⁹ It does not establish a general basis for a new owner automatically to step into the shoes of the previous owner in respect of other personal rights held by the latter.

[59] In the circumstances, Ms Sauhatse would have to apply for a new eviction order, and obtain a warrant in her own right, if she wanted to evict Ms Dlamini and her family members. Obviously, the review order would be relevant to that application.

[60] It seems to me, therefore, that on the facts of this case, the eviction order has become something of a dead letter. This is not a basis on which to grant rescission. My power to do so is circumscribed, and for the reasons I have already advanced, a basis for rescission has not been established in this case.

[61] Even if I am wrong in my rejection of Ms Dlamini's submission to the effect that the retrospectivity of the review order establishes a ground for rescission, I retain a discretion to refuse her application.

¹⁹ *Mignoel Properties (Pty) Ltd v Kneebone* 1989 (4) SA 1042 (A) at 1047J-1047C

[62] It is clear to me for the reasons I have stated that the eviction order has been overtaken by subsequent events, only one of which is the granting of the review order. Even in the absence of the review order, the judgment and order granted by Victor J is no longer of any practical effect at this stage of [Erf 1.....]'s history.

[63] In addition, the review order is central to Ms Dlamini's case for rescission. However, there are patent difficulties with that order. As I have already noted, the property description in the review order identifies a different property altogether, not [Erf 1.....]. Moreover, the review application was not properly served on Mr Moloisane. Nor did Ms Dlamini know when she instituted the review application that Mr Moloisane had transferred the property to Ms Sauhetse. Consequently, although the latter was by then the registered owner of [Erf 1.....], she was not joined as a party in the review proceedings. She was also not joined in the rescission proceedings, and it is unclear if she has any idea of the current legal state of affairs regarding the property. For all of these reasons, there is a question mark over whether the review order will be enforceable and sustainable in its present form.

[64] Finally, Ms Dlamini inexplicably delayed instituting her application for rescission for more than 18 months after the review order was granted.

[65] In my view, taken together these factors mitigate against me exercising my discretion in favour of Ms Dlamini. The need for certainty and finality in court orders in this case outweighs the limited practical benefit (if any) that might flow from a rescission of Victor J's judgment and order.

[66] In summary therefore, I conclude that Ms Dlamini has failed to establish a valid ground for rescinding the judgment and order of Victor J under either the common law or Rule 42(1)(c). However, even if I am wrong in this regard, in the exercise of my discretion I conclude that Ms Dlamini's application should be refused.

[67] I grant the following order:

1. The application is dismissed with costs.

**R KEIGHTLEY
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Date Heard:	18 August 2015
Date of Judgment:	23 September 2015
Counsel for the Applicants:	Adv M W Verster
Instructed by:	Marius Verster Attorneys
Counsel for Respondent:	Adv C Van der Merwe
Instructed by:	Mathopo Attorneys