



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

4 MARCH 2022

Date

Judge M.L. Senyatsi

Case no: 107/2020

In the matter between:

SIANTHA (PTY) LTD

Applicant

and

KHUMALO

First Respondent

BEAR RIDGE TRADING 26 (PTY) LTD

Second Respondent

EKURHULENI METROPOLITAN MUNICIPALITY

Third Respondent

Case Summary: Rescinding and setting aside of a court order, application for rescission is brought in terms of Rule 42(1)(a) of the Uniform Rules of Court, alternatively the common law.

JUDGMENT

SENYATSI J

A. INTRODUCTION

[1] This is an opposed application for rescission of judgment obtained on 1 July 2020 and other related reliefs stated in the notice of motion.

B. BACKGROUND

[2] Mr Peter Presto Fakude ("Fakude") is the sole director of the applicant. Together with Mr James Ziba Khumalo, First Respondent, they are co-directors of the second Respondent Bear Ridge Trading 26 (Pty) Ltd. The parties are therefore related in in this litigation. These are common facts to all of them.

[3] On the 1st of July 2020, Second Respondent was ordered to vacate the premises situated at Erf 10632 Kgaswane Street, Mtembu Village, Springs by the court. Second Respondent had to be out of the premises by 23 July 2020.

[4] Applicant in this action seeks not only to rescind the judgment that ordered the eviction but also to be granted leave to intervene in the eviction application, leave to file its answering papers within 15 days of granting of the order, granting leave to intervene and of course the costs of the application by First Respondent on attorney and client scale.

[5] Applicant brings the application in terms of Rule 42 (1)(a) of the uniform rules of court, alternatively the common law.

[6] It is also common fact that the first respondent, who was applicant in the eviction application is also a majority equity holder in the second respondent with 51% equity.

[7] Third Respondent, a local municipality is cited by virtue of its interest in the eviction and no cost order is sought against it.

[8] Applicant contends that its *locus standi* in the action arises from it having direct and substantial interest in the order which is being sought to be rescinded. It furthermore contends that it is substantially affected by the order.

[9] The equity of Applicant in Second Respondent is 49% . Applicant contends therefore that its shares will be rendered worthless should the rescission order not be

granted, as First Respondent will be at liberty to use the liquor license designated for the physical premises of Second Respondent. It furthermore argues that First Respondent will be able to conduct his own business to the exclusion of Applicant despite the latter having paid R2 million for equity in Second Respondent.

[10] it is apparent from the paper that there has been a fallout between the director of Applicant and First Respondent which has led to litigation between them.

[11] Applicant contends that when it acquired 49% equity in Second Respondent the decision to do so was informed by the value of the immovable property which First Respondent stated to the Applicant that it was owned by the Second Respondent. Second Respondent's financials presented to Applicant showed the immovable property as a property of Second Respondent. The property was valued at R2.5 million according to the valuation provided to Applicant. This persuaded Applicant to pay R2 million in exchange for 49% equity in Second Respondent.

[12] The liquor license used for the benefit of the Second Respondent was issued to the Bootleggers CC and was applicable to the physical address of 10632 Kgaswane Street Kwa – Thema Springs, Gauteng which is the business address of the Second Respondent.

[13] Applicant contends that First Respondent competes directly with Second Respondent's premises and sells alcohol in contravention of the liquor license operative on the adjacent property. Consequently, this led to fallout between the director of Applicant and First Respondent regarding management of Second Respondent.

[14] Applicant bought 49% equity in Second Respondent, not from First Respondent but from one Mr. Skosana. The latter, it would appear from the papers, had a fallout with First Respondent. This led to the sale of his share in Second Respondent to Applicant.

C. APPLICANT'S CASE

[15] Applicant contends that its shares would be rendered worthless should the order evicting the Second Respondent not be granted. It contends furthermore that the First Respondent would be at liberty to use the liquor license designated for the physical

premises of Second Respondent and that First Respondent will conduct his own business thereby by-passing Applicant despite that the Applicant paid R2 million for shares in the Second Respondent.

[16] Applicant avers that the value of shares during its purchase was informed by the value of immovable property which it avers First Respondent presented to the Applicant to be owned by the Second Respondent. It contends that the financials presented to it showed the immovable property as assets of Second Respondent.

[17] It is Applicant's case that it has a defence in the eviction application in that, *inter alia*, as rental had been agreed to and no minutes of meeting of director was attached to the eviction application regarding the rental that was agreed to be payable.

[18] It contends that First Respondent is of the view that as a 51% shareholder in the Second Respondent he incorrectly believes that he can unilaterally make all decisions in respect of the Second Respondent.

[19] Applicant avers that the eviction application that was granted on 1 July 2020 was obtained without its knowledge. According to the evidence adduced on its behalf by its director Mr Fakude, he became aware of the eviction on 24 July 2020 when he was advised by an employee of the Second Respondent of the order served on the premises on 22 July 2020.

[20] First Respondent had also instituted liquidation application against the Second Respondent on 21 May 2020.

[21] Applicant concedes that there was an order given on 10 March 2020 for the Applicant to intervene in the eviction application. The director of Applicant states that the intervention Application could not be formally issued because of the lockdown regulations owing to Covid-19 pandemic. The director of the applicant contends that the court *dies* was suspended due to the lockdown regulations.

[22] Consequently, Applicant seeks to have the eviction order rescinded so that it can intervene in the application.

[23] The Applicant also criticizes First Respondent and accuses him of being a delinquent director by acting the way he did.

D. FIRST RESPONDENT'S CASE

[24] First Respondent contends that the Applicant does not have *locus standi* in the rescission application. The basis of the contravention is that the Applicant does not have a substantial and direct interest in the subject matter of the Application for eviction but only has an interest in the financial health of Second Respondent. He contends furthermore that a financial interest is not a substantial and direct interest for the purpose of intervening in an application.

[25] First Respondent furthermore contends that Applicant has failed to give notice in terms of Section 165 of the Companies Act 2008 ("the Act") that it intended to act on behalf of the Second Respondent, since the dispute started during September 2019.

[26] During February 2020 Applicant canceled an urgent application against First Respondent in its own name and joined its director as an Applicant in the proceedings seeking an order that it was entitled to set in motion the process envisaged in section 165 of the Act within 30 days. The application was struck from the roll with costs. The Application for rescission should be dismissed with costs on this special plea so contends the First Respondent.

[27] First Respondent avers that the eviction application was on the roll on 10 March 2020 for hearing. The set down notice was emailed to the Applicant's attorney. Applicant's attorney appeared in court and sought postponement.

[28] The postponement was granted and the court ordered the Applicant to bring the intervention application within 20 days of the court order. The due date for the intervention was 30 March 2020.

[29] First Respondent concedes that the Covid-19 lockdown had a delaying effect on the intervention application. He maintains, however, that the court and legal office re-opened on 1 May 2020. When no intervention application was forthcoming from Applicant by June 2020, the eviction application was set down. The explanation provided by the

Applicant on why the intervention application has not been sought in the merits, so contends Respondent is not good enough.

[30] The cost order that was issued against Respondent in the urgent application, which was struck from the roll with costs, remain unpaid. Consequently, so avers First Respondent, Applicant is barred from bringing the rescission application.

[31] Although the immovable property was stated in Second Respondent's financials as an asset of the business, this was an error and the financials were inaccurate. Mr. Fakude was well aware of the inaccuracy of the financials.

[32] When the dispute arose between the erstwhile shareholders of Second Respondent, Mr Skhosana and First Respondent, Mr. Skhosana sold his shares to Applicant. First Respondent contends that Mr. Fakude was intimately involved in the process of the sale and the discussions between Mr. Skhosana, himself and the parties were represented by the attorneys.

[33] First Respondent avers that the business was worth R4 million without the immovable property. He contends that the sale of the shares makes no reference to the immovable property as being part of the assets to be transferred to the Applicant.

[34] The First Respondent denies ever trading from the adjacent property and states that he rented the adjacent property to Mr. Perry Mike, who trades as "The Grand Café".

[35] He contends furthermore that after the sale of the shares by Mr. Skhosana to the Applicant, he approached the Applicant's director and informed him that the property would no longer be available to rent to the Second Respondent. Mr. Fakude was not in agreement that rent should be paid by the Second Respondent and this led to the breakdown of the relationship which led to the eviction of the Second Respondent.

E. ISSUES FOR DETERMINATION

[36] The issues that require to be determined can be summarized as follows:

- (a) Whether the Applicant has any direct and substantial interest in the subject matter of the eviction;
- (b) Whether good cause has been established by the Applicant to have the eviction order set aside and
- (c) Whether the Applicant has made a case in terms of Rule 42(1)(a) of the Uniform Rules of Court.

F. LEGAL PRINCIPLES AND REASONS

The requirements for direct and substantial interest in the subject matter of the application.

[37] To be able to succeed in an intervention application Applicant must show that it has direct and substantial interest in the subject matter of the litigation.

[38] This principle is regulated by Rule 12 of the Uniform Rules which provides as follows:

“Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action, may, on notice to all parties, at any stage of the proceedings, apply for leave to intervene as a plaintiff or a defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem to meet.”

[39] The applicant seeking to join as already stated, must show it has a ‘direct and substantial’ interest in the subject matter of the application.¹ The question of joinder should depend on the manner and to the extent to which the court order may affect the interests of third parties. The law is therefore settled on this requirement and that is the intervening party must demonstrate a legal interest.²

¹ See *Henry Viljoen (Pty) Ltd v Awerbush Brothers* 1953 (2) SA 151 (O); *Erasmus Superior Court Practice* B1-102 Footnote where the collection of authorities is made: *Brauer v Café Liquor Licensing Board* 1953 (3) SA 752 (C) at 107A; *National Director of Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 308 C

² See *Astral Operation Ltd and Others v The Minister of Local Government Environmental Affairs and Development Planning and Another and Inter-Clay* 2009: ZAWCHC: 11 May 2010 at para [21].

[40] Applicant, in its attempt to show that it has, some right. Which will be affected by the eviction order relies on SA Riding for the Disabled Association N. Regional Land Claims Commissioner³ where the Constitutional Court held as follows on the principle:

"[10] If the applicants show that it has same right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such a party a pre-decision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

[11] Once the applicant for intervention shows a direct and substantial interest in the subject matter of the case, the court ought to grant leave to intervene. In Greyvenouw CC⁴ this principle was formulated in these terms:

'In addition, when, as this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject-matter of the dispute, the court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognized interest.'

[41] In the instant case, Applicant has no legal interest in the sense that it is not affected by the eviction order. The order affects Second Defendant who occupies the premises and not Applicant. The fact that Applicant paid Mr. Skhosana some R2 million to buy his equity in Applicant creates no legal interest at all, but financial one. It follows therefore that Applicant has no legal basis to join in the litigation and its application for leave to join must fail on this basis.

[42] The approach adopted by the constitutional court in the SA Riding case is applicable in case where legal interest has been established, which is not the case in the instant case as Applicant is only a shareholder. Were the financial interest to be allowed as a consideration for intervention, this would lead to unintended consequences for instance, in case of publicly listed companies with unlimited number of shareholders, they may potentially intervene in litigations brought against the company they hold securities in. This will in my view, defeat the separate legal personality of a company from its shareholders which is a principle well recognized in our law.

³ 2017(5) SA 1 (CC) at 5 A-D.

⁴ *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (2) SA 81 (SE) at 89 B - C

[43] Section 165(2) of the Companies Act No:71 of 2008 provides as follows: -

“A person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company if the person-

(a) is a shareholder or a person entitled to be registered as a shareholder, of the company or of a related company;

(d) has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person”. This derivative action can only be taken by following *the process set out in this section and with leave of the court.* Applicant in the instant case has failed, as correctly submitted on behalf of First Respondent, to initiate such steps. Applicant has therefore no locus standi to intervene in these proceedings.

Whether applicant has shown good cause for setting aside of the eviction order in terms of common law

[44] Applicant states in its case that its application is based on the common law principles of rescission of the eviction order. Applicant must show that it has good cause. The test to establish good cause has three requirements namely:

- (a) Applicant must show that it was not in willful default;
- (b) Has a bona fide defence to the eviction application and
- (c) The application for rescission is bona fide.

[45] Applicant contends as already stated, that it was not in willful default. The issue of whether Applicant was in willful default or not is irrelevant since the eviction order did not concern it but concerned Second Respondent. There was no need to cite Applicant in the eviction. It must however, be noted that Mr. Fakude, the director of Applicant was aware of the litigation. This is so because Applicant when it sought to bring the intervention

application, the court that postponed the eviction hearing, ordered Applicant to launch the intervention application within 20 days from 10 March 2020. Applicant contends that the lockdown regulations owing to Covid-19 pandemic caused the delay in launching its application. It may well have had challenges to launch the application as ordered by court within the time frame stipulated. It may well be that indeed the court offices were closed after the order was issued. It cannot however be denied that as of 1 May 2020, court offices were functional and the opportunity was therefore made available for the intervention application to be launched. Applicant failed to launch the intervention application at the opportune time. It also fails to explain why the application was not launched from 1 May 2020 until the eviction order was obtained on 1 July 2020. Applicant has failed to take this court into its confidence and its explanation that it tried to launch, the application in May 2020, is not supported by any evidence. What is common course is that this application was commissioned on 21 August 2020. I need not make any pronouncement on this issue as Applicant had no role to play in the eviction application.

[46] For completion sake I will restate the factors that Court should have to assess whether an Applicant was in willful default or not. The approach was summed up as follows by the Supreme Court of Appeal in *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited*.⁵

“A full detailed and accurate account of the causes of the delay and their effect must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment of the court, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.”

[47] There must also be a full explanation for the entire period of the delay.⁶ Applicant has referred to the delays relating to the lockdown regulations caused by the Covid-19 pandemic in general terms. It has not prioritized and fully appraised this court on the steps it took especially after 1 May 2020 when the office of the registrar of this court

⁵ 2017 (6) SA 520 (SCA) at para

⁶ See *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) [2003] ZASCA 37 par 6.

became functional on what it did to issue the intervention proceedings as ordered by court on 10 March 2020. It is for this reason that its application for rescission must fail.

[48] One of the requirements for good cause is that the Applicant must have a bona fide defence to the order it seeks to rescind. As already stated, the eviction order concerns Second Respondent and not Applicant. As to what defence can Applicant put up in an action where it has not sought to invoke section 165(2) of the Companies Act 71 of 2008, boggles one's mind. It is not the party to the action and therefore cannot offer any defence.

[49] It should have remembered that the issue relating to the alleged transfer of the immovable property, dates back as far as 2008. There is no explanation protested on the papers as to what steps were taken by anyone and especially First Respondent to invest its rights for the entire period since the purchase of shares by other Mr. Skhosana and by the Applicant as stated already, those rights could only be enforced by the Second Respondent against the First Respondent and not anyone else including the Applicant in this application.

[50] For completion sake, I will also consider I will also consider whether the Applicant has been bona fide in bringing this application. It should be remembered that the parties in this litigation were previously involved in other litigations. Applicant brought an application for a declaratory order under case number 41577/2010 in which it sought that Second Respondent was entitled to the transfer of the property based on the alleged undertaking to do so by First Respondent. That application did not see the light of day after First Respondent provided an answer thereto and the urgent interdict application was withdrawn. The application was eventually withdrawn as Part B thereof was never pursued. There is therefore, contrary to what Applicant avers, no pending application to seek the transfer of the property. In any event, that application can, as already stated, be launched by Second Respondent as Applicant has not invoked the provisions of section 165(2) of the Act to act on behalf of the Second Respondent.

The requirements for rescission of judgment in terms of rule 42 (1)(a)

[51] It is important, for completeness sake, to consider the requirements of Rule 42(1)(a) of the Uniform Rules of Court as Applicant claims to rely thereon for its application.

[52] Rule 42(1)(a) which regulates the variation and rescission of orders provides as follows:

“(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 sought or erroneously granted in the absence of any party affected thereby.”*

[53] Applicant submits in its heads of argument that the judgment was granted in error because had the court granting the eviction order had not known about the circumstances under which Applicant failed to launch its intervention application it would not have granted the order. This cannot be so because court had no evidence to support the contention by Applicant. In fact, there was no error in the eviction order based on the evidence before court. The rescission application on this ground must therefore fail.

[54] The principles applicable in consideration of a rescission application have been restated by our court on numerous occasions. In *Kgomo v Standard Bank South Africa*,⁷ the court held that the following principles apply to the rescission under Rule 42(1)(a):

“(a) *The rule must be understood against its common law background;*

(b) *The basic principle at common law is that once a judgment has been granted, the judge becomes functus officio, but subject to certain exceptions of which Rule 42(1)(a) is one;*

(c) *The rule caters for a mistake in the proceedings;*

(d) *The mistake must be the one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgment;*

⁷ 2016 (2) SA 184 (GP)

- (e) *A judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of default judgment;*
- (f) *The error may arise either in the process of seeking the judgment or in the process of granting default judgment on the part of the court and;*
- (g) *The application for rescission is not required to show over and above the error that there is good cause for the rescission as contemplated in Rule 32(2)(b)."*

[55] In *Lodhi 2 Properties Investments CC v Bondeu Developments (Pty) Ltd*⁸ the court held that:

"In any event, a judgment granted against a party in his absence cannot be considered to have been granted erroneously because of the existence of a defence on the merits which had not been disclosed to the judge who granted the judgment. In support of their contention to the contrary the applicants relied on authorities such as Nyingwa v Moolman NO 1993 (2) SA 508 (TK) and Stander v Absa Bank 1997 (4) SA 873 (E) to the effect that in an application for rescission of a default judgment in terms of Rule 42(1)(9) a court may in certain circumstances have regard to facts of which the judge who granted the judgment was aware in order to determine whether the judgment had been granted erroneously."

[56] Mr. Swanepoel on behalf of the First Respondent submitted that it is inconceivable that a judgment can be set aside in terms of Rule 42(1)(a) on the ground that the court may have not given an eviction order if it knew what was in the Applicant's attorney's mind. I agree with the submission by Ms. Swanepoel. It should be borne in mind that Applicant avers that its attorney intended to deliver an intervention application and did not do so, but if he had, then the application would have set out a defence. This is highly unlikely and such contention by Applicant cannot be allowed to be a ground to rescind the eviction order in terms of Rule 42(1)(a).

[57] There has not been suggestion of any mistake by the court which granted the eviction order. On the contrary, the eviction order was not defended and in any event, the only party which would have been entitled to defend the eviction was Second Respondent and not Applicant.

⁸ 2007 (6) SA 87 (SCA)

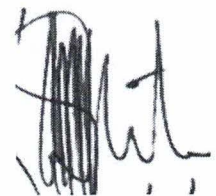
[58] I know deal with the issue of costs on a punitive scale. The punitive costs order will only be considered favorably in special cases such as dishonesty, fraud or where a party against whom the costs are ordered was vexatious, malicious or frivolous. The court has discretion on whether or not to order costs on a punitive scale. It has been submitted on behalf of First Respondent that Applicant was vexatious by not pursuing its declaratory application sixteen months after bringing the application. It should be remembered that every citizen of the Republic has the right to have his/her dispute adjudicated in court. Accordingly, I find no persuasive reasons why a punitive cost order should be imposed.

[59] Having considered the evidence and submissions made on behalf of the Applicant, I am of the view that the Applicant has failed to make out a case for rescission of the eviction order.

ORDER

[60] The following order is made:

- (a) Leave to intervene in the proceedings by Applicant is refused;
- (b) The application for rescission of the eviction order is dismissed.
- (c) The Applicant is ordered to pay the costs of suit.



M.L. SENYATSI
JUDGE OF THE HIGH COURT

Heard: 5 October 2021
Judgment: 4 March 2022
Plaintiffs' counsel: Adv. M Reineke
Instructed by: Pandor Attorneys, Naturena, Johannesburg
rashaad@pandorlaw.co.za
Defendant's counsel: Ms A.E. Swanepoel
Instructed by: Alice Swanepoel Attorneys, Boksburg
c/o Jacques Swanepoel Attorneys, Johannesburg
alice@aliceattorneys.co.za.