

DELETE WHICHEVER IS NOT APPLICABLE

1) REPORTABLE: YES/NO. ☒ YES ☐ NO

2) OF INTEREST TO OTHER JUDGES: YES/NO ☒ YES ☐ NO

3) REVISED ☒

7-10-10

SIGNATURE

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)**

CASE NO: 24678/2008

In the matter between:

SUCCESS PRIMARY SCHOOL	1 st Applicant
SUCCESS PRIMARY SCHOOL GOVERNING BODY	2 nd Applicant
EDUCATORS OF SUCCESS PRIMARY SCHOOL	3 rd Applicant
MRS TE ZULU	4 th Applicant
MR J SKHOSANA	5 th Applicant
MR SOGEB A NGWENYA	6 th Applicant

And

THE MEC FOR MPUMALANGA DEPARTMENT OF EDUCATION	Respondent
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JUDGMENT

MSIMEKI, J

INTRODUCTION

[1] The applicants, represented by Mr. Omar, brought this application seeking an order in the following terms:

- “1. *Rescinding and setting aside the judgment and orders of learned Mr. Justice Botha handed down on the 25th November 2008, in which the learned judge made an order in default as per the notice of motion that initiated these proceedings.*
2. *Granting the Applicants leave to oppose the main application that was issued on the 22nd May 2008.*
3. *Costs of suit.*
4. *Further and/or alternative relief.”*

[2] The respondent opposed the application and Mr. Greyling represented the respondent when the matter was argued on 4 October 2010.

[3] The judgment of Botha J that the applicants seek to have rescinded and set aside reads:

- “1. *That the respondents be interdicted and restrained from conducting business as Success Primary School;*
2. *That the Respondents be interdicted and restrained from entering the premises of Mphephethe Primary School for purposes of conducting the business of Success Primary School.*
3. *That the Respondents be ordered to restore possession of the four classrooms at Mphephethe Primary School in Hendrina, Kwazamokuhle township to the Applicant;*
4. *That the Respondents be interdicted from interfering with the Applicant’s business activities;*

5. *That the respondents be ordered to pay the costs of this application jointly and severally, the one paying the others to be absolved."*

- [4] Mr. Makobe of Makobe and Associates instructed by the applicants to handle their matter, merely served and filed the respondents notice of intention to defend and failed to file the answering affidavit. Botha J then at the instance of the applicant (now respondent) by default granted the interdict on 25 November 2008 which prompted the applicants to bring this application to rescind same.
- [5] Mr. Omar on behalf of the applicants contended that the application is governed by the common law. He is correct because Rule 42 does not cover a situation such as the situation in the current application.
- [6] Under common law "sufficient cause" is required for the setting aside of a judgment obtained by default. The two essential elements of "sufficient cause" for rescission of such judgment are:
- 6.1 that the party seeking relief must present a reasonable and acceptable explanation for his default; and
- 6.2 that on the merits such party has a *bona fide* defence, which, *prima facie* carries some prospect of success

(see in this regard **Chetty v Law Society Transvaal 1985 (2) SA 756 AD** at 765 B-C)

- [7] Mr. Omar further contended on behalf of the applicants that they have a *bona fide* defence to the case of the respondent. Mr. Greyling, however, held a contrary view adding that even if it can be said that the applicants were not in wilful default it can never be said that they have demonstrated any *bona fide* defence to the respondent's case.

THE ISSUE

- [8] The issue is whether the applicants have satisfied the common law requirements for rescission for the order to be granted.
- [9] Mr. Greyling submitted on behalf of the respondent that the applicants' papers do not disclose much to show that they were not in wilful default. Save for confirming that they fully instructed Makobe of Makobe and Associates to handle their matter, according to Mr. Greyling, the applicants have merely shown that they intended to amicably settle the matter with the respondent and the National Minister of Education. It is Mr. Greyling's contention that this does not sufficiently explain the applicants default. The deponent to the founding affidavit, one Thabo Elizabeth Zulu ("Zulu"), the secretary of the Success School Governing Body, states on indexed page 13 paragraph 19 of the papers that:

"Subsequent to the foregoing, and in 2004 the Circuit Manager of the department of Education informed us that there were plans to close our school. We attended a host of meetings during which we, together with the parents and community members raised their objection to the closure of the school."

- [10] It is evident from the above paragraph that consultations and meetings were held before the school was closed. The nub of the matter is that an administrative decision was taken by the respondent. This decision still stands as it has never been challenged. It is this decision which led to the seeking of the relief by the respondent which was granted by Botha J on 25 November 2008. Despite the fact that "Zulu" in her founding affidavit states:

"Noteworthy is that on the 25th November 2008, when the Respondent secured the order to evict us from the Mphephete Primary School we had already been forced out of the school. In fact we have not been at Mphephete School since late March 2008. The Respondent evidently did not draw this to the attention of the above honourable court at the hearing of this matter,"

the applicants never challenged the administrative action to close the school until the respondent sought and obtained the interdict. Botha J in my view, in the absence of any action from the applicants could not be faulted for granting the order sought. There was no *bona fide* defence at the time of the granting of the order and there is still, even to date, no *bona fide* defence, which, *prima facie* carries some prospect of success.

- [11] Mr. Greyling contended that the fact that the administrative action to close down the school has to date not been challenged and the fact that the school remains so closed, reveals therefore, that there can be no basis for the setting aside of Botha J's order. Having regard to the fact that "Zulu" in her founding affidavit states that they were forced out of the school, one would have expected the applicants to have challenged the closure of the school long before Botha J gave his order. This is also indicative of the absence of any *bona fide* defence. The applicants would have put up a heavy legal battle had such *bona fide* defence existed. They would not have simply vacated the school ending up saying that they had been forced out of the school when the respondent secured the order to evict them therefrom.
- [12] The applicants, in my view, have failed to make out a case for the relief that they seek. The application to rescind and to set aside the judgment and orders of Botha J should, therefore, fail.
- [13] **The order I make, in the result, is as follows:**
The application is dismissed with costs.



M. W. MSIMEKI
JUDGE OF THE HIGH COURT