IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)

CASE NO. 227/2010
REPORTABLE

In the matter between:

NATIONAL PRIDE TRADING 452 (PTY) LTD **Applicant**

and

MEDIA 24 LTD **Respondent**

JUDGMENT

ALKEMA J

[1] The respondent instituted application proceedings against the applicant claiming the ejectment of the latter from a building in Walmer, Port Elizabeth. The applicant, in response, filed and served an *"appearance to defend"* which I assume was intended to mean a *"notice of intention to oppose"* as contemplated by Rule 6 of the Rules of this court. However, it did not file and serve any answering affidavit within the stipulated time period prescribed by Rule 6, in consequence of which the respondent applied for and was allocated a date for hearing by the Registrar, which was 23 March 2010. When the matter was called on such date, there was no appearance on behalf of the applicant and the court granted an ejectment order in favour of the respondent. The applicant became aware of the order on 1 April 2010 and applied for the

rescission of the order, which application is opposed by the respondent and which forms the subject of this judgment.

[2] The crisp issue in this application is whether in the absence of any defence raised to the ejectment application, the order may be rescinded under Rule 42 (1) (a) of the Rules of this court. In the absence of a defence, it is common cause that the common law does not apply.

[3] The relevant facts are uncomplicated. The applicant took occupation of the building in terms of a lease agreement with the respondent. The lease agreement expired on 31 December 2009. In terms of an earlier, separate, agreement between the parties, the respondent granted the applicant an option to purchase for R25 million the total issued share capital it held in another company which owns the building. This option had to be exercised by 31 March 2010. No provision was made in any of the agreements for the right of occupation or payment of rentals for the period 1 January 2010 when the lease expired, and 31 March 2010 when the option had to be exercised.

[4] It seems to be common cause that after 1 January 2010 negotiations continued between the parties in regard to the purchase consideration for the exercise of the option, the continued lease of the building and the amount of the rental payable pending finalisation of the sale agreement. It is also common cause that until the date of hearing of this application, no final agreement was concluded between the parties in regard to the execution of the lease and the rental payable, and nor was the option exercised by the applicant either timeously or at all. There is some dispute between the parties on the legal consequences of these arrangements, but for purposes of this judgment only I accept, in favour

of the respondent, that in these circumstances the applicant is in unlawful occupation of the building and was so from 1 January 2010. It has not disclosed any defence to the respondent's claim of unlawful occupation.

[5] The applicant, in its rescission application, bases its relief solely on the ground that no notice of set down of the date of hearing of the ejectment application on 23 March 2010 was given to it either by the Registrar of this court or by the applicant. Mr *Krűger*, counsel for applicant, submitted that the relief is sought entirely in terms of Rule 42 (1) (a) which does not require, as the common law does, that an applicant must in addition show *"reasonable cause"* in the sense of reasonable prospects of success in the main application for ejectment. All it needs to show for the relief claimed is that the order was erroneously sought and erroneously granted within the meaning of the Rule.

[6] Mr *Duminy* SC, counsel for respondent, countered the above argument on the basis that Rule 42 (1) (a) was not intended, and did not, amend or extend the common law. For authority in support of this proposition he referred to the words of Jones AJA in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 at 7 (SCA) (para 6) where the learned Judge said that the Rule is, *"...for the most part at any rate, a restatement of the common law."*

[7] On the above basis, so the argument continued, the requirement that an applicant in a rescission application must show reasonable prospects of success in addition to the other requirements prescribed by Rule 42 (1), remains an integral requirement for the grant of a rescission application.

[8] It is necessary, at this juncture, to refer to the facts giving rise to the applicant's absence in court when the ejectment order was made. It came about in the following manner.

[9] The erstwhile practice in this division was that in all applications in which the respondent filed and served a notice to oppose an application under Rule 6, the application was transferred to the opposed motion court roll. If the respondent failed to timeously file and serve its answering affidavit, it was open to the applicant to place the matter on the opposed motion roll for hearing. Invariably, and due to the volume of opposed applications, it would take a lengthy period of time before a date for hearing was allocated by the Registrar. Further, the defaulting respondent would shortly before the date of hearing either file its answering affidavit with the applicant's consent, or apply for condonation to file same. This resulted in further delays and prejudice to applicants, particularly in those cases where the respondent had no *bona fide* defence to the application. In order to overcome this injustice, the practice was adopted to allow an applicant to place an application where a notice to oppose was filed but no answering affidavit was forthcoming on the so-called *"uncontested opposed roll"* to be heard as an unopposed matter in the ordinary course in motion court. This is what happened in this case.

[10] Since it is the duty of the Registrar to allocate the date for hearing in motion court it was initially also its duty to notify both or all parties of the date of hearing. This soon appeared to be fraught with difficulties in relation to the so-called *"uncontested opposed roll."*

[11] It became difficult to contact a respondent appearing in person. Often the attorney who filed the notice to oppose was no longer acting for

the respondent when the matter was set down for hearing. In some cases the respondent changed his address and it was no longer possible to contact him. Whilst the Rules cater for these eventualities, it was simply not the function of the Registrar to be saddled with those difficulties. It was the function of the applicant to ensure that the Rules are complied with, particularly in regard to service.

[12] The result was a Court Notice (also known as a Practice Note) issued by the Judge President on 14 August 2009, amending the Joint Rules of Practice of this division in regard to, *inter alia*, the service of a notice of set down of matters on the so-called *"uncontested opposed roll"* in the unopposed Motion Court. In terms of the Court Notice, Rule 15 of the Joint Rules of this division was amended by the addition of the following Rule 15 (k):

"15(k)

i) *In all matters where a notice of opposition has been delivered but no answering affidavit or notice in terms of rule 6 (5) (d) (iii) of the Uniform Rules has been delivered within the period prescribed in terms of the Uniform Rules, the applicant must apply for the matter to be set down on the unopposed roll, and the registrar must set the matter down on the unopposed roll under the caption 'UNCONTESTED OPPOSED MATTERS'.*

ii) *Notice in writing of the allocated date of hearing must be given to the respondent by the* ***applicant*** *three (3) days before the allocated date of hearing."* (my emphasis).

[13] Although the respondent, as the applicant in the ejectment proceedings, complied with Rule 15 (k) (i), it did not comply with Rule

15 (k) (ii). It did not serve the notice of set down for the hearing on 23 March 2010 on the applicant as required by the sub-rule. It is abundantly clear from the respondent's attorneys' correspondence attached to the papers in this application that the respondent was under the (mistaken) impression that it was the duty of the Registrar, and not that of the applicant, to serve the notice of set down.

[14] The Registrar's notice of set down for 23 March 2010 is addressed to the attorneys of both the applicant and the respondent. However, it does not bear the stamp of receipt from the applicant's attorney and, as I said, it is common cause that the applicant was not advised by anyone of the date of hearing. I do not know on what basis the learned Judge granted the ejectment order, but the probabilities are that the respondent's counsel *bona fide* in the belief that the Registrar's notice of set down showed service on the applicant, submitted that there was proper service of the notice of set down by the Registrar on the applicant. *Ex facie* the notice, it was indeed addressed to the applicant's attorneys, but it does not bear, as I said, the stamped receipt. Be that as it may, what is relevant in my view is that if the learned Judge was informed of the true state of affairs, namely that the notice of set down was not served on the applicant who had no knowledge of the application, then I have no doubt that he would not have granted the order.

[15] This, then, concludes the relevant factual matrix of the case. I now turn to consider the legal principles. The point of departure is an analysis of Mr *Duminy*'s submissions in this regard.

[16] His first submission is that Rule 42 (1) (a) does not apply to the facts of this case. The Rule 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;"*

[17] Sub-paragraphs (b) and (c) are not relevant for present purposes and I need not refer thereto.

[18] In developing his argument, Mr *Duminy* submitted that the ejectment order was neither erroneously sought nor was it erroneously granted. He submitted that *ex facie* the notice of set down, it was served by the Registrar on the applicant's attorneys and the respondent had no way of knowing that in fact it was not served. In regard to the provisions of Rule 15 (k) (ii), he submitted that it matters not whether the notice of set down was served by the Registrar or by the applicant's attorneys. What matters is that it was served. If it was served by the Registrar, then strict compliance with Rule 15 (k) (ii) falls away. And because the applicant was under the *bona fide* and reasonable belief that there was proper service by the Registrar, then it can not be said that the order was erroneously sought.

[19] For the same reasons, Mr *Duminy* submitted, the order was not erroneously granted. The learned Judge was satisfied, *ex facie* the notice of set down, that it was properly served. The order was therefore not erroneously granted.

[20] In support of his contentions, Mr *Duminy* referred me to *Colyn* (*supra*) which he submitted was on all fours with the facts of this case.

[21] The facts in *Colyn* **(***supra***)** may briefly be summarised as follows. The plaintiff instituted action against the defendant claiming payment of a purchase price. The defendant filed a notice of intention to defend the action. The defendant's attorneys have an office in Cape Town and also an office in Bellville. The plaintiff then filed an application for summary judgment and served it on defendant's attorneys of record at their Cape Town office. The summary judgment application was, due to a filing error on the part of the attorneys, not forwarded to the Bellville office to the attorney personally conducting the matter. The result was that the summary judgment application was not drawn to his or the defendant's attention. In consequence, the notice of intention to oppose the summary judgment was not given, and summary judgment was granted by default by the Cape Town High Court.

[22] The application for rescission of the summary judgment in *Colyn* **(***supra***)** was dismissed by the Cape Town High Court on the basis that the judgment was neither erroneously sought nor erroneously granted, which dismissal was confirmed on appeal to both the Full Bench of the Cape Town High Court and to the Supreme Court of Appeal.

[23] In the above circumstances Mr *Duminy* submitted that by analogy to *Colyn* (*supra*) the error of failing to advise the applicant of the date of set down in this case was not *"erroneous"* within the meaning of Rule 42 (1) (a). In further support of his submissions Mr *Duminy* also referred me to *De Wet and Others v Western Bank Ltd* 1979 (2) 1031(AD) at 1038 B-G.

[24] In my respectful view, there is no merit in Mr *Duminy*'s submissions. I do not find any support for his submission in either *Colyn*

or *De Wet* (*supra*). The facts in those cases are clearly distinguishable from the facts in this case. As Jones AJA pointed out in *Colyn* (*supra*), Rule 42 (1) (a) must be interpreted against the background of the common law.

[25] The Rules of the High Court including Rule 42 (1) (a) regulate the procedure in the High Court and are not part of the substantive law. It is also in this sense, I believe that Jones AJA remarked in *Colyn* (*supra*) that Rule 42 does not purport to amend or extend the common law. Its object and purpose is to provide a procedure for the rescission of judgments and it has no effect on common law principles. This is also recognized in our case law.

[26] In *Theron NO v United Democratic Front* (*Western Cape Region*) *and others* 1984 (2) SA 532 (C) at 536E the court held that Rule 42 (1) *"... is a procedural step designed to correct an irregularity and to restore the parties to the position they were in before the order was granted."*

[27] It has often been held that where the Rules prescribe a particular procedure, and that procedure is not followed, then such procedural error renders the judgment sought and granted *"erroneous"* within the meaning of Rule 42 (1) (a). Effectively, what is being rescinded is the procedure in terms of which the judgment was granted, and therefore, by necessary implication; also the judgment. See *Fraind v Nothmann* 1991 (3) SA 837 (W); *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E); *Stander and Another v Absa Bank* 1997 (4) SA 873 (E); *Lodhi 2 Properties Investments CC and Another v Bondev Developments* 2007 (6) SA 87 (SCA).

[28] *In Lodhi* (*supra*), Streicher JA said at 93H-94B (para 24):

> *"Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the sheriff's return of service wrongly indicates that the relevant document has been served as required by the Rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted erroneously."*

[29] The learned Judge of Appeal continued to remark at 94E (para 25) and 95D (para 27) that, by contrast, a judgment to which a party is procedurally entitled cannot be considered to have been granted erroneously by reason of facts of which the Judge who granted the judgment, as he was entitled to do, was unaware.

[30] Applying the above principles to the facts of the present application, the following emerge:

[31] The amended Court Notice of August 2009 (the Practice Note) prescribes a Practice Rule in this division. It was promulgated by the

Judge President under section 43 of the High Court Act 59 of 1959 and has the same force and effect as the Uniform Rules of the High Court. Non-compliance of this Notice constitutes a procedural irregularity. It was the duty of the applicant, and not of the Registrar, to serve the notice of set down on the respondent. Failure to do so, constitutes a procedural irregularity with the result that the judgment was sought and granted erroneously within the meaning of Rule 42 (1) (a). If the learned Judge who granted the ejectment order knew of the procedural irregularity, namely non-service of the notice of set down on the respondent, he would not have granted the order.

[32] The mistake or irregularity in *Colyn* (*supra*) relied on by Mr *Duminy* was not of procedural nature. In that case the administrative error on the part of the defendant's attorney by failing to forward the summary judgment application to its Bellville office was not a procedural error under the Rules. In the words of Jones AJA at 8G (para 9):

> *"The defendant describes what happened as a filing error in the office of his Cape Town attorneys. That is not a mistake in the proceedings. However one describes what occurred at the defendant's attorneys' offices which resulted in the defendant's failure to oppose summary judgment, it was not a procedural irregularity or mistake in respect of the issue of the order. It is not possible to conclude that the order was erroneously sought by the plaintiff or erroneously granted by the Judge. In the absence of an opposing affidavit from the defendant there was no reason for Desai J not to order summary judgment against him."*

[33] What brings the present case within the ambit of Rule 42 (1) (a) was the procedural failure on the part of the respondent's attorney to serve the

notice of set down on the applicant as it was required to by Practice Rule 15 (k) (ii).

[34] I therefore hold that the judgment in *Colyn* (*supra*) does not support the respondent's case.

[35] The submission that *ex facie* the Registrar's notice of set down it was properly served on the applicant and therefore the *bona fide* belief that the application was procedurally in order, and consequently the order was not erroneously sought or granted, is with respect fallacious. First, as a matter of fact, it was not *ex facie* the notice properly served on the applicant. Although the notice is addressed to the applicant's attorneys, it does not bear its stamp of receipt. It is a long standing practice in this division (as it is I believe in all other divisions of the High Court) that any notice issued by the Registrar to any party must bear the stamp of receipt of the addressee. Its absence should have alerted the respondent, as the applicant in the ejectment application, to the failure of service.

[36] Second, and in any event, the error or irregularity does not have to appear from the proceedings. Some of the earlier cases in this division, such as *Bakoven* (*supra*) (at 471F) and *Tom v Minister of Safety and Security* (1998) 1 All SA 629 (E) held that the *"error"* must be patent from the record of proceedings and that the court is confined to the four corners of the record to determine whether or not Rule 42 (1) (a) is applicable. This is no longer good law. If the *"error"* is of procedural nature it is *"erroneous"* within the meaning of the Rule, irrespective of whether or not it manifested itself in the record of proceedings. See *Stander and Another v Absa Bank* (*supra*) at 882 A-B; *Colyn* (*supra*), and *Lodhi* (*supra*) at 93H-94B (para24).

[37] Third, and although I accept that proper service by the Registrar may have done away with compliance of Rule 15(k)(ii), it remained the ultimate duty of the respondent to serve the notice of set down on the applicant. It may not shift that duty to the Registrar or endeavour to blame the Registrar for non-service, as it does in its answering affidavit and heads of argument.

[38] The reliance by Mr *Duminy* on the case of *De Wet* (*supra*) is equally misplaced.

[39] The *"error"* or irregularity relied on in *De Wet* (supra) was the applicant's attorneys' failure to notify him that he (the attorney) had withdrawn as attorney of record for the applicant. It was common cause that the attorney had in at least two respects failed to comply with the provisions of Rule 16 (4) in withdrawing as attorney for the applicant. Such failure resulted in the applicant not being notified of the date of hearing, and judgment by default was granted against him.

[40] However, the attorney purported to withdraw as attorney of record only after the case had been set down for hearing. When the matter was set down for hearing the notice of set down was properly served on applicant's attorney of record. The applicant applied for rescission which was refused. Both the Full Bench and the Appellate Division (as it was then known) confirmed the dismissal of the rescission application.

[41] The Court of Appeal, per Trengrove AJA, held that there was no question of any irregularity on the part of the respondent. The case was set down for hearing properly and in accordance with the Rules of Court.

As far as the trial Court was concerned, the Rules had been fully complied with and the notice of set down had been duly served. In short, the non-compliance with Rule (16) (4) dealing with the withdrawal of an attorney of record had nothing to do with the regularity or otherwise of the procedure to notify the applicants of the date of trial. When the notice of set down was served on the attorney, he was still the duly appointed attorney of record. It was accordingly held (at 1038B-H) that the *"error"* was not an error within the meaning of Rule 42 (1) (a).

[42] The facts in this case are very different. The *"error"* complained of relates specifically to the non-compliance with Rule 15 (k) (ii) by respondent's attorney to give notice of set down to the applicant. When the matter was heard, the Rules (Rule 15 (k) (ii)) had not been complied with. Had this irregularity been brought to the attention of the Presiding Judge, he would not have granted the order. The order was therefore erroneously sought and erroneously granted within the meaning of Rule 42 (1) (a).

[43] This brings me to the second, alternative, point raised by Mr *Duminy*, namely; that the common law requirement of showing a *bona fide* defence remains a requirement for the relief under Rule 42 (1) (a) even if the Rule applies. As I said, in support of this contention he relies on the dictum of Jones AJA in *Colyn* (*supra*) where the learned Judge said that the Rule does not purport to amend or extend the common law, but is merely *"a restatement of the common law."* Mr *Duminy* submitted that what Jones AJA intended to convey by this phrase is that the common law requirements must be drafted into the wording of Rule 42. I do not agree.

[44] Of course, Jones AJA did not say that the common law requirement of *"sufficient cause"* remains a requirement under Rule 42. This is a supposition of counsel, based on what Jones AJA in fact said. In my view, such supposition is fallacious and is based on a misinterpretation of the judgment in *Colyn* (*supra*).

[45] Having alluded to the requirement that Rule 42 must be interpreted against the background of the common law, and having referred to the guiding principle of the finality of judgments, the learned Judge referred to the common law exceptions to the principle. He referred to four such exceptions (at 5I-6G (para (4)) which he said, in the main, constitute the common law grounds to obtain a rescission of an order or judgment. These are:

1. Judgments obtained by fraud or *justus error*;
2. Where the applicant shows sufficient cause;
3. The correction, alteration and supplementation of judgments or orders; and (possibly)
4. The recalling of its order by court immediately after having given it.

[46] In a comprehensive and well researched judgment on the common grounds for rescission, Van Zyl J in *MEC for Economic Affairs, Environment and Tourism v Kruisenga and another* 2008 (6) SA 264 (CkHC) discuss at 278A-290D the historical origin, development and modern day requirements for each ground. See also *Childerley Estate Stores v Standard Bank of SA Ltd 1924 OPD 163.*

[47] It is unnecessary to repeat or summarise these cases. Suffice to say that, broadly speaking, a distinction is drawn between judgments and

orders granted in the absence of a party against whom the judgment or order is made, and judgments or orders made after evidence was led or made by consent. In the former case, the applicant for rescission must show sufficient (or good) cause which essentially means he must give a reasonable explanation for his absence and disclose a *bona fide* and legal defence to the claim (the second ground). I have not found in any of the cases or authorities I have consulted, or in the judgment of Van Zyl J, any suggestion that sufficient cause is a requirement under any of the other common law grounds of rescission. And nor can I conceive of any good reason why it should be a requirement under any of the other grounds.

[48] To return to the four grounds mentioned by Jones AJA in *Colyn* (*supra*), ground 1 is only employed after evidence is led and the merits of the dispute have been determined. See also *Athanassiou v Schultz* 1956 (4) SA 357 (W) at 360G; *Verkouteren v Savage* 1918 AD 143 at 144; and *Colyn* (*supra*) at 6A-B.

[49] Since the application for rescission based on fraud or *justus error* is considered only after the merits have been determined, it seems wholly unnecessary (if not illogical) to again determine the *bona fides* of the defence in the circumstances where it was fully aired and determined by the court which granted the order or judgment.

[50] Ground 2 applies only where the order or judgment was taken by default; ground 3 is not strictly aimed at rescission but at correction in limited and prescribed circumstances; and ground 4 applies only where the order is withdrawn either immediately or shortly thereafter when a patent error is realized and no prejudice is suffered by any party.

[51] The requirement that the applicant must show a *bona fide* defence is peculiar to the ground of sufficient cause in relation to a judgment or order granted by default. It is not a requirement of any of the other common law grounds upon which rescission may be sought or granted. Put differently, where an applicant relies on any other common law ground for rescission, it does not have to show a *bona fide* defence. The four grounds mentioned by Jones AJA are therefore distinct and separate from each other, each having its own particular requirements or elements.

[52] Jones AJA did not and could not have intended to convey that all common law requirements under all common law grounds became implied requirements under Rule 42, and nor did he stipulate which requirements under which grounds became requirements under Rule 42. As I will shortly demonstrate, Rule 42 caters for a completely different situation which provides for its own peculiar requirements.

[53] It is a procedural measure designed to rectify a procedural error, and in this sense, in the words of Jones AJA, (at 7B-C) *"It does not purport to amend or extend the common law."* In the words of Erasmus J in *Tom v Minister of Safety and Security* (*supra*) at 638(C): *"... Rule 42 (1) (a) provides for a remedy distinctly different from the relief allowed under the common law."*

[54] It therefore follows that the requirements of Rule 42 are prescribed by the wording of the Rule itself and are not imported from the common law. In a long line of cases it is recognised, for instance, that the common law requirement of *"sufficient cause"* under the second ground mentioned by Jones AJA, is not a requirement under Rule 42 (1) (a). See: *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576 (W) at

578F-G; *De Wet and others v Western Bank Ltd* 1977 (4) SA 770 (T) at 777F-G; *Tshabalala and another v Peer* 1979 (4) SA 27 (T) 30C-D; *Bakoven* (*supra*) at 471 G-H; *Topol and others v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 650 D-J; *Dawson and Fraser (Pty) Ltd v Havenga Construction (Pty)Ltd* 1993 (3) SA 397 (B) at 399C-D; *De Sousa v Kerr* 1978 (3) SA 635 (W); *Mutebwa v Mutebwa and another* [2001] 1 All SA 83 (Tk) at 89e (para 16).

[55] The matter is now authoritatively settled by the judgment of the SCA in *Lodhi 2 Properties* (*supra*) where Streicher JA said at 95F:

> *"The existence or non-existence of a defence on the merits is an irrelevant consideration ..."* (under Rule 42 (1) (a)).

[56] There is, I believe, also a consideration of policy why it is not a requirement that an applicant has to show a *bona fide* defence under Rule 42 (1) (a), and that is this: Any order or judgment made against a party in his absence due to an error not attributable to him, is such a profound intervention in his right to a fair trial and right to be heard, that, for this reason alone, the judgment or order should be set aside without further ado.

[57] If Jones AJA did not intend to mean that the common law grounds apply to Rule 42, what then did he intend to convey by saying that the Rule is *"...* ***a restatement of the common law …****"*? In my respective view, what he intended to convey was no more than this: Rule 42 contains a similar remedy to that of the common law, namely to restore the parties to their same position before the wrong order was made.

[58] The one feature which runs like a golden thread through all the

decided cases on the common law grounds for rescission, is that its historical origin lies in the remedy of *restitutio in integrum.* Its aim is to correct an injustice and to place the aggrieved party in the same position in which he was before the error or fraud or other form of injustice was committed. Although Rule 42 provides for a different mechanism, namely to set aside a procedural irregularity, its aim is the same as that of the common law, namely to restore the applicant in its previous position before the irregularity occurred. And it is in this context, against the background of the common law, that the words of Jones AJA in *Colyn* (*supra*) must be read and understood where he stated (at 7B-C (para 6)):

> *"...**It** (Rule42 (1)(a)) **is, for the most part of any rate, a restatement of the common law. It does not purport to amend or extend the common law,** ..."* (my emphasis).

[59] What Jones AJA clearly meant by the above, is that Rule 42, as does the common law, provides for the remedy of *restitutio in integrum.* It does not purport to amend or to extend the common law, but merely restate the same defence in procedural form, having as its only requirement an order or judgment which was (procedurally) erroneously sought or erroneously granted in the absence of a party affected thereby. It is a procedural error explaining the absence of the affected party

[60] In my view, to interpret the judgment in *Colyn* (*supra*) in the manner contended for by Mr *Duminy*, is to take the words of Jones AJA out of context and to ascribe a meaning thereto which was not intended and which is not conveyed in the text.

[61] I am satisfied that the judgment in *Colyn* (*supra*), for the reasons mentioned, does not support the respondent's case.

[62] In all the above circumstances I am satisfied that the applicant is entitled to an order rescinding the order of this court granted on 23 March 2010.

[63] I accordingly make the following order:

1) The order of this court granted on 23 March 2010 in this matter be and is hereby rescinded and set aside;
2) The respondent is ordered to pay the costs of this application.

ALKEMA J

Heard on 24 June 2010

Delivered on 02 September 2010

Counsel for Applicant	:	Adv. Kruger
Instructed by	:	Goldberg & De Villiers Inc.
Counsel for Respondent	:	Adv. Duminy SC
Instructed by	:	Joubert Galpin Searle Inc.