

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH**

CASE NO: 992/16

Reportable	Yes
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In the matter between:

GOBO GCORA CONSTRUCTION & PROJECT

1ST Applicant

MANAGEMENT CC

SIPHO GCORA

2ND Applicant

KHUSELWA GOBO-GCORA

3RD Applicant

And

NELSON MANDELA BAY MUNICIPALITY

Respondent

**THE PUBLIC PROTECTOR OF THE REPUBLIC
OF SOUTH AFRICA**

Interested Party

And

Case No: 1414/2016

NELSON MANDELA BAY MUNICIPALITY

Applicant

And

THE PUBLIC PROTECTOR OF THE REPUBLIC

1ST Respondent

OF SOUTH AFRICA

GOBO GCORA CONSTRUCTION & PROJECT

2ND Respondent

MANAGEMENT CC

THE MEMBER OF THE EXECUTIVE COUNCIL

5TH Respondent

FOR HUMAN SETTLEMENTS, EASTERN CAPE

PROVINCIAL GOVERNMENT

W K CONSTRUCTION SA (PTY) LTD

6TH Respondent

W K PIPELINES (PTY) LTD

7TH Respondent

JUDGMENT

VAN ZYL DJP:

1) This is an application for leave to appeal against a judgment of this court under case numbers 992/2016 and 1414/2016 (the rescission judgment). The judgment dealt with two applications for the rescission and setting aside of three judgments of this court delivered under the same case numbers. Both rescission applications (the applications) were dismissed with costs.

2) The background to the applications was comprehensively dealt with in the judgment and it is not necessary to say anything further with regard thereto. The applications were based on the provisions of Court Rule 42, more specifically Rules

42(1)(b) and 42(1)(c). This Court found that the grounds relied upon by the applicants in support of the application do not constitute an error as envisaged in sub-paragraphs (1)(b) and (c) of Rule 42. The grounds relied upon were summarised in paragraphs 30 to 31 of the rescission judgment.

3) It was found that what the applicants contended were errors or mistakes in the three judgments, was not what Rule 42(1)(b) and (c) envisaged to constitute an ambiguity, patent error, omission, or a mistake common to the parties. Instead, what the applicant's based the rescission applications on were nothing more than errors or mistakes in the reasoning and the findings of the court that delivered the three judgments. The applicants were accordingly seeking a correction of what they considered to have been wrong decision(s) on the merits, and that their appropriate remedy in the circumstances was an appeal, a remedy which they have already pursued.

4) In argument Mr Gcoro, who as before, represented the applicants, focused his address on the judgment of Pickering J in the application for review. His submission was that the learned judge made an error in law, and that it constituted a *iustus* error that was a ground for setting aside of the judgment in terms of Rule 42 or the common law. Mr Gcoro in particular relied on a decision of the *Constitutional Court in Occupiers, Berea v de Wet NO and Another* 2017 (5) SA 346 (CC) at paras [68] to [78].

5) The error of law relied upon is based on the contention, in very broad terms, that the finding of Pickering J that the Public Prosecutor acted outside her powers when she made findings with regard to the relationship between the Metro and the

close corporation, was wrong in law in that: (a) it is inconsistent with precedent in relation to the rectification of maladministration; (b) did not give effect to the mandate of the public prosecutor; (c) did not give effect to the finding of invalidity of the contract between the Metro and WK; and (d) the setting aside of the remedial action meant that what was found to be unlawful, and to constitute maladministration, was allowed to continue.

6) The aforementioned finding of Pickering J was made on the evidence placed before him, and the arguments raised thereon. It was in other words a finding made on the merits of the matter. The correction of such a finding is the function of a court of appeal that in the present matter, declined to do so by refusing the applicants leave to appeal the judgment of Pickering J. An incorrect finding of the nature contended by the applicants is not an error as envisaged in Rule 42 or the common law. It falls outside the scope of the provisions of Rule 42 on which the applicants chose to base the rescission application on.

7) The judgment in *Occupiers, Berea v de Wet NO and Another* relied upon is not authority for the applicants' submission that, on the assumption that the *ultra vires* finding was incorrect, it constitutes an error providing a basis for the rescission of the judgment. In that matter there were two categories of applicants. The order made against those applicants who were absent when the order was granted, was considered and set aside in terms of Rule 42(1)(a). For the obvious reasons mentioned in the rescission judgment, sub-paragraph (a) did not find application in the present matter and no reliance was as a result placed thereon. In respect of the four applicants in *Occupiers, Berea v de Wet NO and Another* who consented to the judgment, the Court found that their lack of knowledge vitiated consent. Accordingly,

the agreement that formed the basis of the granting of the consent judgment was invalid. The reason for this finding is found in the fact that in contract a mistake (*iustus* error) may be a good ground for a party to rescind from a contract (Bradfield Christie's Law of Contract in South Africa 7th ed at page 365 and further).

8) It is accordingly evident that the present matter must on the facts be distinguished from the judgment in *Occupiers, Berea v De Wet*. The judgments which form the subject matter of the rescission application were granted on the evidence placed before the respective Courts and in the presence of the parties. The judgments were not consent judgments or granted by default. I have dealt with the scope of those provisions of Rule 42 on which the applicants based the rescission application on as they apply in the circumstances of this matter, and I remain unconvinced that the grounds on which the applicant rely constitute a mistake or an error as envisaged therein. Rule 42 is not a vehicle to re-litigate a matter that had been dealt with on the merits. It cannot be used to revive failed arguments, and does not prevent a second opportunity to make a stronger case, or to revisit issues previously addressed, or to consider new arguments or supporting facts which were otherwise available at the time of the hearing of a matter.

9) The issues raised in the remainder of the grounds of appeal have been dealt with in the judgment of this Court. There is however one matter raised in the grounds of appeal that requires comment. It is the suggestion that this Court found that Rule 42 could not find application by reason of the fact that the applicants have exhausted their appeal remedies. It is based on a misreading of the last paragraph of this Court's judgment and does not account for the reasoning in the preceding paragraphs. The fact that the applicants have unsuccessfully pursued their appeal remedy does raise

the question whether the refusal of their application for leave to appeal the judgment of Pickering J, leaves them any room at all to contend that the finding of Pickering J with regards to the authority of the Public Protector constituted an error of law. However, the issue of a choice of remedies and the implications of the exercise of a choice, was not raised and therefore not addressed. The finding was simply that Rule 42 did not find application on the basis contended by the applicants, and could therefore not provide an additional remedy for the relief sought by the applicants.

10) I accordingly conclude that there are no reasonable prospects that a court of appeal will come to a different conclusion on any of the grounds raised. With regard to the costs of the application for leave to appeal, there was no appearance for the respondents, and an appropriate order would be to make no costs order.

11) In the result it is ordered that:

(a) The application for leave to appeal is dismissed.

(b) There be no order as to costs.

D VAN ZYL

DEPUTY JUDGE PRESIDENT

Counsel for the Applicants: Mr S Gcora and Mrs KGobo-Gcora
(In person)

Counsel for the Respondents: No Appearance

Date Heard: 27 June 2019

Judgment Delivered: 2 July 2019