

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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| (1) | NOT REPORTABLE |
| (2) | NOT OF INTEREST TO OTHER JUDGES |

CASE NO: 2021-44017

DATE: 8TH MARCH 2024

In the matter between:

IMPAC PROP CC

Applicant

and

MOHAMMAD, AZEEM N O

First Respondent

PATEL, MOHAMAD ZUBER DAUBHAL N O

Second Respondent

MOHAMMAD, AZEEM

Third Respondent

PATEL, MOHAMAD ZUBER DAUBHAL

Fourth Respondent

KHAN, MUHAMMED ALI

Fifth Respondent

MUHAMMAD, ASLAM

Sixth Respondent

AYOB, FATIMA

Seventh Respondent

VADIWALA, NASRNBANU MUSTAK

Eighth Respondent

RANCHOD, INDRAVADAN

Ninth Respondent

RANCHOD, PRAVKN RANCHOD

Tenth Respondent

RIMSHAH TRADING CC

Eleventh Respondent

REGAP MANSIONS BODY CORPORATE

Twelfth Respondent

Neutral Citation: *Impac Prop v Mohammad and Others (2021/44017)* [2024]
ZAGPJHC --- (8 March 2024)

Coram: Adams J

Heard on: 4 March 2024

Delivered: 8 March 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 8 March 2024.

Summary: Civil procedure – application for rescission of costs order – good cause to rescind the costs order shown by respondents – there may be merit in respondents contention that costs order should not have been granted – equates to *bona fide* defence – explanation for non-appearance reasonable and adequate – application granted.

ORDER

- (1) The costs order granted on 17 May 2023 in favour of the applicant against the third and fourth respondents be and is hereby rescinded.
- (2) The first to the eleventh respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicant's costs of this opposed rescission application.

JUDGMENT

Adams J:

[1]. I shall refer to the parties as referred to in the main application, in which a costs order was granted *in absentia* against the second and the third respondents ('the respondents') on 17 May 2023 in favour of the applicant. In this application, the respondents apply for a rescission of the said costs order. Their attorney

explains that, whilst the notice of set down for 17 May 2023 had clearly been served on his offices, it did not come to his attention for whatever reason. Had it come to his attention, so the attorney says, he would most certainly have attended court on the aforesaid date to oppose the granting of the costs order, as his clients were of the view that the applicant is not entitled to be awarded costs of the main application.

[2]. The rescission application is vigorously opposed by the applicant on the basis that the respondents were in wilful default when the costs order was granted by this Court on 17 May 2023. This, so it is submitted by the applicant, is confirmed by the fact that the notice of set down was served on the respondents' attorneys. Pre-hearing applications were also held, during which the applicant's attorneys brought to the attention of the respondents' attorneys that the matter was set down for hearing on the said date. On the morning of the hearing of the costs argument on 17 May 2023, the applicant's Counsel and its attorneys tried to get hold of the respondents' attorneys, without success. The foregoing, coupled with the fact the respondents do not have a *bona fide* defence to the granting of the costs order, mean, so the applicant contends, that good cause for the rescission of the judgment has not been demonstrated by the respondents.

[3]. It is trite that an applicant for rescission of a judgment or the setting aside of an order is required to show 'good cause' to have the order rescinded. 'Good cause', in turn, requires a demonstration by the applicant that his default was not wilful and that he has a *bona fide* defence to the claim underpinning the default judgment. Lastly, the application for rescission must be *bona fide* and not directed at frustrating the respondent's attempts to vindicate his entitlement to the relief claimed. As was held by the Constitutional Court, albeit in the context of a condonation application, in *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd*¹, an applicant for condonation 'must establish that the extent of its default is pardonable in the light of its prospects of success on

¹ *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* 2012 (2) SA 637 (CC) at para 11.

the merits of the appeal, combined with the strength of its explanation for its default, in order for condonation to be granted’.

[4]. *In casu*, I am therefore required to consider the reasonableness of the explanation given by the third and the fourth respondents for their non-appearance on 17 May 2023, and, secondly, I need to consider their prospects of successfully opposing the applicant’s application for the costs order granted by the court on the aforesaid date.

[5]. As I have already indicated, the respondents’ explanation for their non-appearance at court on 17 May 2023 is simply that their attorney did not realise that the matter was on the roll. I have no reason not to accept the explanation by the respondents’ attorney. The simple fact of the matter is that the notice of set down did not come to his attention and that is an explanation which, in my view, is a reasonable one, supported by the evidence, notably the fact that later on the very day on which the matter was on the roll, the respondents’ attorneys placed on record that he did not realise that the matter was on the roll for that day.

[6]. As regards the *bona fide* defence to the application for a costs order, the respondents contend that there was no need for the applicant to have instituted the proceedings in question. There were other avenues open to the applicant, which it ought to have explored before launching into legal proceedings. It is the case of the respondents that, irrespective of the fact that the matter resolved itself after the institution of the main application, the application should not have been issued for starters. They therefore intended arguing the issue of the costs at the hearing on 17 May 2023 and they believe that they have cogent arguments against the granting of the costs order, including the punitive costs award in favour of the applicant on the scale as between attorney and client. So, for example, the third and the fourth respondents aver that they are not the trustees of the Body Corporate in question, but merely acted as *de facto* trustees in the absence of lawfully elected Trustees at a formal Annual General Meeting called in accordance with the Sectional Titles Act. The point made by the respondents is simply that, whilst the main application seemingly had the desired effect in that

the disputes between the parties were resolved, the applicant had no right to lawfully institute the proceedings against them.

[7]. I find myself in agreement with these submissions on behalf of the respondents. In my view, there may very well be merit in the respondents' contention that the costs order, especially a punitive one on the scale as between attorney and client, ought not to have been granted by this court.

[8]. This then means that the respondent has, in my judgment, demonstrated good cause to have the costs order rescinded. Their application should therefore be granted.

Costs

[9]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*².

[10]. During the hearing of the rescission application on 4 March 2024, Mr Clayton, the respondents' attorney, seemingly accepted that, in the circumstances of this matter, the first to eleventh respondents, who are the applicants in this application, should be paying the costs. I agree. There would not have been a need for the rescission application if the notice of set down had not been missed by respondents' attorney.

[11]. I am therefore of the view that the first to the eleventh respondents should pay the applicant's costs of this application.

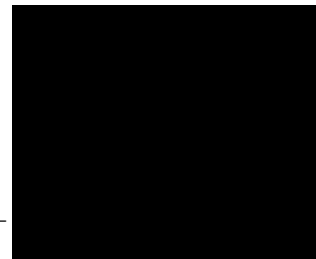
Order

[12]. Accordingly, I make the following order: -

- (1) The costs order granted on 17 May 2023 in favour of the applicant against the third and fourth respondents be and is hereby rescinded.

² *Myers v Abramson* 1951(3) SA 438 (C) at 455.

- (2) The first to the eleventh respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicant's costs of this opposed rescission application.



L R ADAMS

*Judge of the High Court
Gauteng Division, Johannesburg*

HEARD ON:	4 th March 2024
JUDGMENT DATE:	8 th March 2024
FOR THE APPLICANT:	Adv N Lombard
INSTRUCTED BY:	Shirish Kalian Attorneys, Bramley, Johannesburg
FOR THE FIRST TO THE ELEVENTH RESPONDENTS:	Attorney B C Clayton
INSTRUCTED BY:	Bryan Clayton & Company, Houghton, Johannesburg