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**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MTHATHA]**

CASE NO. 3027/2021

In the matter between:

ANDISIWE MANGQOBE

1st Applicant

CWENGA MANGQOBE

2nd Applicant

VIWE MANGQOBE

3rd Applicant

and

NOMTHANDAZO PATIENCE MANGQOBE N.O

Respondent

JUDGMENT

JOLWANA J:

Introduction.

[1] In this application the applicants seek an order for the rescission of a court order which was granted by agreement between the parties. Their intention is to have the merits of the application in respect of the proceedings leading to the granting of that court order reopened. The said court order was taken in opposed motion proceedings in which both, the then applicant, who is now the respondent in the rescission application and the then respondents, who are now the applicants were represented by counsel and possibly by their attorneys or legal representatives from the offices of their respective attorneys of record, as is the convention. The order sought to be rescinded was granted by this Court on 20 October 2022. The proceedings in respect of which that order was granted (the main application) were instituted by the respondent. That matter was opposed by the applicants until it was ripe for argument. However, the applicants experienced some difficulties in paying the fees of their attorneys of record as a result of which they withdrew as their attorneys of record in the main application.

The parties.

[2] The three applicants are siblings and children of the late Mvuyo Goodwin Mangqobe (the deceased) who died on 18 December 2009 and his second wife, Pearl Theodora Nomphele Mangqobe (the second wife) who died on 26 June 2021. I will refer to the parties as they are in this application even when reference is made to the main application for consistency and to avoid any confusion that may be caused by reference to the same litigant differently. The first applicant who is championing this application also on behalf of the second and third applicants will be referred to simply as Andisiwe.

The applicants' case.

[3] In a surprisingly terse founding affidavit Andisiwe's account in respect of the events leading to the granting of the order sought to be rescinded is mainly the following. On 19 July 2022 she visited an attorney known by her friend, Mr Qotoyi of Mbulelo Qotoyi Attorneys to help them apply for the postponement of the main application which was going to be heard on 20 October 2022. The said postponement was necessitated by the withdrawal of their attorneys of record. During their consultation she informed Mr Qotoyi that the matter was known better by their erstwhile attorney, Mr Mantyi of Mantyi Attorneys who had previously represented their mother and had drafted all the papers in respect of the main application. She therefore wanted Mr Qotoyi to just apply for the postponement of the matter to a future date.

[4] On 21 October 2022 Andisiwe called Mr Qotoyi to find out about the date to which the matter was postponed on 20 October 2022. However, she could not get through to him. She tried again on 24 October 2022 but that attempt to call Mr Qotoyi was also unsuccessful.

[5] On 26 October 2022 the applicants were served with a court order dated 20 October 2022 in which on reading it, it appeared that their counsel, Mr Mhambi, whom they did not even know, had agreed to the granting of that order which was, as a result taken by agreement. This was a shocking development to her as it appeared that their counsel had, contrary to the postponement instructions she had given to their attorney, Mr Qotoyi, consented to the said order instead of having the matter postponed to a future date. The reason she had asked Mr Qotoyi to postpone the matter was so that they could pay Mr Mantyi's fees so that he, and not Mr Qotoyi, could deal with the matter to finality. For the reasons stated above the applicants seek an order for the rescission or variation of the

order dated 20 October 2022 in terms of rule 42(1) of the Uniform Rules of Court.¹ In the alternative, they seek the setting aside of the said court order in terms of common law.

[6] Andisiwe contends that the property at the centre of the main application, described as lot No.5[...]6, Hadini Location in the district of Libode, was acquired by the deceased for their mother, the second wife. Her late sister, Yvonne and her child Mila were buried there because it was their home before they got a new site. She was also born there. It is their property as they inherited it from their late mother. She attached tax receipts in respect of what is referred to therein as the local tax reflecting the inscriptions “second wife” and “first wife”. She contends that the inscription “second wife” refers to her late mother and it is evidence of the tax that was paid for the property in question for her late mother. She says that in 1981 their current homestead, lot No. 5[...]2 was not yet acquired by their mother. The property in question, lot 5[...]6 does not belong to her father’s estate, the deceased but to her late mother. It has a ten-year long lease entered into between her late mother and Messrs Rehman and Asghar who are running a brickyard business on the property. That lease is due to expire in August 2028 having been entered into on 1 September 2018.

¹ Rule 42 reads:

- (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;
 - (b) An order or judgment in which there is ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
 - (c) An order or judgment granted as the result of a mistake common to the parties.
- (2) Any party desiring any relief under this rule shall make an application therefor upon notice to all parties whose interests maybe affected by any variation sought.
- (3) The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.

[7] She contends that she and her co-applicants never consented or agreed to the order and therefore it must be set aside. She argues that it can be set aside just like a contract where the other party did not agree to the terms he signed for as there would not have been a meeting of the minds. It was a mistaken belief that they consented to the order when they never did. Their attorney, Mr Qotoyi and counsel, had no authority to consent to that court order being granted without them having agreed to it. It was taken without agreement or consent from them, and they would not have agreed to it as it would have meant agreeing to losing their only source of income. The order was granted in error or without their authority and the consent to the order was against their instructions. In the final analysis she contends that if consent orders are taken without authority, that establishes a good cause for the setting aside of the order so taken.

The respondent's case.

[8] The respondent's answering affidavit is deposed to by the respondent's attorney, Ms Nyathela. She gives a detailed factual background to how the order sought to be rescinded got to be taken by agreement. That factual background is the following. The main application papers were issued on 01 July 2021 (presumably on an urgent basis) and an order was granted on the same day with a return date. The notice to oppose, the notice of anticipation and the applicants' answering affidavit were filed on 9 July 2021 which led to the said order being reconsidered on 23 July 2021. The replying affidavit was filed on 5 August 2021. On 7 September 2021 the rule *nisi* was extended to 28 September 2021. On 28 September 2021 the matter was postponed to 9 November 2021 with stipulated time frames for the filing of the parties' respective heads of argument. On 9 November 2021 the matter was postponed to 16 November 2021 and on 16 November

2021 the matter was again postponed to 22 April 2022 for argument with the rule *nisi* being extended on each occasion.

[9] On the date of the hearing being the 22 April 2022 the applicants' current attorneys of record who were the applicants' attorneys even then, Mantyi Attorneys withdrew as the applicants' attorneys of record. That withdrawal resulted in the matter being postponed to the 20 October 2022 for hearing with the rule *nisi* being extended accordingly. The respondent's attorneys instructed sheriff to serve a notice of set down, notifying the applicants that the main application would be heard on 20 October 2022. The court order dated 22 April 2022 postponing the matter to the 20 October 2022 was simultaneously served on the applicants by the sheriff on 22 June 2022. On the eve of the hearing of the main application which was the 19 October 2022 Mbulelo Qotoyi Attorneys served the respondent's attorneys with their notice of acting on behalf of the applicants.

[10] On 20 October 2022, just before the hearing of the matter commenced, counsel for the applicants, Mr Mhambi, indicated to Mr Mapekula, counsel for the respondent, that he intended to apply for the postponement of the matter to a future date. Mr Mapekula indicated that his instructions were to oppose any contemplated application for postponement and that the matter should proceed. He had even already prepared comprehensive heads of argument in opposition to any contemplated application for postponement which were handed to Mr Mhambi. Furthermore, there was no substantive application for the intended postponement application. When the matter was called the presiding judge was not prepared to entertain the postponement application, absent a substantive application. Mr Mhambi then applied for the matter to stand down. The matter was indeed stood down by the court.

[11] While the matter was standing down Mr Mhambi made numerous calls, presumably to the attorney of record for the applicants, Mr Qotoyi. After some time, he advised the respondent's legal representatives that his instructions were to settle the matter. A draft order was prepared and went through the process of correction until there was agreement on it with Mr Mhambi being happy with the final version thereof. That is the draft order that was handed up to the court which reflected that it was being taken by agreement between the parties. Therefore, the court order dated 20 October 2022 was taken by agreement between the parties with both parties being legally represented by their respective counsel.

[12] Ms Nyathela further makes the following contentions. Mr Mantyi, the applicants' current attorney of record was aware that this matter was set down for hearing on 22 April 2022 when he decided to withdraw as the applicants' attorney of record on the date of the hearing. His last-minute withdrawal was not done in accordance with the rules. From the 22 June 2022 when the applicants were served with the court order dated 22 April 2022 postponing the matter they became aware that the main application would be heard on 20 October 2022. They were also served with a notice of set down indicating that the matter was being set down for hearing on 20 October 2022. Between Mr Mantyi's last minute withdrawal on 22 April 2022 and the 20 October 2022, the applicants could have prepared for the hearing. They did not do so. Having been made aware of the impending hearing date, the applicants did not file a substantive application for postponement if they genuinely desired, on good grounds, to have the matter postponed.

[13] In addition to all the above, the applicants' counsel agreed to the order being taken by agreement between the parties. That resulted in the court order that they now want to

have rescinded. She further contends that on the applicants' own showing, their attorneys, Mbulelo Qotoyi Attorneys, were instructed as far back as the 19 July 2022 to apply for the postponement of the matter from the 20 October 2022 to a future date. However, they only filed their notice of acting on 19 October 2022 which was the day before the matter was to be heard on 20 October 2022. There is no explanation from Mbulelo Qotoyi Attorneys about how it came to be that they did nothing from the 19 July 2022 when they were given instructions and only filed their notice of acting on 19 October 2022. This is the same thing that Mr Mantyi did on 22 April 2022 who, a few minutes before the matter was to be heard, withdrew as the applicants' attorney of record. This has not been explained by the applicants or Mr Mantyi who has now resurfaced as the current attorney of record for the applicants.

[14] It is further contended that the applicants say that they instructed Mr Qotoyi on 19 July 2022 to assist them in getting the matter postponed from the 20 October 2022 to a later date. There is no explanation by the applicants or Mr Qotoyi why a substantive application for postponement was not prepared between the 19 July 2022 and the date of the hearing. It is similarly not explained why three months before the hearing date the applicants would be instructing Mr Qotoyi to apply for the postponement of the matter instead of preparing for the hearing. Mr Qotoyi only served his notice of acting in the afternoon on 19 October 2022 despite, on applicants' own version, having been instructed to deal with the matter or apply for its postponement on 19 July 2022. This is also not explained.

[15] Mr Mantyi who had initially withdrawn as an attorney of record for the applicants, issued the rescission application and served it upon the respondent's attorneys of record

on 02 November 2022 effectively getting back on board as the applicants' attorney of record shortly after the 20 October 2022. In this regard Ms Nyathela contends that these changes in legal representation were themselves suspicious. When Mr Mantyi seemingly got back on board, Mbulelo Qotoyi Attorneys had not filed a notice of withdrawal as the applicants' attorneys of record.

[16] In dealing with and responding directly to the founding affidavit, Ms Nyathela asserted that Andisiwe who deposed to the founding affidavit has no knowledge of what happened in court on 20 October 2022. In the absence of a confirmatory affidavit from Mr Mhambi who was present in court and personally dealt with the matter, her evidence was hearsay. Furthermore, there was no confirmatory affidavit from Mr Qotoyi who would have given instructions to Mr Mhambi concerning the order being taken by agreement. There was also no confirmatory affidavit from Mr Mantyi himself. Therefore, anything said about them by Andisiwe was all hearsay.

[17] It is further contended that this application does not meet the requirements of a rescission, a variation application in terms of in rule 42(1) or a rescission application in terms of the common law. This is so because there is no procedural error, irregularity or legal error relied upon to show that the respondent was not entitled to that order. The applicants are not even raising an issue relating to the wording or even the contents of the order which requires its variation or amendment.

[18] The respondent filed a confirmatory affidavit in which she confirms that the applicants' mother was indeed the deceased's second wife. She contends that the estate of the second wife is not the subject of these proceedings as the property never belonged to her. It belongs to herself. The respondent refers to the main application in which she

suggests that in that application she gave the following background. She got married to the deceased on 14 January 1965 at Mthatha. In 1974 the deceased asked for another piece of land from the local chief for business purposes. The deceased was awarded the property in issue being site No.5[...]6, Hadini Location, Ngolo Administrative Area in Libode. The deceased used this property for business ventures like his agricultural activities, and agricultural equipment which he used to generate income. The deceased died on 18 December 2009.

[19] It was after the deceased's death that the applicants and their mother started claiming ownership of the property saying that it belonged to their mother. Because of the dispute relating to the ownership of the property, she referred the dispute to the local chief for his determination. The chief called her and her children, the applicants, and their mother to a meeting at his place on a date she cannot remember in 2010. All of them attended that meeting at the chief's place. The second wife and her children who are the applicants, the respondent and her children, the chief and his advisors were in attendance. The matter was discussed pursuant to which the chief found in her favour. The chief thereupon ruled that he was awarding that site to her and that she should pay R750.00 which she did. The chief wrote a letter in confirmation of his determination that the site was awarded to the respondent. That determination has never been challenged or set aside in any form and therefore remains extant.

[20] The chief's letter is stamped with a rubber stamp reflecting chief M. Ndamase and is addressed to whom it may concern reads:

"This serves to confirm that Mvuyo Goodwill Mangqobe ID 3[...]passed away on 18 December 2009 was allocated a site at Zitatele A/A (Hadini) (Sun-city) Libode. Now the

site has been allocated to his wife Mangqobe Nomthandazo Patience ID No. 4[...], under the jurisdiction of the chief Ndamase Mongezi ID No. 7[...].

The imbuso has been paid R750.00.”

[21] The respondent contends that she is therefore the owner of the said property. The respondent further contends that anything said about Mr Mantyi, Mr Qotoyi, Mr Mhambi and the first applicant’s unnamed friend is all hearsay in the absence of confirmatory affidavits from them. Therefore, the whole application is based on hearsay evidence as both Mr Qotoyi and applicants’ counsel, Mr Mhambi have not filed any affidavit explaining what happened in court leading to the granting of the order by agreement. The applicants would have known that if the application for postponement was not granted the respondent would be entitled to apply for the final relief. Therefore, the main application was, in any event going to proceed in the event of the application for postponement being refused.

[22] Therefore, the applicants have not made out a case for the relief sought, the granting of the application for rescission. The order sought to be rescinded which, if the application is granted, will inevitably lead to the re-opening of the merits of the case in circumstances in which the order was taken by agreement. The applicants now want to re-open the case and are raising new defences that were not raised in the main application. The property was never acquired for the applicants’ mother by the deceased. Even if it was the case that the property was acquired for their mother, which is denied, the applicants lacked *locus standi* as only the executor or executrix of their late mother’s estate would have *locus standi* to institute this application in that event.

[23] The applicants' assertion that it was a mistaken belief that they consented to the order and that therefore the order was granted without their authority is bad in law. The order was not granted by mistake or error or without authority. The applicants are, in any event, not entitled to rely on the mistakes of their own legal representatives. When the order was granted, it was not granted in default of the applicants as they were represented by counsel in court. Therefore, they have failed to show good cause for the granting of the rescission application and the order having been taken by agreement, is not rescindable. Finally, the respondent contends that the interests of justice require that the relief sought by the applicants be dismissed with costs on an attorney and client scale.

The applicants' replying affidavit.

[24] The applicants' replying affidavit does not add much to what the applicants say in the founding affidavit other than maintaining their main contention that they never agreed to the order being taken by agreement. They further allege that Mr Mhambi was forced to agree to the order. The basis on which the applicants make the contention that their counsel, Mr Mhambi was forced to agree to the order is not explained in the replying affidavit. Andisiwe further says that she was never called by Mr Qotoyi or Mr Mhambi and that she never instructed either of them to take that order by consent.

[25] She also says that it was a mistake on her part that Mr Qotoyi was instructed on 19 July 2022. He was, instead, instructed on 19 October 2022. Andisiwe concludes by saying that it was not necessary to get confirmatory affidavits from Mr Qotoyi, Mr Mhambi and their now current attorney of record, Mr Mantyi. Finally, the applicants deny that they attended any meeting with the chief and further contend that if such a meeting did take place it was illegal as a chief is not entitled to distribute an estate.

The analysis.

[26] I consider it necessary to give a retrospection of some of the events leading up to the date on which the court order was taken even at the risk of being repetitious, as I may, for clarity regrettably have to do so a few times hereinbelow. The respondent's attorney has deposed to the answering affidavit and to the extent necessary, there is a confirmatory affidavit deposed to by the respondent. In her affidavit Ms Nyathela as would have been observed above gives some revealing details about what happened during the months preceding the 20 October 2022 and on that date.

[27] The said details include the fact that Mr Mantyi was, throughout, the applicants' attorney of record. On 22 April 2022 which was the date for the hearing of the main application, Mr Mantyi withdrew from further representing the applicants. He did so unprocedurally and contrary to the provisions of rule 16² of the Uniform Rules of Court. It is worth emphasizing that the only person who could explain why he withdrew just before the matter was called is Mr Mantyi himself. However, he has not taken the court

² Rule 16 (4) reads:

- (a) Where an attorney acting in any proceedings for a party ceases so to act, such attorney shall forthwith deliver notice thereof to such party, the registrar and all other parties: Provided that notice to the party for whom such attorney acted may be given by facsimile or electronic mail in accordance with the provisions of rule 4A.
- (b) The party formerly represented must within 10 days after the notice of withdrawal notify the registrar and all other parties of a new address for service as contemplated in sub-rule [sic] (2) whereafter all subsequent documents in the proceedings for service on such party shall be served on such party in accordance with the rules relating to service: Provided that the party whose attorney has withdrawn and who has failed to provide an address within the said period of 10 days shall be liable for the payment of the costs occasioned by subsequent service on such party in terms of the rules relating to service, unless the court orders otherwise.
- (c) The notice to the registrar shall state the names and addresses of the parties notified and the date on which and the manner in which the notice was sent to them.
- (d) The notice to the party formerly represented shall inform the said party of the provisions of paragraph (b).

into his confidence in this regard. Rule 16 has been amplified by rule 7 of the Joint Rules of Practice, for the High Courts of the Eastern Cape Province (the Joint Rules) as follows:

“7 Withdrawal of Attorneys

- (a) Uniform Rule 16(4)(a) provides that an attorney ceasing to act for a party must forthwith give notice thereof to such party, to the registrar, and to all other parties. An attorney so ceasing to act should state in writing exactly what steps he has taken to advise his former client of that fact, and whether he can say that his former client has received such notification and is aware of his rights and obligations and of the possible consequences if he fails further to comply with the requirements of the rule.
- (b) Where a date of hearing has already been allocated at the time the attorney withdraws, the notice of withdrawal should state whether and in what manner the client has been informed of the date of hearing.
- (c) **As an officer of the court, it is a matter of an attorney’s duty not to withdraw at so late a stage that a matter which has been set down for hearing cannot proceed on the allocated date.**³ In the event of the late withdrawal of an attorney occasioning a postponement, the judge may require the attorney concerned to explain on affidavit why he or she did not withdraw earlier and, if no satisfactory explanation is forthcoming, the attorney may be ordered to pay any wasted costs occasioned by the late withdrawal *de bonis propriis*.”

[28] Mr Mantyi withdrew as the applicants’ attorney of record on the date scheduled for the hearing of the matter on 22 April 2022. This was done in total disregard of the provisions of rule 7 of the Joint Rules. As a result, the court was forced to postpone the matter in the interests of justice. The respondent’s attorneys caused a notice of set down to be served upon the applicants setting the matter down for the 20 October 2022 together with the court order dated 22 April 2022 postponing the matter to the 20 October 2022. The service thereof was effected on the applicants on 22 June 2022. Therefore, from

³ My emphasis and underlining.

that date the applicants were aware that the matter would be heard on 20 October 2022. However, nothing happened until the 19 October 2022 when Mbulelo Qotoyi Attorneys filed a notice of acting as the applicants' attorneys of record.

[29] In the founding affidavit Andisiwe says that she instructed Mr Qotoyi on 19 July 2022. However, in her replying affidavit there is an attempt to change that date calling it a typographical error. She says that she actually instructed Mr Qotoyi on 19 October 2022 which was the day before the matter was to be heard. How this typographical error occurred is however not explained. Mr Qotoyi has also not filed a confirmatory affidavit confirming the date on which he was instructed in the matter and what his mandate was.

[30] Absent an explanation about how that error occurred, the conclusion that this change in dates is done possibly disingenuously in an attempt to deal with the respondent's assertion that it has not been explained why since the service of the notice of set down and the court order postponing the matter to the 20 October 2022, no substantive application was made for the desired postponement becomes at least plausible. It bears remembering that the applicants' case in the founding affidavit is that she had instructed Mr Qotoyi on 19 July 2022 to get the matter further postponed from the 20 October 2022 to a future date. Mr Qotoyi's notice of acting was served at 14:48 on respondent's attorneys on 19 October 2022. However, there is no attempt to explain why from the 22 June 2022 when they were served with the notice of set down and the court order issued on 22 April 2022 postponing the matter to the 20 October 2022, they did nothing at all about the impending date some four months ahead of time.

[31] With no substantive application for postponement having been filed or prepared, counsel for the applicants appeared in court on 20 October 2022 and sought to have the

matter postponed. Even if it were to be accepted that Andisiwe instructed Mr Qotoyi on 19 October 2022, and not on 19 July 2022 it remains shrouded in obscurity why even at that late hour, a substantive application for postponement was not prepared and filed or made ready to be handed up even in court during the hearing of the matter. When it became clear to counsel for the applicants that the postponement application without a substantive application was not going to be entertained by the court, he asked for the matter to stand down. The court granted this indulgence. Ms Nyathela's account is that while the matter was standing down, counsel for the applicants, Mr Mhambi made numerous calls. I can only assume that he was making the calls to his instructing attorney, Mr Qotoyi. Eventually, Mr Mhambi advised the respondent's legal representatives that his instructions were to settle the matter. That led to the preparation of a draft order. The draft order went through various corrections until Mr Mhambi was happy with it. It was then presented to the court in terms of which the order was being taken by agreement. This version is not gainsaid at all.

[32] In making out their case that the order was not taken by agreement the applicants said nothing about what transpired in court. This is despite the fact that on the day the court order was taken, they were legally represented by a firm of attorneys. Furthermore, counsel had been secured to attend court and did in fact attend court and placed himself on record on their behalf. The respondent's attorney's account of what transpired in court is stated from paragraphs 9.10 to 9.14 of the answering affidavit in quite some detail. Andisiwe curtly responds to it as follows:

“AD PARAGRAPH 9.10 – 9.14

I am not aware of the contents of these paragraphs. I must state categorically that I was never called either by Mr Qotoyi or Mr Mhambi. Mr Qotoyi never informed me of any problems and I could not get hold of him on his cell that day and the days that followed until I was served with a court order which is the subject of these proceedings.”

[33] Andisiwe’s direct answer to all the allegations about what took place in court is a very short sentence of exactly ten words, “*I am not aware of the contents of these paragraphs*”.

Very surprisingly, there are no affidavits whatsoever from Mr Qotoyi and Mr Mhambi giving the applicants’ version of what happened in court as they were not personally present. Assuming that for some reason, it did not occur to the applicants to obtain affidavits from Mr Qotoyi and Mr Mhambi, when the issue was raised very strongly in the answering affidavit, I find it bewildering that that issue is not addressed in the replying affidavit. There is no explanation for the failure to file these affidavits from the applicants’ legal representatives who dealt with the matter on that day. The importance of the applicants’ response to the allegations about what transpired in court is that they do not deny Ms Nyathela’s allegations. They are merely saying that they are not aware of them.

[34] Understood in its proper context, the applicants’ explicit attitude is simply this. Because the applicants say that Mr Qotoyi and Mr Mhambi had no mandate to settle the matter Andisiwe’s word in that regard suffices. It is not even a case of Mr Qotoyi not being available or Mr Mhambi or both not being available. I must say that I am dumbfounded by this approach. Were it to be accepted, it would make a dangerous and slippery precedent which would make all the court orders which are taken by consent daily in our courts across the country by the litigants’ legal representatives vulnerable. Such orders would clearly be subject to the whims of the litigants who could change their minds if they decide to do so or even change their legal representatives to achieve the

desired outcome. On the applicants' approach courts would just have to accept that. I do not think that that proposition is sound nor is it the correct legal position. It is also contrary to our jurisprudence on consent orders as I understand it.

[35] If Mr Mhambi had been asked one can only assume that he would have explained what happened in court on that day. He probably would have explained what he did after it became clear that his instructions to postpone the matter without a substantive application was not going to be entertained by the court. Did he call his instructing attorney? If he did, what did his instructing attorney say to him regarding how the matter should be dealt with? Did he execute those instructions? Under what circumstances did he advise the court that he had instructions to settle the matter. Who gave him those instructions? Did he make an error of judgment, or did he understand his instructions genuinely to be that he should take an order by consent? If it was the case that he had misunderstood his instructions, under what circumstances did any alleged confusion occur? There are so many possibilities and questions which only Mr Mhambi would have been able to answer.

[36] The applicants elected not to get any information from Mr Mhambi. I am simply unable to understand how the application to rescind an order of court which was taken by consent is even conceptually plausible as a sound proposition without an explanation from the person who took the order. This is because the person who evidently agreed to that order, Mr Mhambi and informed the court on behalf of the applicants that he had such instructions has not been asked for an explanation by the applicants. I cannot think of any reason why it would be unconscionable for Mr Mhambi to take instructions even telephonically to settle the matter in the manner in which he evidently did.

[37] Concerning a legal practitioner conscionably settling a matter on behalf of his client, as Mr Mhambi did in this case, something similar even though with a totally different factual matrix, happened in *Mathimba*⁴ in this very Division where Lowe J writing for the full court said:

“I can think of no reason why it would be unconscionable for the parties to negotiate on the amount claimed, agree on the amount to be paid, as well as costs, and decide to exclude interest in the agreement. If, during the negotiations, Mr West had intended to raise interest, he would have done so and ensured that it formed part of the agreement.”

[38] What is unconscionable is Mr Mhambi, without instructions from his instructing attorney, Mr Qotoyi, telling the court that his instructions were to settle the matter and going ahead to do so when no such instructions were given to him, as the applicants want me to accept. Mr Mhambi had a number of options, most important of which would be to play open cards with the court by candidly telling the court that during the time that the matter was standing down he had tried to call his instructing attorney but was unsuccessful - if that was the case. The extreme of, for no apparent reason, just misleading the court by telling the court that he had been instructed to settle the matter when that did not happen is preposterous.

Is an order taken by consent rescindable?

[39] It is indeed so that an order taken by agreement can be rescinded or set aside. There is no doubt about that. However, in my view, that should only be done in the clearest of cases where it is manifestly in the interests of justice to do so based on the facts of that particular matter. Were that not to be the case our judicial system and the principle of finality would be constantly thrown into unimaginable state of chaos and confusion with

⁴ *Mathimba v Nonxuba* 2019 (1) SA 550 at 570 E–F.

the courts themselves being used at times for nefarious reasons of subverting justice itself. This could include the setting aside of an order taken by consent being sought on the basis of, for instance, one of the litigants having second thoughts about a settlement consequent upon having been given what he or she believes is a better legal advice or his or her circumstances having changed. This is clearly untenable and has to be prevented at all costs by ensuring that a good factual and legal basis is set out before a court decides to set aside any court order, especially one taken by agreement. It surely cannot be there for the mere asking. Our courts have recognised the profoundness of this principle and have been very consistent in upholding it. Not so long ago the Supreme Court of Appeal had occasion to re-emphasize these very fundamental principles of our law in *Moraitis*⁵.

[40] In that matter Wallis JA expressed himself as follows:

“The approach differs depending on whether the judgment is a default judgment or one given in the course of contested proceedings. In the former case it may be rescinded in terms of either rule 31(2)(b) or rule 42 of the Uniform Rules, or under the common law on good cause shown. In contested proceedings the test is more stringent. A judgment can be rescinded at the instance of an innocent party if it were induced by fraud on the part of the successful litigant or fraud to which the successful litigant was party. As the cases show, it is only where the fraud – usually in the form of perjured evidence or concealed documents – can be brought home to the successful party that *restitutio in integrum* is granted and the judgment is set aside. The mere fact that a wrong judgment has been given on the basis of perjured evidence is not sufficient basis for setting aside the judgment. That is a clear indication that, once a judgment has been given, it is not lightly set aside, and De Villiers JA said as much in *Schierhout*.

Apart from fraud the only other basis recognised in our case law as empowering a court to set aside its own order is justus error. In *Childerley*, where this was discussed in detail, De Villiers JP said that ‘non-fraudulent misrepresentation is not a ground for setting aside a judgment’ and that its only relevance might be to explain how an alleged error came about. Although a non-fraudulent misrepresentation, if material, might provide a ground for avoiding a contract, it does not provide a ground for rescission of a judgment. The scope for error as a ground for vitiating a contract is narrow and the position is the same in regard to setting aside a court order. Cases of justus error were said to be ‘relatively rare and

⁵ *Moraitis Investments (Pty) Ltd v Montic Dairy (Pty) Ltd* 2017 (5) SA 508 (SCA) at pages 514-5[...]⁶.

exceptional'. *Childerley* was considered and discussed by this court in *De Wet* without any suggestion that the principles it laid down were incorrect.

The same issue arose indirectly before this court in *Gollach & Gomperts*. I say indirectly because the case was not concerned with a judgment, but with the avoidance of an agreement of compromise (a *transactio*) on the basis of non-disclosure. The judgment repays careful consideration. The general principles were stated as follows:

'A *transactio*, whether extra-judicial or embodied in an order of Court, has the effect of *res judicata*. ... It is obvious that, like any other contract (and like any order of Court), a *transactio* may be set aside on the ground that it was fraudulently obtained. There is authority to the effect that it may also be set aside on the ground of mistake, where the error is *justus*.'

The judgment then referred to *Childerley* and the refusal to accept that a judgment could be set aside on the grounds of justus error induced by a non-fraudulent misrepresentation. It continued as follows:

'The matter then before the Court was an action to set aside a judgment delivered in a defended case. Concerning judgment entered by consent, the learned Judge-President accepted that they could, "under certain circumstances", be set aside "on the ground of just error". It appears to me that a *transactio* is most closely equivalent to a consent judgment ... Such a judgment could be successfully attacked on the very grounds which would justify rescission of the agreement to consent to judgment. I am not aware of any reason why *justus error* should not be a good ground for setting aside such a consent judgment, and therefore also an agreement of compromise, provided that such error vitiated true consent and did not merely relate to motive or to the merits of a dispute which it was the very purpose of the parties to compromise.'

Is Rule 42 applicable?

[41] As indicated earlier, the applicants rely on rule 42 of the Uniform Rules of Court or the common law. It bears emphasizing that there are specific grounds on which a court may rescind or vary an order or judgment in terms of rule 42. To the extent that the applicants rely on this rule there are a number of problems in that reliance as I demonstrate below. Chief among those is the fact that rule 42(1)(a) does not feature at all. This is because on the day the order was granted by agreement the applicants' attorney had filed a notice of acting the day before. Secondly, the applicants' attorney had briefed counsel who indeed appeared on their behalf. Therefore, the issue of the order having been granted in the absence of the applicants does not arise. Thirdly, it has not been shown that the order was erroneously sought or erroneously granted.

[42] Rule 42(1)(b) also does not feature at all. This is because no ambiguity or patent error or omission has been shown to exist in the order of the 20 October 2022. In fact, the applicants are not seeking the correction of any error or ambiguity. The last issue is rule 42(1)(c) which similarly does not feature at all. There is no mistake of any kind, let alone one common to the parties which led to the order being sought and granted. None has been pleaded in any event. I am thus not persuaded that the jurisdictional factors provided for in rule 42 have been shown to exist.

Has a case been made for rescission under common law?

[43] There is also an indication that the applicants seek the setting aside of the court order relying on common law. Other than mentioning common law as an alternative basis, the actual basis on which the court order is sought to be vitiated is not pleaded. Instead of properly pleading whatever good cause sought to be relied upon, there is instead, a bald reference to a good cause in the founding affidavit. This is seemingly based on other bald averments about the applicants allegedly not having agreed to the order by agreement or their legal representatives having no authority to agree to it. Regardless, whatever the true basis is, it has not been properly pleaded or pleaded with any degree of cogency to make it capable of any legal comprehension or plausibility. Our law on pleadings has been stated and restated since time immemorial. It needs no further restatement or elaboration: It is that a litigant must stand and fall by his or her pleaded case.

Conclusion.

[44] In this case the applicants have not properly pleaded any cogent and legally sustainable basis on which the court order dated 20 October 2022 could be set aside. It follows that the application for rescission, variation or the setting aside of the court order dated 20 October 2022 must fail. The legal representative of the respondent has asked for the dismissal of the application with costs on an attorney and client scale. It is so that the applicants' papers leave much to be desired. I am not satisfied though that this is such a case as would warrant the applicants being mulcted with costs on a punitive scale as between attorney and client.

The results.

[45] In the result the following order shall issue:

1. The application for the rescission, variation or the setting aside of the court order dated 20 October 2022 is dismissed.
2. The applicants are ordered to pay the costs of this application, the one paying the other to be absolved on a party and party scale.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicants : M. Mantyi

Instructed by : Mantyi Attorneys

Mthatha

Counsel for the respondent: N. Sakhela

Instructed by : Sakhela Inc.

Mthatha

Date heard : 03 November 2023

Date delivered : 23 January 2024