

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 35946/2011

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	NOT REVISED.
17 March 2023	
DATE	SIGNATURE

In the matter between:

BACK TO CHRIST ASSEMBLY

First Applicant

and

BACK TO CHRIST ASSEMBLY CHURCH

First Respondent

Z MSIPHA

Second Respondent

JUDGMENT

FRANCIS-SUBBIAH, J:

[1] The applicant seeks rescission in terms of Rule 42(1)(a) of the Uniform Rules of Court. The rescission is sought against an order granted by Justice Tolmay on 26 July 2016. (Tolmay order) Justice Tolmay had rescinded an order granted by Justice Phatudi on 6 November 2015. (Phatudi Order)

[2] The current application for rescission was launched on 25 February 2022, approximately five and half years after the Tolmay order was granted. It is trite that a rescission application be launched within a reasonable time. In ***Money Box Investments 268 (Pty) Ltd and Easy Greens Farming and Farm Produce CC***, unreported case no A221/2019 dated 16 September 2021 the court held that a six-month delay is excessive and would require condonation.

[3] The applicant claims it became aware of the Tolmay order when an urgent application was filed in the Johannesburg High Court in December 2020. Thereafter the applicant is silent in regard to its delay in launching this application. A period of one year and two months remains unexplained.

[4] The constitutional court held in ***Ferris v First Rand Bank Ltd limited*** 2014 (3) SA 39(CC) that lateness is not the only consideration in determining whether an application for condonation may be granted. The court must make the determination on the condonation by looking at what is in the best interest of justice.

[5] In my view, *Ferris* is convincing and in the circumstances of this matter it would be in the interests of justice to grant condonation and consider the merits of the rescission application.

[6] The Tolmay order was granted in terms of Rule 42(1)(c) of the Uniform Rules of Court. The provisions of Rule 42(1) (c) refers to an order or judgment granted as

the result of a mistake common to the parties. Under those circumstances the order may be rescinded on condition that the court is satisfied that all parties whose interests may be affected have notice of the order proposed.

[7] The mistake claimed by the respondents is that the legal representative for the respondents consented to a judgment under the mistaken belief that the respondents had authorized him to do so. It is submitted that the parties formed this belief under the misapprehension that the applicant and the first respondent had amalgamated. However, they had not and remained two separate congregations.

[8] The applicants conversely submit that the respondents' representative consenting to an order that he was not authorized to, remains a private issue between the legal representative and the respondents. For this reason, they submit that, the Tolmay order was erroneously granted. Further, since both parties were not present before Justice Tolmay on the day the rescission was granted entitles them to a rescission of the Tolmay order.

[9] It is common cause that the applicant was served with the application for rescission of the Phutudi order. Although the applicant initially defended the matter, subsequent thereto, they did not attend at the court proceedings. Reasons are not advanced for their absence. The submissions of the respondents are that the applicants upon their own accord elected not to participate in the proceedings. In other words, their absence was willful and they cannot be allowed to "butcher the judicial process and then plead the absent victim". Accordingly, the granting of the order was procedurally correct.

[10] In *Freedom Stationery (Pty) Ltd and others v Hassam and others* 2019 (4) SA 459 (SCA) it was set out that an applicant will be procedurally entitled to an order when all the affected parties were adequately notified of the relief that may be granted in their absence. The court concluded that a party "who is aware of the proceedings and the relief

sought, who did not oppose or participate in the proceedings would not be entitled to relief sought under Rule 42(1)(a).”

[11] This view is entrenched in ***Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of state Capture, Corruption and Fraud in the Public Section including organs of State*** 2021 (5) SA 327 CC where it was strongly held at para. [61] that:

“Our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, the absence does not fall within the scope of the requirements of Rule 42(1)(a). And, it certainly cannot have the effect of turning the order granted in absentia, into one erroneously granted.”

[12] Hence, the applicant’s contention that the Tolmay order was erroneously granted and therefore it should be rescinded in terms of rule 42(1)(a); is incorrect. Rule 42(1)(a) does not cater for cases where a court order was erroneously granted. It refers to the absence of a party at the proceedings. The correct procedure to follow when an order is erroneously granted; is the appeal process.

[13] **The Order is as follows: -**

[13.1] The application for condonation is upheld.

[13.2] The application for rescission is dismissed with costs.


A handwritten signature in blue ink, appearing to read 'Francis', is written over a horizontal line.

FRANCIS-SUBBIAH, J

THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

APPEARANCES:

Counsel for the Applicant: : Adv. A. Makgopa

Instructed by: : Shapiro Ledwaba Inc.

Counsel for the Respondent: : Adv. T. Lipshitz

Instructed by: : Michael Dansky Attorneys

Date of hearing: 13 March 2023

Date of judgment: 17 March 2023