

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 41031/2020

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHERS JUDGES: YES/NO

(3) REVISED

DATE: 28/3/2023

SIGNATURE:

In the matter between:

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

First Applicant

**DIRECTOR-GENERAL OF
DEPARTMENT OF JUSTICE**

Second Applicant

**NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

Third Applicant

**MINISTER OF INTERNATIONAL
RELATIONS AND COOPERATION**

Fourth Applicant

and

**DIRECTOR OF PUBLIC
PROSECUTIONS BOTSWANA**

Respondent

Summary: *Rescission application – Rule 42 of the Uniform Rules of Court – common law of rescission – application dismissed with costs.*

ORDER

1. The applicants' rescission application is dismissed with costs.

J U D G M E N T

RAULINGA, J

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

Introduction

[1] This is a rescission application in which the Minister of Justice and Correctional Services and others seek an order rescinding the order made by my brother De Vos J, dated 7 July 2021 under case number 41031/2020. The rescission application is made in terms of rule 42(1)(a) of the Uniform Rules of Court, or common law.

Parties

[2] The first applicant is the Minister of Justice and Correctional Services; the second applicant is the Director-General of the Department of Justice; the third applicant is the National Director of Public Prosecutions and the fourth applicant is the Minister of International Relations and Cooperation (DIRCO).

[3] The respondent is the Director of Public Prosecutions Botswana.

Issues

[4] The following issue arises for determination, whether the applicants have met the requirements, either in terms of rule 42(1) (a) of the Uniform Rules of Court or common law, for rescission.

Background

[5] The respondent submitted a request for Mutual Legal Assistance (MLA), with reference CONS/0668/19 on 25 September 2019, to the DIRCO. The MLA request forms part of an investigation conducted by the respondent, into the various

allegations made against prominent and politically connected persons in South Africa and Botswana.

[6] Due to not receiving any update, the respondent submitted a second request for MLA on 26 August 2020. The respondent's legal representatives sent correspondence on various dates seeking an update relating to the developments made with regards to the MLA with reference CONS/0668/19 which was sent on 25 September 2019. On 23 June 2020, an acknowledgement email was received, in which it was informed the matter was receiving attention.

[7] The acknowledgment email was followed by numerous requests for an update with regard to this matter, however, it fell on deaf ears from the applicants. On 25 September 2020, the respondent brought a *mandamus* application compelling the applicants to provide it with an update on the developments regarding the MLA request. The applicants filed a notice of intention to oppose, on 29 April 2021 but failed to file an answering affidavit.

[8] The answering affidavit became due and then overdue. The respondent enrolled the application on the unopposed motion court roll for an order directing the second applicant to inform the respondent of the measures it had taken with regard to the MLA in the Bank of Botswana fraud and money laundering matter.

[9] The respondent was granted an order on 7 July by De Vos J, the order stated the following:

“The second respondent (Director General: Department of Justice) is hereby ordered to, within fourteen(14) days of granting of this order, inform the applicant (Director of Public Prosecutions Botswana) of steps taken in furtherance of his duty in respect of a request for Mutual Legal Assistance (MLA), in the Bank of Botswana Fraud and Money Laundering, matter presented to the Department of International Relations and Cooperation(DIRCO), of the Republic of South Africa under reference CONS0668/2019 dated 25 September 2019 as per certificate number 23/2020, and delivered by DIRCO to the first

respondent(Minister of Justice and Correctional Services) on 30 September 2020 under reference 10/3/R. Cost of suit;”

In this Court

Applicants’ Submissions

[10] Aggravated by the High Court order, the applicants applied for the rescission of the order. The applicants submit that there is a dispute of facts with regard to how many MLA requests were filed by the respondent, and the extent and frequency that communication was done with the South African Central Authority.

[11] The applicants contend that the respondent never sought an update regarding the status of the investigation that the applicants had concluded. The applicants argue that their Mr Van Heerden, enquired with the respondent with regards to the investigation conducted from their side, and that is when they were informed about filing of the second MLA.

[12] The applicants further submit that, on 25 September 2020, the Minister had approved the request for obtaining evidence in terms of section 7(2) of the International Corporation in Criminal Matters Act (ICCMA),¹ and on the same day, the respondent filed a *mandamus* application.

[13] The applicants submit on 19 November 2020, they updated the respondent on the developments and since the application to obtain evidence has been approved, the matter was now being sent to the Director of Public Prosecutions of the Assets and Forfeiture Unit to investigate, therefore, it was not necessary to continue with the *mandamus* application, as the matter was moot because they have provided an update.

[14] On 11 December 2020, the applicants wrote a letter to the respondent informing the respondent that the investigating officer and prosecutor has been appointed in the matter. The applicants argue that on 20 April 2021, they called the respondent to settle the matter.

¹ 75 of 1996

[15] The applicants contend that the failure to file an answering affidavit was not intentional and this rescission application is not in bad faith. The applicants argue that they tried to settle this matter out of Court, however, they experienced difficulties with obtaining the services of a senior counsel to represent them, thus even their notice of intention oppose was filed late. Furthermore, the applicants submit that they were unaware that the respondent proceeded to re-enroll the matter, and my brother De Vos J ought to have heard the parties, in a virtual hearing, but then they were informed on the morning of the hearing that the Judge decided to handle the matter in chambers and based on papers. The applicants argue their legal representative were ready to appear in Court and argue the matter.

[16] The applicants submit due to COVID-19, the office of their legal representative was working on a rotational basis, as a COVID-19 preventative measure and the attorney to whom this matter was allocated was hospitalized.

Respondent's Submissions

[17] The respondent opposes this rescission application and argues it should be dismissed with costs, because the applicants are in contempt, and still have not provided any update.

[18] The respondent argues that the applicants do not satisfy the requirements laid down in rule 42(1)(a)-(c), to prove their case. The respondent relies on *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*, to the effect that litigation should come to an end and that the principles required for relying on common law rescission have not been met.² The respondent argues that the applicants have not provided any bona fide defence and this matter lacks any prospects of success.

Settlement attempts to resolve the matter out of Court

² [2021] ZACC 28;2021 (11) BCLR 1263 (CC) at para 1.

[19] It is worth mentioning that after the proceedings were concluded on 30 May 2022, the Court suggested to counsel that the matter be adjourned to 6 June 2022, pending a possible settlement out of Court, should the parties not reach a settlement, the Court would proceed with the writing of the judgement and delivery thereof. The suggestion by the Court stems from the historical good diplomatic relations between South Africa and Botswana since time immemorial.

[20] The Court noted the correspondence exchanged between the attorneys for the parties, dated 31 May 2022 and 1 June 2022, respectively, which revealed that there was an agreement that they would meet on 2 June 2022 at 14H00. After the parties had met on 2 June 2022, and having discussed options available to settle the matter, they accordingly requested for a seven-day extension for further discussion. The Court obliged and granted an extension of two weeks.

[21] On 3 June 2022, the parties were still on course to settle the matter out of court. It seems to me that, from 4 June 2022 onwards, the parties started exchanging correspondence on the dispute concerning different matters pertaining to the Bank of Botswana fraud case. However, the settlement negotiation went far beyond the two weeks extension initially granted by the court resulting in the matter not being settled.

Rescission in terms of rule 42 of the Uniform Rules of Court

[22] Rule 42 of the Uniform rules of Court provides:

“variation and rescission of orders

(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 judgement erroneously sought or erroneously granted in the absence of any party affected thereby;

- (b) an order or judgement in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or submission;
 - (c) an order or judgement 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 interest may be affected by any variation sought.
- (3) The court shall not make any order rescinding or varying any order or judgement unless satisfied that all parties whose interests may be affected have notice of the order proposed.”

[23] Similarly, in *Zuma v Secretary of Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*,³ the Court had to determine whether the applicant had met the requirements, either in terms of rule 42 or the common law, for rescission. Secondly, whether the applicant has established any reasonable grounds upon which the Court may rescind its order. The Court held that:

“It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that a court “may”, not “must”, rescind or vary its order – the rule is merely an “empowering section and does not compel the court” to set aside or rescind anything. This discretion must be exercised judicially.”⁴

³ [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) at para 47.

⁴ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) at para 53.

[24] The Court reaffirmed that when relying on rule 42 (1) (a), both grounds must be shown to exist; meaning that an applicant must show that the order to be rescinded was granted in their absence and that it was erroneously granted or sought. It further noted that if the requirements are met, a Court is merely endowed with a discretion which must be influenced by considerations of fairness and justice and is not compelled to rescind an order.

Absence requirement and its meaning

[25] The Court held that the word “absence” in rule 42(1)(a) “ exist[s] to protect litigants whose presence was precluded, not those whose absence was elected”.⁵ It, therefore, held that the requirements of the first aspect had not been met, given that Mr Zuma was given notice of the case against him, as well as sufficient opportunities to participate in the matter, but he nonetheless elected not to participate. Essentially, the Court’s finding was that a litigant’s strategic election not to participate does not constitute “absence” for the purposes of rule 42(1)(a).

Order erroneously sought or granted

[26] The meaning of erroneously granted was explained in the case of *Bakoven Ltd v GJ Howes (Pty) Ltd*,⁶ as follows:

“An order or judgment is 'erroneously granted' when the Court commits an 'error' in the sense of 'a mistake in a matter of law appearing on the proceedings of a Court of record' It follows that a Court in deciding whether a judgment was 'erroneously granted' is, like a Court of Appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31(2)(b) or under the common law, the applicant need not show 'good cause' in the sense of an explanation for his default and a bona fide defence (*Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* (supra) at 578F-G; *De Wet* (2) at 777F-G; *Tshabalala and Another v Pierre* 1979 (4) SA 27 (T) at 6 30C-D). Once the applicant

⁵ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) at para 61.

⁶ 1990 (2) SA 446 at page 471E to H.

can point to an error in the proceedings, he is without further ado entitled to rescission.”

[27] In *Rossitter*, the Supreme Court of Appeal relied on *Lodhi* and held:

“The law governing an application for rescission under Uniform rule 42(1)(a) is trite. The applicant must show that the default judgment or order had been erroneously sought or erroneously granted. If the default judgment was erroneously sought or granted, a court should, without more, grant the order for rescission. It is not necessary for a party to show good cause under the subrule. . . . In *Lodhi*, Streicher JA held that if notice of proceedings to a party was required but was lacking and judgment was given against that party such judgment would have been erroneously granted.”⁷

[28] The requirement that the judgment was erroneously granted is generally satisfied when the applicant can show that at the time the order was made, there existed a fact that had the court been aware of, it would not have been inclined to grant the order.

Rescission in terms of the common law

[29] In the *Zuma* case, the Court emphasized the requirements that an applicant is required to prove to succeed with rescission under common law. The Court held:

“the requirements for rescission of a default judgment are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is

⁷ *Rossitter v Nedbank Ltd* [2015] ZASCA 196 at para 16.

sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.”⁸

[30] The common law test requires both requirements must be met, the first being the reasonable and satisfactory explanation for the absence, and second being a bona fide case that carries some prospects of success. In *De Wet v Western Bank Limited*,⁹ the court held that under the common law, a judgment could be altered or set aside only under limited circumstances.

Applying the law to the facts

[31] In my view, having regard to the facts and the circumstances of this matter, the applicants have no legitimate grounds for rescission, falling within the ambit of the requirements set out in rule 42(1)(a) or the common law.

[32] Rule 42(1)(a), requires that a party be absent, and an error must have been committed by the court. The applicants were indeed absent but they failed to bring a proper case by filing an answering affidavit when it was due. Put differently, the applicants were aware of the proceedings but failed to oppose and state their defence timeously. The applicants failed to even file the opposing papers late, then apply for condonation.

[33] An applicant seeking to rescind a judgment that was erroneously granted must prove that there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment.

[34] The applicants failed to demonstrate why the order was erroneously granted. The applicants as much as they tried to settle the matter out of court, they were playing delay tactics, they appointed an investigator and a prosecutor and still failed to provide an update on the developments that the investigator had made. The

⁸ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) at para 71.

⁹ 1997 [4] SA 770.

respondent is correct in their submission that there comes a point when litigation must come to an end.

[35] The applicants failed to satisfy the requirements of a rescission application in terms of common law. The applicant's reasoning for default is not justifiable and there is no bona fide defence. The applicants never opposed this application because they failed to file an answering affidavit, thus the matter was placed on the unopposed motion roll. The applicants did not participate in the proceedings for the *mandamus* application.

[36] The contention that they struggled to obtain the services of a senior counsel, and that the working procedures during the national state of disaster somehow impeded them from properly opposing the matter is rejected. The state attorney is a big organization with qualified legal practitioners, the applicant knew this application was looming since September 2020, but they failed to consult the client in time and act accordingly. Even after the notice of intention to oppose was filed an answering affidavit was never filed.

Conclusion

[37] Having considered the abovementioned factors and after hearing the matter, the Court granted the parties an opportunity to settle out of court. However, the applicants still dilly-dallied and failed to offer a solution to get the matter settled. They failed to cooperate with the respondent.

Order

[38] The following order is made:

1. The applicants' rescission application is dismissed with costs.

J RAULINGA

Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 30 May 2022

Judgment delivered: 29 March 2023

APPEARANCES:

For the Applicants: Adv S Kazee

Attorney for the Applicants: The State Attorney, Pretoria

For the Respondent: Adv GC Nel together with
Adv P Voster

Attorney for the Respondent: Hurter and Spies Incorporated
Pretoria