



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)**

CASE NUMBER: 496/2020

(1)	REPORTABLE: ☒ YES / NO
(2)	OF INTEREST TO OTHER JUDGES: ☒ YES NO
(3)	REVISED.
<u>25/1/2022</u>	
DATE	SIGNATURE

In the matter between:-

VALUE POOLS (PTY) LTD t/a GOOD PRICE 4 U

Applicant

and

COMMUNITY PROPERTY CO (PTY) LTD

Respondent

In re:-

COMMUNITY PROPERTY CO (PTY) LTD

Applicant

and

VALUE POOLS (PTY) LTD t/a GOOD PRICE 4 U

Respondent

JUDGMENT

INTRODUCTION

- [1] In this matter the applicant (the respondent in the ejectment application and herein referred to as “Value Pools”) applies for rescission of an order by the late Sigogo AJ, granted on 7 September 2020 (“the ejectment order”). In terms of the ejectment order the court evicted Value Pools from the commercial premises known as Shop 4 (Portion 3 of Erf 2276, KaNyamazane-A Township) situated at Chris Hani Street, KaNyamazane, Mpumalanga (“the premises”).
- [2] The respondent (the applicant in the ejectment application and herein referred to as “Community Property Co”) launched the ejectment application, which gave rise to these proceedings. At the time Community Property Co was the registered owner of the premises.

BACKGROUND

- [3] The facts are largely common cause.
- [4] The ejectment application was served on Value Pools on 25 February 2020 at both the premises and at Value Pools’ chosen *domicilium*-address.
- [5] On 27 February 2020 Value Pools delivered a notice of intention to oppose but failed to file an opposing affidavit as envisaged in Rule 6(5). The *dies* to do so having expired on 19 March 2020. Per the notice of motion, the matter would be enrolled for hearing on an unopposed basis on 17 April 2020, in the event that the matter was not opposed.
- [6] On 26 March 2020 the National Lockdown was imposed, the effect of this being that per the issued directives of this Division, unopposed matters set down on 17 April 2020 would be re-enrolled for hearing on 22 May 2020.¹

¹ Alert Level 3 Covid-19 Directive 6

- [7] By 13 May 2020, two months after expiry of the *dies*, Community Property Co still did not receive an opposing affidavit. Community Property Co caused a notice of set down to be served on Value Pools, informing them that the matter was enrolled for 22 May 2022, on the unopposed roll.
- [8] On the eve of the unopposed hearing, Value Pools wrote to Community Property Co wherein it advised that it noted that the matter had been enrolled on the unopposed roll, however the matter is opposed as a notice of intention to oppose had been filed. Value Pools explained that consultations with counsel, in order to finalise its opposing affidavit, could not take place due to the lockdown. Community Property Co was requested to remove the matter from the unopposed roll and to place it on the case management roll. In response, Community Property Co advised that the matter will not be removed from the unopposed roll, as the *dies* for delivering an opposing affidavit had lapsed prior to the onset of the lockdown. The matter therefor being unopposed.
- [9] On 22 May 2020, and in the absence of the parties, in keeping with the directives in respect of unopposed motions during said period of the lockdown, the matter came before Kgoele J. It was ordered that the matter is opposed, and as such postponed to a date on the case management roll which would be arranged with the registrar.
- [10] According to the respondent no case management hearings were held from the onset of the lockdown. The case management procedures were resumed on 14 October 2020 under Covid-19 Directive No 8.
- [11] Still not having received any opposing affidavit, Community Property Co elected, to again proceed with the matter on an unopposed basis. On 4 August 2020² they again serve a notice of set down for hearing of the matter on the unopposed roll for 7 September 2020 on Value Pools. Value Pools did not respond hereto.
- [12] On 31 August 2020 Community Property Co served an index and practice note on Value Pools. No communication was received from Value Pools in response.

² According to the applicant the notice was dated 31 July 2020

Value Pools failed to appear on the 7th of September 2020 and the ejectment order (now sought be rescinded) was granted during a virtual hearing.

- [13] On 28 September 2020 the ejectment order was served on Value Pools. No communication was received from Value Pools. On 6 October 2020 a warrant of ejectment was delivered to the Sheriff for execution on.
- [14] On 2 November 2020 this rescission application was served on Community Property Co.

CASE FOR AND AGAINST RESCISSION

- [15] This rescission application is founded on Rule 42(1)(a) of the Uniform Rules of Court, in that it is alleged that the ejectment order had been erroneously sought and granted in Value Pools' absence. In substantiation it has been alleged that after service of the ejectment application, Value Pools filed its notice of intention to oppose. This, according to Value Pools, ought to have triggered paragraph 7.2 of the practice directives³, which hold that every opposed motion shall be case managed upon delivery of a notice to oppose or any time thereafter, and that a Form B shall be completed by the parties or their legal representatives during the judicial case management hearing.
- [16] With reference to paragraph 7.4 of said directive, the registrar, within 5 (five) days upon the filing of a notice to oppose, enrolls the matter on the case management roll at 08h45 on any court day before any judge available. Any party shall be entitled to place the matter on the case management roll upon the delivery of a notice to oppose, or at any stage of litigation.⁴
- [17] During the case management conference, the date of the hearing and time frames for the filing of an answering affidavit, replying affidavit and written heads of argument shall be determined and set by the parties or their legal

³ Dated 9 January 2020
⁴ Paragraph 7.3

representatives.⁵

[18] It was stated on the founding affidavit that “*no matter shall be enrolled for hearing unless it has gone through the judicial case management*” process, and the date of hearing was determined during the judicial case management conference.⁶

[19] It is contended by Value Pools that contra the aforesaid provisions, and the fact that it filed a notice of intention to oppose, Community Property Co elected to set the matter down on the unopposed roll of 22 May 2020. Even after the order of 22 May 2020 (referring the matter for case management), Value Pools failed to do so. According to Value Pools, Community Property Co ought to have employed paragraph 4 of Covid-19 Practice Directive No 6, dated 3 June 2020, which provides that the parties or their legal representatives shall jointly complete a Form B, and thereafter file the form with the registrar when a set of court papers is handed over to the registrar by an applicant in terms of paragraph 15 of Covid-19 Practice Directive 5A.

[20] Value Pools argued that in disregard for aforesaid, Community Property Co again elected to serve a notice of set down on Value Pools on 31 July 2020, enrolling the matter on the unopposed roll of 7 September 2020. It is on this basis that it is argued that the ejectment order was erroneously sought and granted, as:-

“the matter is opposed and the matter should have been enrolled for case management, although the applicant did not file its answering affidavit.... The time frames for the filing of an answering affidavit, replying affidavit and written heads of argument shall be determined and set by the parties or parties’ legal representatives during case management conference.”

[21] In justification it was contended on behalf of Community Property Co that Value Pools was obliged to deliver its answering affidavit within 15 (fifteen) days from 27 February 2020 as dictated by Rule 6(5)(d)(ii). Therefore, the *dies* having expired on 18 March 2020, the matter is unopposed, and the respondent was

⁵ Paragraph 7.7
⁶ Paragraph 7.1

entitled to proceed on said basis.

- [22] It was argued by Community Property Co that the Form B, as contained in the court's directives, cannot be seen to replace the Uniform Rules of Court. Further, that during the period 27 March 2020 to 14 October 2020, there was no case management conducted in this Division.
- [23] Community Property Co contends that the ejectment order was not erroneously sought or granted, as Value Pools was well aware of the hearing date on the unopposed roll, but nevertheless decided not to appear. It did so in circumstances where it was informed that Community Property Co considers the matter to be unopposed in the absence of an opposing affidavit being filed.
- [24] Value Pools was therefore aware of the date of hearing, the relief which would be sought and the potential consequence should the relief be granted. Notwithstanding, Value Pools still elected to not appear at the hearing. Or for that fact engage Community Property Co.
- [25] Community Property Co argued that the late Sigogo AJ was fully aware of all the pertinent facts underpinning such ejectment application, as specifically dealt with in the practice note. Copies of the e-mail exchanges between the parties' attorneys were also placed before the late Sigogo AJ.

THE APPLICABLE PRINCIPLES

- [26] Under Rule 42(1) as well as the common law, a court's power to rescind a final order is limited. This is so as a rescission may only be granted in circumstances where the common law or the rules of court specifically permit it.⁷

⁷ South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) at 550H

[27] In the present matter, Value Pools elected to confine its application to Rule 42(1). As held by the Supreme Court of Appeal in the matter of **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)**⁸:-

“Rule 42 is confined by its wording and context to the rescission or variation of an ambiguous order or an order containing a patent error or omission (Rule 42(1)(b)); or an order resulting from a mistake common to the parties (Rule 42(1)(c)); or ‘an order erroneously sought or erroneously granted in the absence of a party affected thereby’ (Rule 42(1)(a)). ... The trend of the Courts over the years is not to give a more extended application to the Rule to include all kinds of mistakes or irregularities.”

[28] It is important to bear in mind that the purpose of Rule 42(1) is “to correct expeditiously an obviously wrong judgment or order”,⁹ and that the power to grant rescission under Rule 42(1) is discretionary.¹⁰

[29] For a party to successfully rely on Rule 42(1)(a) it needs to prove (1) that an order was granted in its absence and (2) that such order was either erroneously sought or erroneously granted.

[30] Rule 6(5)(d)(ii) provides as follows:-

“Any person opposing the grant of an order sought in the notice of motion must:

- (i) within the time stated in the said notice, give applicant notice, in writing, that he or she intends to oppose the application ...*
- (ii) within fifteen days of notifying the applicant of his or her intention to oppose the application, deliver his or her answering affidavit, if any, together with any relevant document; and...”*

[31] The rule further provides that where no answering affidavit, or notice in terms of sub-section (iii) of paragraph (d) is delivered within the period referred to in sub-paragraph (ii) of paragraph (d), an applicant may within 5 (five) days of

⁸ 2003 (6) SA 1 (SCA) at par [6] to [7]

⁹ **Bakoven Ltd v GJ Howes (Pty) Ltd** 1992 (2) SA 466 (E) at 471E-F

¹⁰ **Tshivhase Royal Council and Another v Tshivhase and Another** 1992 (4) SA 852 (A) at 862G

the expiry thereof, apply to the registrar to allocate a date for the hearing of the application.¹¹

[32] In terms of the practice directive the following is relevant:-

“7. ENROLMENT AND MANAGEMENT OF OPPOSED MATTERS

7.1 *No opposed matter shall be enrolled for hearing unless it has gone through the judicial case management process and the date of hearing was determined during judicial case management conference.*

7.2 *Every opposed motion matter shall be case managed upon delivery of notice to oppose or any time thereafter and Form B shall be completed by the parties or their legal representatives during the judicial case management conference.*

7.3 *Any party shall be entitled to approach the registrar to place the matter on the case management roll upon delivery of notice to oppose or at any stage of litigation.*

7.4 *The registrar shall within five days upon the filing of notice to oppose or any time thereafter, enrol such a matter on the case management roll at 08h45 on any court date before any judge available, and the file or files shall be properly indexed and paginated by the applicant at least two clear court days before the date of the judicial case management conference...*

7.6 *During the case management conference the date of hearing and the time frames for the filing of answering affidavit, replying affidavit and written heads of argument shall be determined and set by the parties or parties' legal representatives..."*

“8. UNOPPOSED MOTIONS

...

¹¹ Rule 6(5)(f)(i)

- 8.6 *Should any unopposed application become opposed, it shall not be removed from the unopposed motion role. Instead, it shall be case managed to the date in question and enrolled on the opposed motion roll by completion of Form B.”*

“IN THE ABSENCE OF ANY PARTY AFFECTED THEREBY”

[33] Notwithstanding it requiring address, Value Pools, in the papers before court, fails to deal with its absence. Value Pools confirms however that it received a notice of set down dated 31 July 2020. This set down indicating the matter to be enrolled for hearing on 7 September 2020. But, Value Pools fails to state what it did in response hereto.

[34] It is so that a respondent would ordinarily not appear at a unopposed hearing. But the same cannot be said of a respondent who has or seriously intends to oppose an application. Even more so when such respondent have been made aware of the fact that the applicant intends to proceed on an unopposed basis, notwithstanding the filing of a notice of intention to oppose 7 months earlier.

[35] Absent any facts set out by the applicant in respect of its absence, the only conclusion to be drawn is that it sat back, waiting for the outcome in contemplation of a rescission application. That begs the question, whether such absenteeism was calculated, thereby pre-empting the right to rescission.

[36] It **Lodhi 2 Properties Investment CC and Another v Bondev Development (Pty) Ltd**¹² it was held that

“when notice of proceedings to a party is required and judgment is granted against such party in the absence without notice of the proceedings having been given to him, such judgment is granted erroneously.”

[37] This is however distinguishable from the matter at hand, as on the common cause facts. Value Pools was given approximately a month’s notice that Community Property Co was intending to proceed to set the matter down on the unopposed roll and seek an order in the terms prayed for.

¹² 2007 (6) SA 87 (SCA)

[38] Value Pools was given notice of the proceedings launched, it knew of the relief sought, it was informed of the hearing date and was aware that the court was competent to grant the relief, if the court was satisfied. Having the requisite notice and knowledge, Value Pools elected not to participate.

[39] In **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 (11) BCLR 1263 CC at par [61] it was held:-

“Our jurisprudence is clear: Where a litigant, given notice of the case against them and given sufficient opportunity to participate, elects to be absent, this absence does not fall within the scope of the requirement of Rule 42(1)(a).”

ERRONEOUSLY SOUGHT OR GRANTED

[40] Value Pools further argue that there is a direct conflict between the Rules of Court and Practice Directives. Its contended that the ejectment order was erroneously granted, as Community Property Co was obliged to follow the practice directives. In this respect the matter was to be case managed upon a notice of intention to oppose being filed, and it was therefore opposed.

[41] Acutely aware of the provisions of the Practice Directive, I cannot agree with the conclusion that a matter is opposed by the mere fact that a notice of intention to oppose has been filed. The very wording of this notice speaks to the contrary. The effect of a “notice of intention to oppose” is to inform the applicant that the respondent intends to oppose and that an opposing affidavit is imminent.

[42] Practically put, a notice of intention to oppose informs the applicant of the intention and precludes the applicant from proceeding with the matter on an unopposed basis for the period allowed (being 15 days) within which the respondent must prepare and deliver its opposing affidavit. Should a

respondent fail to take this opportunity, the matter can simply not continue to enjoy the status of an opposed matter and the applicant may seek set-down as envisaged in Rule 6(5)(f)(i).

- [43] Therefore, as much as the practice directives directs how opposed and unopposed applications ought to be enrolled, it does not expressly state that a matter wherein a notice of intention to oppose had been filed, is an opposed matter. It merely sets out that where such a notice is filed, the process of case management is to commence. The directive, as essential as it is in respect of the daily functioning of the court, does not diminish or give cause to avoid and ignore the Rules of court. Rules of court has obligatory force.¹³
- [44] The practice directives facilitate what the Rules of the court provide, and therefore cannot be interpreted to overrule or place obstacles in the way of a litigant who operate in terms of the Rules of court. As held in the matter of **National Director of Public Prosecutions (ex parte application)** (case number 905/2017) [2018] ZASCA (86) (31 May 2018) at 31, practice directives cannot be applied to restrict or undermine the Rules of Court. It needs to co-exist and the directives needs to be interpreted and applied together with that prescribed by the Rules of court.
- [45] There is in my view no contradiction present between Rule 6(5)(d) and that held in the practice directive in respect of opposed and unopposed matters. Where the directive indicates that a matter needs to be case managed after a notice of intention to oppose has been filed it does not give a proverbial stick to a dilatory litigant to beat an applicant with. It is focused at effective enrolment of an opposed matter by employing case management while the time periods set out in the rules run. This is so in order to create a situation where both parties agree, record their compliance, date on which so complied or will comply, and facilitate the exchange of further documents, to ensure the matter is ready when enrolled for hearing.

¹³

The National Director of Public Prosecutions (ex parte application) (case number 669/2020) [2021] ZASCA 142 (7 October 2021) at 19

- [46] Similarly the practice directive provision that parties will agree on dates to exchange affidavits, cannot be said to overrule that directed under Rule 6(5)(d). But it does not do so. Rule 27 empowers parties to agree on extension or abridging time periods prescribed by the rules. Therefore absent an agreement a litigant is bound by the prescribed period or obliged to seek condonation from court.
- [47] Differently put, the directive simply says litigants are free to agree on when affidavits and heads of arguments are to be exchange. But if you don't agree for whatever reason you are bound to the prescribed time periods or seek condonation from court. This is perfectly in line with the Rules of Court.
- [48] But even assuming that Community Property Co was to enrol the matter on the opposed roll, does that entitle Value Pools to sit back and pre-empt its right of rescission? Such a conclusion is untenable. When Value Pools were advised that Community Property Co does not regard the matter opposed and intended to proceed with the matter on an unopposed basis, it could and should have taken up the opportunity to persuade the court otherwise. The obvious reason for its failure is that it had no intention of filing an opposing affidavit.
- [49] Can it notwithstanding above be said that there existed, at the time of the issue of the order, a fact of which the court was unaware, which would have precluded the granting of the ejectment and which would have induced the court, if aware of it, not to grant the ejectment order. No, a mere perusal of the application papers which served before the late Sigogo AJ, together with the practice note, clearly tells a story of full disclosure. In the practice note the history is dealt with, and the court's attention is specifically drawn to the fact that the previous order was made, the matter not going through case management as Value Pools had still not filed an opposing affidavit, and the status of the matter therefore remaining unopposed. In addition, the correspondence exchanged between the parties were made available to the court. Armed with this, the court, satisfied, granted the ejectment.

- [50] In **Trans Africa Insurance Co Ltd v Maluleke** 1956 (2) SA 273 (A), which was quoted with approval in **Life Health Group (Pty) Ltd v Mdladla and Others** (42156/2013) [2014] ZAGP JHC 20 (10 February 2014), the court stated the following:-

“No doubt parties and their legal advisors should not be encouraged to become slack in the observance of the rules, which are an important element in the machinery of the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be omitted, in the absence of prejudice to interfere with the expeditious and if possible, inexpensive decision of cases on the real merits.”

- [51] As much as Value Pools would argue that it was prejudiced by the ejectment order, same is ill-fated when regard is had to the fact that it had knowledge of the hearing and wilfully elected to absent itself. Value Pools explained to Community Property Co why its opposing affidavit was not filed during May 2020, and yet as at September 2020, some 6 (six) months later, it still failed to file its opposing affidavit. Then notwithstanding again being invited to participate should it not agree with the process followed by Community Property Co, it decides not to.
- [52] Practice directives are invaluable, but they cannot be utilised as armour against litigants who act squarely within the ambit of the Rules of Court. The rules and practice directives ought to be employed in unison and with the common goal of ensuring effective and efficient access to justice.
- [53] Value Pools attempts to utilise the process of case management to frustrate, justify its inaction and non-compliance with the rules. In the founding affidavit in support of the rescission application, it is stated that no matter shall be enrolled for hearing unless it has gone through judicial case management. It does so with reference to paragraph 7.1 of the practice directive. This is clearly a misstating of the provision, as paragraph 7.1 explicitly deals with opposed motions and not all matters.
- [54] Value Pools' reliance on Community Property Co's failure to set the matter down for case management, is further contrived when regard is had to the fact

that any party is entitled to set a matter down on the case management roll. This is not a function exclusively reserved for Community Property Co. Therefore, should Value Pools have been serious about the case management and enrolment of the matter on the opposed roll, it would have taken the lead not only by setting the matter down, alternatively facilitating the completion of a joint Form B in line with the lockdown measures, but by filing its opposing affidavit. It had 7 months to do so from the date of the delivery of the notice of intention to oppose and would have been the most effective way to ward off a default judgment.

CONCLUSION

[55] In my view the narration of reasons on which Value Pools attempts to persuade the court that the ejectment order was erroneously sought and granted in its absence, does not disclose a procedural irregularity or mistake in respect of the issuing of the ejectment order. It is therefore not possible to conclude that the ejectment order was erroneously sought by Community Property Co or erroneously granted by the late Sigogo AJ. In the absence of any answering affidavit by Value Pools, there was simply no good reason precluding the late Sigogo AJ from granting the ejectment order.

[56] As held by Kampepe J in the **Zuma** matter (*supra*), it cannot be accepted that litigants are allowed to butcher, of their own will, judicial process which in all other respects have been carried out with the utmost degree of regularity, only to then, *ipso facto* (by that same act) plead the “absent victim”.

ORDER

[57] Consequentially the following order is made:-

1. The application is dismissed with costs.



DATE OF HEARING: 26 October 2021

DATE OF JUDGMENT: 25 January 2022

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