

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

CASE NO: 446 / 2017

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.

19 September 2022

In the matter between:

CICILIA ELENA SMIT

APPLICANT

And

**SIDEPOINT TRADING
(Reg no. 2004/075359/23)**

RESPONDENT

IN RE:

**SIDEPOINT TRADING
(Reg no. 2004/075359/23)**

APPLICANT

And

CICILIA ELENA SMIT

FIRST RESPONDENT

ANTON BREDEL DU PLESSIS

SECOND RESPONDENT

**DÉCOR TRANSPORT MALELANE
(PTY) LTD (Reg no. 2003/021952/07)**

THIRD RESPONDENT

J U D G M E N T

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 19 September 2022.

[1] This is an application for rescission of a judgment granted by this court on 07 May 2018, where it was ordered and declared that:

1.1 The applicant, (the Respondent in this application), was the owner of a property described as Portion 1 of the Farm S[....]No. [....] Registration Division JU, Mpumalanga Province (the property);

1.2 The rights referred to in (and flowing from) the deed of cession [....] do not in any way restrict or diminish the applicant's ownership of the property or any part thereof;

1.3 To the extent that cession [....]may have restricted the rights of the owner of Portion 1 of the Farm S[....]No. [....] Registration Division JU, Mpumalanga Province, such restriction has lapsed or has ceased to exist;

1.4 The cession as contained in the notarial deed of cession [....]is currently of no force or effect and all rights as may have been granted to the cessionary have lapsed and have reverted back to the owner of the property;

1.5 The second respondent has no right in law to occupy or continue to occupy Portion 1 of the Farm S[....]No. [....] Registration Division JU, Mpumalanga Province or any part thereof and/or to rent same to a tenant;

1.6 The third respondent has no rights in and/or to the property whatsoever;

1.7 The first to third respondent are jointly and severally, to pay the costs in respect of the application.

[2] In the alternative, the Applicant seeks a rescission of paragraphs 1.2 to 1.7 above and further alternative, that the order be varied by deleting paragraphs 1.2 to 1.7 of the order. The application is opposed by the Respondent, the applicant in the main application. The rescission is premised on Rule 42(1)(a) of the Uniform Rules of the High Court. It is contended as such that the judgment was erroneously sought or granted as there was no legal basis for granting it in the first place.

[3] Background.

Common cause facts are that the Respondent is the owner of the property, having purchased it from the previous owner in June 2014. The employees of the Applicant's son in law were residing in the property by virtue of a notarial deed cession of trading rights ceded to the Applicant and registered against the title deed in 1974. These employees occupied the property with the consent of the Applicant.

[4] After several unsuccessful attempts to get the occupants to vacate the property amicably, in 2017, the Respondent launched the main application seeking the

declaratory order referred to above. The Applicant filed a notice of intention to oppose the application but did not file an answering affidavit. After her legal representative was alerted that the Respondent intended to apply for default judgment unless an answering affidavit was filed, he responded saying that the Applicant would not file an answering affidavit as the occupants had vacated the property and that she regarded the application as moot. The application was as such placed on the unopposed roll and the order was granted as sought. On 28 February 2020, a payment for costs in excess of R34 000 was received from the respondents in the main application.

[5] In vacating the property, the occupants removed the kitchen cupboards, air conditioners, and paving attached to (the building in) the property. In so doing, some damage was caused to the building and/or the property. This was in reaction to the Respondent's attitude that there were no improvements on the property worth compensating the Applicant. The Respondent has since launched a court action for damages to the tune of R781 670-00 against the Applicant's son in law and his company, the second and the third respondents in the main application.¹ The Respondent argues that the rescission application was prompted by this case so as to enable the son in law to have credence in his plea to the effect that the Applicant acted within her rights as the ceded rights were still in force when the improvements to the property were removed.

[6] The applicable law.

It is necessary to look into the provisions of Rule 42 of the Uniform Rules of the High Court as a whole although reliance is placed on Rule 42(1)(a) only. It provides,

“(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;

¹ See case no. 2810/2020 pending in this Division.

(b) an order or judgment in which there is an 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 application therefor upon notice to all parties whose interests may be affected by any variation sought.

(b) (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.” [My emphasis].

[7] In relying on this rule for purpose of rescission application, the Applicant quotes from *Marais v Standard Credit Corporation Ltd*² where Coetzee J said,

“In terms of Rule 42(1)(a) I can rescind the judgment on application by the party affected. In my view the word 'erroneously' covers a matter such as the present one, where the allegation is that for want of an averment there is no cause of action, ie nothing to sustain a judgment, and that the order was without legal foundation and as such was erroneously granted for the purposes of Rule 42(1)(a). I refer to [*Athmaram v Singh*³] at 957A, where Nienaber J said:

' . . . (B)ut even so I have not been persuaded that the order of 18 August 1988 *was without legal foundation* and as such was erroneously granted for the purpose of Rule 42(1)(a).'

[8] It is the Applicant's contention that there was no legal basis for the court to grant the order as aforesaid as she still had personal servitude rights in the cession registered against the title deed. She compares her rights to “a *habitatio* granted to a specific person. If such a person decides for whatever reason, not to reside at the

² 2002 (4) SA 892 (W) at 897A-B

³ 1989 (3) SA 953 (D).

relevant property for a period, it does not lead to the lapsing of the right.”⁴ In her founding affidavit she challenges the Respondent saying, “[t]he Respondent is invited to explain in its answering affidavit on what basis the personal servitude granted to me in terms of the cession of the trading rights would come to an end simply because I do not at that particular point in time actively conduct trading on the property. Such a case was in any event not made out in the founding affidavit.”⁵

[9] Rule 42(1)(a): Judgment must have been granted in the absence of the applicant.

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*,⁶ the Constitutional Court (the CC) held that it is trite that an applicant who invokes Rule 42(1)(a) must show that the order sought to be rescinded was granted in his or her absence *and* that it was erroneously granted or sought. Both grounds must be shown to exist.

[10] The CC proceeded to give clear definition and meaning of being absent when Khampepe J held,⁷

“[56] Mr Zuma alleges that this Court granted the order in his absence as he did not participate in the contempt proceedings. This cannot be disputed: Mr Zuma did not participate in the proceedings and was physically absent both when the matter was heard and when judgment was handed down. However, the words “granted in the absence of any party affected thereby”, as they exist in rule 42(1)(a), exist to protect litigants whose presence was precluded, not those whose absence was elected. Those words do not create a ground of rescission for litigants who, afforded procedurally regular judicial process, opt to be absent.

⁴ See paragraph 8.13 of the founding affidavit on p. 10 of the paginated bundle.

⁵ See paragraph 8.14 of the founding affidavit on p. 10 of the paginated bundle.

⁶ (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) at paragraph 54.

⁷ See *Zuma Supra* at para 56-58 & 60.

[57] At the outset, when dealing with the “absence ground”, the nuanced but important distinction between the two requirements of rule 42(1)(a) must be understood. A party must be absent, and an error must have been committed by the court. At times the party’s absence may be what leads to the error being committed. Naturally, this might occur because the absent party will not be able to provide certain relevant information which would have an essential bearing on the court’s decision and, without which, a court may reach a conclusion that it would not have made but for the absence of the information. This, however, is not to conflate the two grounds which must be understood as two separate requirements, even though one may give rise to the other in certain circumstances. The case law considered below will demonstrate this possibility.

[58] In *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd*,⁸ for example, it was said that “where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him, such judgment is granted erroneously”. And, precisely because proper notice had not been given to the affected party in [*Theron N.O. v United Democratic Front (Western Cape Region)*],⁹ that Court found that the orders granted in the applicants’ absence were erroneously granted. In that case, the fact that the applicant intended to appear at the hearing, but had not been given effective notice of it, was relevant and ultimately led to the Court committing a rescindable error.

[60] Accordingly, this Court found that the irregularity committed by the High Court, insofar as it prevented the parties’ participation in the proceedings, satisfied the requirement of an error in rule 42(1)(a), rendering the order rescindable.¹⁰ Whilst that matter correctly emphasises the importance of a party’s presence, the extent to which it emphasises actual presence must not be mischaracterised. As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from

⁸ [2007] ZASCA 85; 2007 (6) SA 87 (SCA) at para 24

⁹ 1984 (2) SA 532 (C) at 535G-H; 536B-C; and 536H-537A.

¹⁰ *Morudi v NC Housing Services and Development Co Limited* [2018] ZACC 32; 2019 (2) BCLR 261 (CC) at para 34.

participating, physically or otherwise, may be entitled to rescission in the event that an error is committed.¹¹ I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, *ipso facto* (by that same act), plead the “absent victim”. If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing *absentia* (absence).”

[11] It follows that the Applicant *in casu* cannot be considered as having been absent within the meaning of Rule 42(1)(a). It is common cause that she was served with the application papers from the Respondent. She caused a notice of intention to oppose the application to be filed with the Registrar through her legal representatives. When no answering affidavit was filed, her legal representatives were alerted by the Respondent that the application would be placed on the unopposed roll, which eventually was done.

[12] The fact that the Applicant was advised by the legal representatives that opposing the application was moot is immaterial because at the end, it was her decision not to file opposing affidavit. I therefore find that the Applicant consciously chose not to participate in the proceedings that were open for her to take part. It can be concluded that she chose to abide by the court’s decision while fully aware or ought to have known that that this Court was competent to grant the relief sought. For the reason that the Applicant was not absent, Rule 42(1)(a) is not applicable in this application. On this point alone, the application stands to be dismissed. For the sake of completeness, I deem it appropriate to consider if the order granted was erroneously sought or granted.

¹¹ It is of interest that, in certain instances, even when a party failed to oppose proceedings and was absent for reasons beyond their control, courts have held that the requirements of rule 42(1)(a) were not satisfied. See [*Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* [2003] ZASCA 36; 2003 (6) SA 1 (SCA)] at paras 7-9, where the Supreme Court of Appeal held as follows at para 9:

“The defendant describes what happened as a filing error in the office of his Cape Town attorneys. That is not a mistake in the proceedings. However, one describes what occurred at the defendant’s attorneys’ offices which resulted in the defendant’s failure to oppose summary judgment, it was not a procedural irregularity or mistake in respect of the issue of the order. It is not possible to conclude that the order was erroneously sought by the plaintiff or erroneously granted by the Judge. In the absence of an opposing affidavit from the defendant there was no good reason for Desai J not to order summary judgment against him.”

[13] Was the order erroneously sought or granted?

In *Lodhi* 2¹², the Supreme Court of Appeal held,

“Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant the judgment if granted cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A Court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff’s claim as required by the Rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the Rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous judgment.”

[14] In *Zuma*¹³, the CC held,

“[64] Thus, Mr Zuma’s bringing what essentially constitutes his “defence” to the contempt proceedings through a rescission application, when the horse has effectively bolted, is wholly misdirected. Mr Zuma had multiple opportunities to bring these arguments to this Court’s attention. That he opted not to, the effect being that the order was made in the absence of any defence, does not mean that this Court committed an error in granting the order. In addition, and even if Mr Zuma’s defences could be relied upon in a rescission application (which, for the reasons given above, they cannot), to meet the “error” requirement, he would need to show that this Court would have reached a different decision, had it been furnished with one or more of these defences at the time.”

¹² *Supra* at para 27.

¹³ *Supra* at para 64.

[15] As pointed above, the Applicant's submission that the order was erroneously granted is that there was no legal basis for the order to have been granted as the requirements for a termination of personal servitude rights were not established. That is if it is to be accepted that the cession granted her such rights. It was further submitted that the only reason advanced by the Respondent in the main application in motivating that this right had lapsed, was the non-renewal of a trading license by the Applicant. The Applicant now submits that renewal of a trading license was not a condition registered in the cession.

[16] It is however undisputed that the Applicant had ceased to trade in this property in 2001. At the time of the main application, the occupants were not conducting any trade as per the cession. These are the facts presented to the court before the order was granted. The argument to the effect that the Respondent relied only on the non-renewal of the trading license cannot stand.

[17] It is difficult to reject the Respondent's contention to the effect that the Applicant's belated defences are not raised *bona fide*. I say this because long before the order could be granted, the property occupants vacated it, demonstrating no interest of going back. Again, many years have lapsed since the order was granted without any party attempting to have it rescinded. The averment to the effect that the application could be aimed at giving some credence to a defence in the damages action against the Applicant's son in law is not only undisputed, but seems obvious. I am therefore not persuaded that the order was erroneously sought or granted.

[18] For the aforesaid reasons, I make the following order:

[18.1] The application for rescission of judgment is dismissed with costs.

TV RATSHIBVUMO
JUDGE OF THE HIGH COURT

**MPUMALANGA DIVISION
MBOMBELA**

**FOR THE APPLICANT : ADV AA BASSON
INSTRUCTED BY : WDT ATTORNEYS INC
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**FOR THE RESPONDENT : ADV G BENSCH
INSTRUCTED BY : WALTER & STANDER ATTORNEYS
: MBOMBELA**

**DATE HEARD : 01 SEPTEMBER 2022
JUDGMENT DELIVERED : 19 SEPTEMBER 2022**