



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: |

Date: **2 September** Signature: *Z Majavu*

CASE NO: 15653/2019

In the matter between:

KETTIE PHAKATHI

1st Applicant

JAINE KAROS

2nd Applicant

DOCTOR MOYO

3rd Applicant

MONGEZI MOYO

4th Applicant

THEMBELIHLE NDLOVU

5th Applicant

ROBERT MPEKERE TLADI

6th Applicant

PIET LIBOHANG

7th Applicant

MARIA MAHLALELA

8th Applicant

JACK LESUDI

9th Applicant

EASTLEIGH COURT HOUSING DEVELOPMENT

10th Applicant

And

JABULANI NDLOVU AND 4 others

Respondents

Coram: Majavu AJ

Heard: 10 June 2021

Delivered: 2 September 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* digital system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 2 September 2021

Summary: Application for rescission of judgement, respondents in the main application not properly served, in the result the order was erroneously sought and granted, applicants *in casu* brought themselves within the ambit of rule 42(1)(a) of the uniform rules of court.

Consequently, the application for rescission granted and respondents ordered to pay costs.

ORDER

- (a) The application for decision of judgement is granted.
- (b) The order of Dosio AJ of 2 May 2021⁹ is hereby rescinded and set aside.
- (c) The applicant shall deliver the answering affidavit in respect of the main application within fifteen (15) days of the date of this order, should they be so inclined or advised.

- (d) The respondents are ordered to pay the costs of this application, on a party and party scale, including the costs consequent upon the employment of counsel, the one paying, the others to be absolved.
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Majavu AJ

Introduction

[1] This is an application for rescission of judgement, against an order which my brother, Honourable Dosio AJ handed down on 2 May 2019.

[2] This matter has a long and unfortunate history, which resulted in the above-mentioned order, which was obtained by default and on an urgent basis against all named persons, who are reflected as the 1st to 10th applicants.

[3] The initial application for rescission was enrolled for hearing on 31 July 2019, however, was removed from the roll on the day, with an order that the respondents would bear the costs.

[4] After delayed exchange of pleadings, including heads of argument the matter was re-enrolled on 5 May 2021, and yet again, removed from the roll by notice on 3 May 2021.

[5] The matter was further re-enrolled for hearing on 7 June 2021.

[6] I do not deem it necessary to traverse all the interlocutory applications, as well as exchanges between the impugned order of 2 May 2019 and the eventual hearing of the rescission application before me.

[7] Notwithstanding the delays, I am grateful to both counsels for the heads of argument which I have found useful, as well as their oral submissions.

The Dosio AJ order

[8] “1. *Directing that the application is heard as a matter of urgency in terms of rule 6 (12).*

2. *Directing that the 1st to 10th respondents restore the electricity to the housing unit of the applicant and members in the building suffering the same fate.*

3. *Interdicting the 1st to 10th respondents to desist from forceful illegal collections of monies against the applicant and others affected members.*

4. *Interdicting the 1st to 10th respondents from further harassment of the applicant and members residing in the building against illegal electricity terminations and illegal evictions.*

5. *Directing the restoration of Gauteng Housing Secondary Co-operative as a property contracted agent to continue managing the affairs of the property.*

6. *Directing the Sheriff of the High Court accompanied by the SAPS to do all to ensure the relief for that is carried out successfully.*

7. *Directing the SAPS to investigate the conduct of the 1st to 9th respondents regarding the hijacking of the property.*

8. *The applicant and other members a period of not exceeding 30 days to bring an application before court for the judicial management of the property in terms of the Co-operatives Act.*

9. *Directing the respondent to pay the costs in the event of opposing this application.*

10. *No order as to costs.” (sic)*

[9] It would appear that the relief sought in respect of paragraph 2 of the order has now become moot, as per the concession by the applicant’s *in casu*, *in that the electricity supply has since been restored*. However, the balance of the impugned order still remains in contention, hence the persistence by the applicant’s the rescission application.

Condonation application by the respondents

[10] It would appear that the matter was not expeditiously pursued by both parties beyond what appears to be an initial application for rescission launched by the applicant’s and removed from the roll on 31 July 2019. To the extent that the respondents were woefully out of time with the filing of their answering

affidavit and subsequent to heads of argument, in the interests of justice, I exercise my discretion in favour of granting such condonation, to enable me to deal with this matter definitively, in terms of the issues before me for determination.

Point in limine (by the respondents in this application)

[11] The respondents take issue with the *locus standi* of the 1st applicant, to the extent that he alleges to be the chairperson of the housing scheme. There can be no merit to the contention that the first applicant, or the 2nd to the 10th applicants for that matter, lack the necessary *locus standi* to bring this application, when they have been expressly named in the initial notice of motion, which resulted in the order, which is the subject matter of this very application.

[12] It is trite that any party who is cited in the proceedings is indeed entitled to participate, assuming that such proceedings or processes initiating such proceedings are brought to their attention. Conversely, in the event any such party were to discover even after the fact, that a court may have pronounced or was in the process of pronouncing about the matter in which they have a sufficient material interest, then such party can hardly be said to be non-suited and accordingly, is entitled to be heard. This appears to be undoubtedly, such a case. I therefore find that there is no merit to the point in *limine* and it is accordingly dismissed.

Requirements for rescission of judgement: Rule 42

[13] A useful starting point is always the applicable rule, in this case rule 42 (1) (a), of the Uniform Rules of Court which states as follows:

“ (i) the court may, in addition to any other powers it may have, *mero motu* or upon 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 (emphasis added)

[14] The prerequisites that the applicants need to satisfy under the subrule are the following:

(a) the default judgement must have been erroneously sought or granted; (emphasis added)

(b) such judgement must have been granted in the absence of the applicants: and

(c) the applicant's rights or interests must be affected by the judgement.

[15] There can be no doubt that the latter two requirements appear as reasonably undisputed, and I accordingly find that they have been established by the applicants. However, in order to succeed for rescission under the sub-rule, the applicants still bear the onus of establishing that the judgement was erroneously granted.

Meaning of erroneously granted?

[16] The meaning of the words “erroneously granted” was explained in the case of *Bakoven Ltd v GJ Howes (Pty) Ltd*¹ where the court held:

“an order or judgement 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 record. (The shorter Oxford dictionary). It follows that the court in deciding whether a judgement was “erroneously granted” is, like a court of appeal, confined to the record of proceedings. In contradiction to relief in terms of rule 31 (2) (B) or under common law, the applicant need not show (good cause) in the sense of an explanation for his default and a bona fide defence...”

[17] In context, the error accompanying the granting of the order is with reference to specifically, whether or not the applicants had notice of the initial application, which resulted in the order handed down by Dosio AJ. When one evaluates the explanation given by the applicant’s (*in casu*) it is not improbable that, in truth, the process never reached their attention, or that of the first applicant. All the respondents do, by way of rebuttal, is a blanket denial as contained in 12.4 and 12.5 of their answering affidavit (incorrectly titled replying affidavit) by simply stating that the age of the said minors is undisclosed, as well as the fact that *“they were apparently not in school even though the day of the service was done during school going time”* (sic). They further assert that “no

¹ 1990 (2) SA 466 at page 469B

statements were included from minus to support their case or let alone any other member state in the building to support the statement” (sic). The essence of the version by the applicants, directly with regard to the *non-service* of the original application, remains largely unassailed. I accordingly accept it to be true.

[18] This resulted in the applicants’ default, with reference to stating their case prior to the granting of the order sought to be rescinded. Such default can never be said to be wilful. In fact, I find that it was not.

[19] Given the nature of the relief sought, the socio–economic, property rights implicated, one cannot imagine that the applicants would have elected, knowingly, not to participate in the proceedings even on an urgent basis.

[20] To the extent that Dosio AJ was given an impression that the application was duly served when the applicants (in the main application) knew that such was not the case, that in my view, is enough for the applicant’s (*in casu*) to bring themselves within the jurisdictional requirements contemplated in rule 42(1)(a). It is not even expected of them to traverse their defence on the merits. This would have been distinguishable if this application was anchored on common law, which would have required the applicant to *show good cause* and by implication, to traverse the merits of their defence, or as would have been the case in terms of rule 31 (2) (b).

[21] In spite of what appears to be irrelevant mosaic of issues, in my view, the central issue for determination before me is whether or not the applicants have brought themselves within the ambit of rule 42 (1) (a) in order to establish, on a

balance of probabilities that the judgement was erroneously sought and/or *granted* in their absence. If I find the answer to be in the affirmative, then such resultant judgement falls to be rescinded. If one were to borrow, with approval, the words in *Bakoven* (where the court placed reliance on *Hard Road (Pty) Ltd v Oribi Motors, De Wet and Tshabalala and Another v Pierre*) decision *supra*, “*once the applicant can point at an error in the proceedings, he is, without further ado entitled to rescission*”. (Emphasis added)

[22] In order to apply the above rationale, an examination of the facts as contained in the pleadings is called for. In evaluating the version of the applicants (*in casu*) with regard to their absence in the hearing which resulted in the Dosio AJ order, weighed against that of the respondents (*in casu*), I am indeed satisfied that the order was indeed granted erroneously. The original application before Dosio AJ was never brought to the attention of the applicants (then respondents). It therefore follows that the applicants *need not* show “good cause” in the sense of an explanation for the default judgement and a *bona fide* defence. Having crossed this jurisdictional hurdle, it therefore follows that the applicants are entitled to have this order rescinded.

[23] I also note that the applicants (*in casu*) seem to fudge issues, both in the founding affidavit, as well as in their heads of argument, by referring to the requirements in terms of rule 42 (1) (a) interchangeably with the test under common law. Given the fact that I have already found that the applicants have brought themselves within the requirements of rule 42, I do not deem it necessary to deal with the common law requirements.

[24] For these reasons I make the following order:

Order

- (i) The application for rescission judgement is granted.
- (ii) The order of Dosio AJ of 2 May 2021⁹ is hereby rescinded and set aside.
- (iii) The applicants shall deliver the answering affidavit in respect of the main application within fifteen (15) days of the date of this order, should they be so inclined or advised.
- (iv) The respondents are ordered to pay the costs of this application, on a party and party scale, including the costs consequent upon the employment of counsel, the one paying, the others to be absolved.

Z M P MAJAVU

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:

10 June 2021

JUDGMENT DATE:

2 September 2021

FOR THE APPLICANT:

Adv SG Zwane

INSTRUCTED BY:

Dube N Attorneys.

FOR THE
RESPONDENTS :

Adv Shole

INSTRUCTED BY:

Mr. Jabulani Ndlovu –in-
person