

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 65191/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
27 February 2020 DATE	
<i>[Signature]</i> SIGNATURE	

In the matter between:

DOUGLAS BENNETT INCORPORATED

FIRST APPLICANT
(First Defendant)

DOUGLAS LANLEY BENNETT

SECOND APPLICANT
(Second Defendant)

and

PC DIEDERICKS & ASSOCIATES

RESPONDENT
(Plaintiff)

JUDGMENT

COLLIS J

INTRODUCTION

[1] This is an opposed application in terms of Rule 42(1) (a) wherein the applicants seek to rescind or vary an order which was erroneously granted in the absence of the applicants.

BACKGROUND

[2] On 20 September 2017, the plaintiff issued summons against the defendants for medical services rendered upon instruction of the second defendant acting on behalf of the first defendant.

[3] Pursuant to the service of the summons the defendants entered an appearance and on 18 October 2017 and the plaintiff launched summary judgment proceedings with the allocated hearing being 6 February 2018.

[4] The defendants resisted the summary judgment proceedings and delivered their affidavits and heads of arguments on 2 February 2018.¹

[5] On 5 February 2018, the day prior to the hearing of the matter, the Plaintiff's attorney of record agreed with the Defendants that the matter would be removed from the roll with costs to be costs in the cause.²

[6] What follows was an exchanged of a Notice of Removal *via* email between the parties, where the costs was agreed to be costs on the cause.³

[7] The defendants were not present at the hearing on the 6 February 2018 and on 1 March 2018 was informed by correspondence received

¹ Founding Affidavit para 14 p 12

² Founding Affidavit para 15 p 12

³ Founding Affidavit para 17 & 18 p 13, Annexures 'DB 5', 'DB 6' and 'DB 7'

from the plaintiff's attorney that the summary judgement application was removed, leave to defend granted and that the court ordered costs to be costs in the cause.⁴

[8] It is the contents of the above letter so received that is the premise for the rescission application in that the application was not removed from the court roll on 6 February 2018 with leave to defend granted, but that instead the order that the court granted was to grant leave to defend with costs in the cause. Thus contrary to the agreement reached between the parties on 5 February 2018.

[9] Uniform Rule 42 provides as follows:

“S 42(1)(a) The court may, in addition to any other powers it may have, *mero motu* or on 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;.....”

[10] In order to obtain rescission under this sub rule, the applicant must show that the prior order was ‘erroneously sought or erroneously granted in the absence of any party affected thereby’.⁵ Once the court holds that an order or judgment was erroneously sought or granted, it should without further enquiry rescind or vary the order⁶ and it is not necessary for a party to show good cause for the sub rule to apply.

⁴ Founding Affidavit para 22 p 15

⁵ Duma v Absa Bank Ltd 2018 (4) SA 463 (GP)

⁶ Tshabalala v Peer 1979 (4) SA 27 (T)

[11] Furthermore, in general terms a judgment is erroneously granted if there existed at the time of its issue facts of which the court was unaware, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment.⁷

[12] In the decision *Naidoo v Matlala* it was held NO 2012 (1) SA 143 (GNP) at 153 C-E it was held that: 'if material facts are not disclosed in an ex parte application or if fraud is committed (i.e. the facts are deliberately misrepresented to the court) the order will be erroneously granted.

[13] In the founding affidavit the deponent sets out, the court order issued in respect of the proceedings of 6 February 2018, reflected the following:

- '1. Leave to defend is hereby granted.
2. Costs to be costs in the cause.' Whereas as per the agreement reached between the parties, the matter should merely have been removed from the roll with costs to be costs in the cause as agreed to between them. This is precisely the reason why relief in terms of this present application is sought.

[14] In addition to the above the deponent sets out that the reason for the absence by the defendants at court, was due to their belief, that an agreement was reached between the parties as to what order would be made and that such agreement would be honestly complied with and sought by the plaintiff.

⁷ *Rossiter v Nedbank Ltd* (unreported, SCA case no 96/2014 dated 1 December 2015) at paragraph [16]

[15] Furthermore, that the order of 6 February 2018, therefore does not reflect the intention of the parties and that the plaintiff's legal counsel, which includes Cilliers & Reynders had no basis or authority to pursue the order that it did on 6 February 2018.⁸

[16] In the Answering affidavit, the plaintiff responded as follows:

16.1 That it was always the intention that the summary judgment enrolled for 6 February will be removed from the roll in order to allow the defendants to proceed with their defence.⁹

16.2 Neither my letter of 5 February 2018, nor the notice of removal, stated that the order of 'costs in the cause' pertained only to the removal of the application from the roll of 6 February 2018 and that the defendants ought to have sought clarification as to which costs, costs in the cause related to.

16.3 Furthermore, it at all times was open to the defendants to have attended court on 6 February 2018 in order to ensure that the order made by the court on this day indeed reflected the defendants understanding of their agreement with the plaintiff.¹⁰

16.4 In an application for an opposed summary judgment where the plaintiff is minded to allow the defendant leave to defend, it is typically understood that the matter will need to be removed from the roll and the defendant would be granted leave to defend.

[17] As mentioned in order for an applicant to succeed with a rescission under Rule 42 an applicant must show that the application was 'erroneously sought or erroneously granted'.

⁸ Founding affidavit para 34 p 24

⁹ Answering affidavit para 14 p 207

¹⁰ Answering affidavit para 16 & 17

[18] In order for this court to make a determination as to whether the applicant has satisfied the *onus* in order to succeed to have the judgment rescinded in terms of Rule 42(1) (a), this court would have to determine what is the effect of the order so given by the court on 6 February 2018.

[19] What is apparent from the agreement reached between the parties on 5 February 2018, was that the plaintiff was not going to proceed with the summary judgment application on 6 February 2018. The agreement reached was that the application was going to be removed (*or postponed*) and implicit thereto, that this application would be re-enrolled on a future date for adjudication.

[20] Furthermore, that the costs occasioned by such removal (*or postponement*) of the application set down for 6 February 2018, was that the court would order such costs to be costs in the cause.

[21] In reality what instead occurred was not a removal, or a postponement of the application but instead the defendants were granted leave to defend, with costs ordered to be costs in the cause.

[22] The question that now begs for an answer is whether the said order granting the defendants leave to defend the action resulted in a different outcome as if the application was merely removed (*or postponed*), and later re-enrolled on a future date and eventually successfully opposed by the defendants?

[23] In the event of the latter having occurred, the defendants at best would have been given the same order of granting them leave to defend if they were successful in their opposition and a court would have awarded

the usual order of costs to be costs in the cause. The result thereof is that the defendants would be permitted to file their plea and thereby ultimately defend the action.

[24] In the present instance the defendants have no misgivings about the costs order given by the court on 6 February 2018. They quite rightly conceded to and accepted same. Therefore in respect of the costs order given on the hearing date, it cannot be said this order on costs was erroneously sought or granted.

[25] This then leaves the order given by the court in relation to the merits of the application. As mentioned it has been conceded that the order on the merits given by the court, was not the order agreed upon by the parties on 5 February 2018. As mentioned, if the application was merely removed and if the plaintiff was of the intention to proceed with the summary judgment in future, another date would have to have been applied for and the previously removed summary judgment application set down and ultimately adjudicated upon. If the defendants in this instance would then have been successful with their opposition, no different order would have been given by the court, but for the order to grant the defendants leave to defend.

[26] It therefore must follow, that the resultant order on the merits sought and given by the court on 6 February 2018, albeit not intended by the parties at the time, had the same desired outcome as if the summary judgment application was only later adjudicated upon. It certainly is not an order erroneously sought or granted by the court. In addition thereto, the order so given is also not an order which can be considered to be prejudicial to any of the defendants' rights.

COSTS

[27] As far as costs and having regard to what has been espoused in the respective affidavits, I am of the opinion that the appropriate costs order in the circumstances will be to order each party to pay its own costs.

ORDER

[28] As a consequence the application falls to be dismissed with each party ordered to pay its own costs.



C.J COLLIS
JUDGE OF THE HIGH COURT

Appearances:

For the Applicants : Adv. S. Saunders

Instructed by : Douglas Bennett Inc.

For the Respondent : Adv. E. Van As

Instructed by : Cilliers & Reynders Inc.

Date of Hearing : 27 August 2019

Date of Judgement : 27 February 2020