



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

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES ☒ NO ☒
(2)	OF INTEREST TO OTHER JUDGES: YES ☒ NO ☒
(3)	REVISED: ☒
29 May 2019	
DATE	SIGNATURE

Case No: 8991/2017

In the matter between:

THENDO GERALDINE RAMAITE

First Applicant

MUTHANYI ROBINSON RAMAITE

Second Applicant

and

**MUNAKA GENERAL TRADING (PTY) LTD
(IN LIQUIDATION)**

Respondent

IN RE:

**MUNAKA GENERAL TRADING (PTY) LTD
(IN LIQUIDATION)**

Plaintiff

and

THENDO GERALDINE RAMAITE

First Defendant

MUTHANYI ROBINSON RAMAITE

Second Defendant

JUDGMENT

HF JACOBS, AJ:

[1] On 26 October 2017 Mavundla J granted summary judgment against the applicants in the following terms:

"THE COURT GRANTS SUMMARY JUDGMENT in favour of the plaintiff against the defendants jointly and severally, the one paying the other to be absolved for:

CLAIM 1:

1. *Plaintiff of the capital amount of R1 873 967.00;*
2. *Interest on the aforesaid amount, a tempore morae;*
3. *Costs of suit;*

CLAIM 2:

1. *Plaintiff of the capital amount of R235 599.02;*
2. *Interest on the aforesaid amount, a tempore morae;*
3. *Costs of suit."*

[2] Before Mavundla J were the respondent's particulars of claim (with a number of annexures attached thereto), an application for summary judgment and an affidavit deposed to by the applicants resisting the application for summary judgment. At the hearing of the application for summary judgment the respondent was represented by senior counsel. Senior counsel's heads of argument presented to Mavundla J forms part of the record in this application. Counsel for the respondent dealt with the affidavit of the first applicant presented in opposition to the application for summary judgment in his heads of argument before Mavundla J and made submissions in support of the application for summary judgment by, *inter alia*, dealing with the defences raised in the opposing affidavit.

[3] The applicants were not present at the hearing of the application for summary judgment and were not represented by counsel or an attorney when the application for summary judgment was heard. Against that background and broader context the applicants now apply for rescission of the summary judgment of 26 October 2017.

[4] During argument I requested counsel for the applicants to indicate on which basis in law the application for the rescission is brought. I was informed that the evidence presented by them justifies the relief on more than one legal premise. I will, therefore, consider the rescission application as an application brought in terms of Rule 31(2)(b), Rule 42 and the common-law.

[5] A summary judgment, if erroneously granted, may be rescinded in terms of Rule 42.¹ In Louis Joss Motors v Riholm² it was held that in an application for rescission of a summary judgment under Rule 42 the grounds are limited to those set out in sub-rule 42(1)(a) and (b). Rule 42(1)(a) and (b) reads as follows:

"42. Variation and rescissions of orders

- (1) *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 judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*

¹ See Nyingwa v Moolman N.O. 1993 (2) SA 542 (T) at 510B-511A.

² 1971 (3) SA 452 (T) at 454G-H.

- (b) *an order or judgment in which there is ambiguity, or patent error or omission, but only to the extent of such ambiguity, error or admission;*
- (c) *an order or judgment granted as a result of a mistake common to the parties."*

[6] An order or judgment is erroneously granted if there exists an irregularity in the process that gave rise to the order or judgment or if it was not legally competent for the Court to have made the order. *In casu* Mavundla J had, in law, the jurisdiction to grant or dismiss the application for summary judgment and the respondent was in law entitled to apply for summary judgment. Summary judgment could, therefore, not have been "*erroneously sought*" or "*erroneously granted*" within the meaning of those terms in Rule 42(1)(a). The applicants' approach to the application for rescission is that summary judgment was "*wrongly granted*" having regard to the pleaded cause of action, its nature and the alleged illiquidity of that claim on authority of the judgment in Nyingwa v Moolman N.O. *supra*.³

[7] The record of the proceedings before Mavundla J shows that the applicants were not present on the day and not represented by a practitioner, but the summary judgment application was however opposed and considered by the presiding judge. Summary judgment was granted under circumstances where strict compliance with Rule 32 was required. The presiding judge considered the affidavit presented to him in opposition of the application for summary judgment,

³ At 510D-G; Occupiers, Berea v De Wet 2017 (5) SA 346 CC at [69]; Seale v Van Rooyen N.O. & Others; Provincial Government, North West Province v Van Rooyen N.O. & Others 2008 (4) SA 43 (SCA) at [18].

heard counsel for the respondent and after having considered what was placed before him exercised his discretion as provided for in Rule 32(5). One must be mindful thereof that a defendant who delivered an opposing affidavit in summary judgment proceedings is not obliged to appear at the hearing. The presiding judge is, however, obliged to consider the contents of the opposing affidavit filed and may even refuse summary judgment if the application is unopposed if he or she is not satisfied that the extraordinary remedy provided for by Rule 32 should be allowed. It is therefore necessary to consider whether the applicant's challenge of the summary judgment shows that it had been applied for and granted erroneously.

[8] The grounds for the rescission advanced by the applicants are conveniently summarised in paragraph 3 of the applicants' counsel's heads of argument and include the following:

[8.1] that the applicants were not in wilful default and that they cannot be blamed for not being present or having representation when the application for summary judgment was heard and granted on 26 October 2017;

[8.2] the application for summary judgment was erroneously sought as the claims embodied in the particulars of claim do not fall under the provisions of Rule 32 and the particulars of claim are defective, excipiable on the ground that it is vague and embarrassing and does not disclose a cause of action; and

[8.3] that the application for summary judgment was not competent in law.

[9] I am not convinced that the applicants were in wilful default. They intended to oppose the application for summary judgment and their absence or the absence of a legal representative on the day was the result of remissness of the staff in the office of their attorney. They are in my view not barred from seeking the relief sought.

[10] If a summary judgment application was unopposed, the judgment consequently granted in the absence of a defendant cannot be rescinded under Rule 31(2)(b).⁴ The main reason for that is that the provisions of Rule 31 are not applicable to summary judgment because the rule applies only to those cases in which a defendant is in default of delivery of a notice of intention to defend or a plea which is not the position in an application for summary judgment. In the present matter the application for summary judgment was opposed. The application for rescission cannot succeed in terms of Rule 31.⁵

⁴ See *Louis Joss Motors v Riholm* supra at 454A-I; *Tlholoe v Maury (Edms) Bpk h/a Franelle Gordyn Boetiek* 1988 (3) SA 922 (O) at 925G-H.

⁵ See *Louis Joss Motors (Pty) Ltd v Riholm* 1971 (3) SA 452 (T) at 454; *Bristow v Hill* 1975 (2) SA 505 (N) at 505H; *Nyingwa v Moolman N.O.* 1993 (2) SA 508 (Tk).

[11] A summary judgment can be rescinded under the common-law.⁶ The law in this regard has been restated by the Supreme Court of Appeal in Moraitis Investments.⁷ The relevant paragraphs read as follows:

"[12] The approach differs depending on whether the judgment is a default judgment or one given in the course of contested proceedings. In the former case it may be rescinded in terms of either rule 31(2)(b) or rule 42 of the Uniform Rules, or under the common law on good cause shown. In contested proceedings the test is more stringent. A judgment can be rescinded at the instance of an innocent party if it were induced by fraud on the part of the successful litigant, or fraud to which the successful litigant was party. As the cases show, it is only where the fraud — usually in the form of perjured evidence or concealed documents — can be brought home to the successful party that restitutio in integrum is granted and the judgment is set aside. The mere fact that a wrong judgment has been given on the basis of perjured evidence is not a sufficient basis for setting aside the judgment. That is a clear indication that, once a judgment has been given, it is not lightly set aside, and De Villiers JA said as much in Schierhout.

[13] Apart from fraud the only other basis recognised in our case law as empowering a court to set aside its own order is justus error. In Childerley, where this was discussed in detail, De Villiers JP said that 'non-fraudulent misrepresentation is not a ground for setting aside a judgment' and that its only relevance might be to explain how an alleged error came about. Although a non-fraudulent misrepresentation, if material, might provide a ground for avoiding a contract, it does not provide a ground for rescission of a judgment. The scope for error as

⁶ See: Louis Joss Motors (Pty) Ltd v Riholm 1971 (3) SA 542 (T) at 455A-B; Nyingwa v Moolman N.O. 1993 (2) SA 508 (Tk) at 511B-512B; Saxum Group (Pty) Ltd v Dalefern Properties (Pty) Ltd 2011 (1) SA 230 (GSJ) at 232I; Sundra Hardware v Mactro Plumbing 1989 (1) SA 474 (T) at 476I.

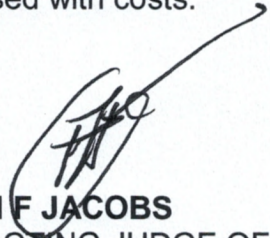
⁷ Moraitis Investments v Montique Dairy 2017 (5) SA 508 (SCA) at [12]-[13].

*a ground for vitiating a contract is narrow and the position is the same in regard to setting aside a court order. Cases of justus error were said to be 'relatively rare and exceptional'. Childerley was considered and discussed by this court in De Wet without any suggestion that the principles it laid down were incorrect."*⁸

[12] The applicants' challenge of the summary judgment is, although couched as a rescission application of a judgment "*erroneously sought and granted*", in fact a challenge of the judgment on the basis that it was "*wrong*". It was wrong, so the allegations go, because the claim was not liquid, and, therefore, not being capable of summary judgment, premised on a cause of action which has been pleaded in a vague and embarrassing manner and not recognised in law. The summary judgment is a final order in contested proceedings. It is not within my remit to reconsider the application for summary judgment. I am of the view that the proper procedure to challenge the summary judgment would be an appeal.

Under the circumstances I make the following order:

The application is dismissed with costs.



H F JACOBS
ACTING JUDGE OF THE HIGH COURT
PRETORIA