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

- (1) REPORTABLE: Electronic reporting only
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED.

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DATE

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SIGNATURE

Case no: 45403/14

In the matter between:

JAY INCORPORATED

Applicant

and

**J T
L T**

First Respondent
Second Respondent

Case Summary: Practice - Superior Courts – Uniform Rules of Court – Rule 42(1)(b) - rescission or variation of an order ‘erroneously sought or erroneously granted in the absence of any party effected thereby’ - setting aside of costs order *de bonis propriis* granted against firm of attorneys in its absence – attorneys no longer represented a party in the proceedings, were not a party to the proceedings and they were not participants at the hearing - they should, at the very least, have been invited to make submissions regarding an adverse costs order against them - consequently, they were not heard - therefore, an irregularity in the proceedings - r 42(1)(a) finds application.

A person against whom an order was granted in his or her absence in an urgent application may, in any event, in terms of r 6(12)(c), set the matter down for reconsideration of the order.

JUDGMENT

MEYER J

[1] This is an application for the setting aside of the costs order *de bonis propriis*, which this court (Makume J) granted in favour of the first respondent, Mr J T, against the applicant, Jay Incorporated (Jay), on 30 September 2015 in a r 43 application under case no. 45403/14 that had been instituted by the second respondent, Ms L T, against Mr T. Jay acted as Ms T's attorneys of record in the r 43 application until 22 September 2015, when it filed its notice of withdrawal as attorneys of record for her. The rescission application is brought in terms of r 42(1)(a) of the Uniform Rules of Court or under the common law.

[2] Jay acted as the attorneys of record for Ms T in divorce proceedings, which Mr T had instituted against her. Ms Melissa van Zyl, an attorney at Jay, represented her. They are sisters. Ms T was not financially able to defend the divorce action and she was only liable for Jay's disbursements. She instructed Ms van Zyl to institute a r 43 application for the payment of maintenance *pendente lite* to her. The r 43 application was issued on 15 April 2015. An opposing affidavit was filed on 21 April 2015. The matter was not immediately enrolled for hearing for reasons that are not presently relevant.

[3] Jay appointed Scheepers Pretorius Inc. as its correspondent attorneys in Johannesburg. Ms Chanel Scheepers dealt with Ms T's r 43 application. Ms Scheepers ultimately obtained a date, 11 September 2015, from the registrar's office for the enrollment of the r 43 application. She had sent a messenger to the registrar's office to ensure that the file was properly indexed and paginated, and to finally enroll the matter for hearing on the allocated date, 11 September 2015.

[4] However, on the date allocated for the hearing of the r 43 application, it appeared that the matter had not been finally enrolled for hearing on that date. Ms van Zyl was advised that the next available date for the enrollment of the hearing of the r 43 application was during the middle of November 2015. She conveyed that to her sister. In this regard Ms van Zyl states:

‘My sister, the second respondent, informed counsel and me that she made arrangements with the bank not to repossess her vehicle that the first respondent had stopped paying, as well as with her landlord to await the outcome of the r43 application on 11 September 2015 before taking any further steps against her. She was in tears and informed us further that she could not hold her creditors at bay and requested if the application could be heard on an earlier date. At her request counsel and I explained the positives and negatives of an urgent application to her as well as the aspect of urgency. The second respondent then instructed me to proceed with an urgent application.’

[5] Ms van Zyl requested Ms Scheepers to enroll the urgent r 43 application on Friday, 18 September 2015, for hearing on Tuesday, 29 September 2015, and the matter was so enrolled. The urgent r 43 application was served at the offices of Mr T’s attorneys of record, Klinkenberg Inc. (Klinkenberg), on 18 September 2015. Mr Peter Breedt, the attorney dealing with the matter on behalf of Mr T, forwarded a letter to Jay on the same day wherein he, *inter alia*, advised s T’s attorneys as follows:

‘Your attempt to have this matter dealt with in the urgent court is an abuse of process and should you proceed herein, we will request that the court grant a *de bonis propriis* costs order against your firm as it is clear that your client is being poorly advised.

...

We require confirmation by close of business today whether it is your attention to proceed with your application on an urgent basis and place on record that should you do so we will seek a costs order *de bonis propriis* against you.’

[6] Ms van Zyl discussed the content of the letter with her sister, Ms T. In this regard she states the following:

‘21.1 I contacted the second respondent and discussed the content of the letter with her in detail. I specifically stated that the applicant is not going to expose itself to *de bonis propriis* costs orders, specifically where the second respondent could not make any

contribution towards the legal costs of the urgent application but still insisted that we proceed therewith even though the inherent risks therein were explained to her.

21.2 I made it very clear that as the applicant is in any event withdrawing from record she should decide if she wanted to proceed or not.

21.3 The second respondent stated that she wanted to proceed but requested and pleaded for my assistance. I told her that I would take it up with the directors of the applicant but made no promise in this regard. The directors of the applicant insisted that I withdraw from record due to the second respondent's lack of funds. They were not prepared to act as attorneys of record where there was no reasonable prospect that the second respondent at least cover the costs of disbursements.'

[7] Jay filed its notice of withdrawal as attorneys of record, which notice was delivered to Klinkenberg on 22 September 2015. Ms T approached the Legal Aid Board, Johannesburg on the same day. The Legal Aid Board, however, did not become Ms Theron's attorneys of record nor did it represent her at the hearing of the urgent r 43 application. The reason why the Legal Aid Board did not represent her has not been disclosed by Ms T.

[8] On 29 September 2018, the matter stood down in the urgent court to the next day. On 3 September 2015, Makume J made the following order:

- '1. The urgent application dated 18 September 2015 is dismissed.
2. The applicant's attorneys are to pay the costs *de bonis propriis*.
3. Applicant's r 43 application dated 26 March 2015 stays pending.'

Neither Jay nor Ms van Zyl was present at the hearing of the urgent r 43 application when the question of costs was argued or when the order to pay the costs *de bonis propriis* was made against Jay. Mr T was represented and Ms T appeared in person.

[9] Ms T's former attorneys, Jay, were no longer representing her, they were not a party to the proceedings before the urgent court and they were not participants at the hearing of the urgent r 43 application. They should, at the very least, have been invited to make submissions regarding an adverse costs order against them. That did not happen. Consequently, they were not heard. There was, therefore, an irregularity in the proceedings. Rule 42(1)(a) provides for the rescission or variation of an order 'erroneously sought or erroneously granted in the absence of any party effected

thereby.’ An order is erroneously granted if there was an irregularity in the proceedings. Rule 42(1)(a), therefore, finds application in this instance. (See *Promedia Drukkers and Uitgewers (Edms) Bpk v Kaimowitz and others* 1996 (4) SA 411 (CPD) at 417 G – I.) A person against whom an order was granted in his or her absence in an urgent application may, in any event, in terms of r 6(12)(c), set the matter down for reconsideration of the order.

[10] Jay and Ms T agreed that she would abide the decision of this court and that Jay would not seek an order for the costs of the present application against her. I am of the view that it would be appropriate in all the circumstances to make no order as to costs, also against Mr T. Klinkenberg advised Jay on 18 September 2015 of its intention to seek a *de bonis propriis* costs order. Jay did not respond to that letter, nor did it appear at court when the urgent application was heard.

[11] In the result the following order is made:

Paragraph 2 of the court order granted in this court on 30 September 2015 under case no. 45403/2014 is hereby rescinded and the matter of costs of that application is reserved.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:

5 September 2018

Date of judgment: 10 September 2018
Counsel for the Applicant: Adv AJ Swanepoel
Instructed by: Jay Inc Attorneys, Johannesburg
Counsel for the 1st Respondent: Adv Heineke
Instructed by: LP Baartman Attorneys, Roodepoort
Counsel for the 2nd Respondent: Adv M Vermeulen
Instructed by: Vermeulen Attorneys, Roodepoort