

IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION, MTHATHA]

CASE NO: 2400/2011

Date heard: 16 October 2015

Date delivered: 27 October 2015

In the matter between:

MASHATA SIKHOSANA & 28 OTHERS

Applicants

And

ELUNDINI LOCAL MUNICIPALITY

1st Respondent

THE SHERIFF OF THE HIGH COURT,

MOUNT FLETCHER

2nd Respondent

THE STATION COMMISSIONER,

MOUNT FLETCHER POLICE STATION

3rd Respondent

JUDGMENT

BROOKS AJ:

- [1] This is an application in which the applicants seek the rescission of a judgment granted against them by default on 9 February 2012. The judgment by default was granted in favour of the first respondent who was the initial applicant in the proceedings.
- [2] The second and third respondents have been cited by the applicants by virtue of their involvement in the proceedings *nomine officio* subsequent to the granting of the judgment by default in favour of the first respondent. No substantive relief is claimed against the second and third respondents accordingly.
- [3] The first respondent has opposed the application for rescission and a full exchange of affidavits has occurred *inter partes*.
- [4] Inevitably, some disputes of fact have arisen in the affidavits filed of record. In considering the proper approach to be adopted in the evaluation of the evidence set out in the affidavits, it is necessary to consider the nature of the relief sought. The effect of rescission would be to render the order a nullity. Neither advantage nor disadvantage can flow therefrom. The applicants are entitled to claim that the *status quo ante* be restored.¹ In my view, the grant of rescission can be likened to the grant of interim relief and the proper approach is to take the facts set out by the applicants together with any facts set out by the first respondent which the

¹ SECURIFORCE CC v RUITERS 2012 (4) SA 252 (NCK) 261 D-E.

applicants cannot dispute and to determine whether, on those facts, the applicants are entitled to relief.²

[5] Whilst the applicants' notice of motion does not state a particular Rule or procedure in terms of which the application has been instituted, the application has been sufficiently widely presented to encompass Rule 42 (1) (a) of the Uniform Rules of Court on the basis that the judgment by default was erroneously sought or erroneously granted in the absence of the applicants.³ This was confirmed by MR BODLANI who appeared on behalf of the applicants and was accepted by MR NTSALUBA who appeared on behalf of the first respondent.

[6] It has been held ⁴ that the prerequisite factors for granting rescission under Rule 42 (1) (a) of the Uniform Rules of Court are the following. Firstly, the judgment must have been erroneously sought or erroneously granted; secondly, such judgment must have been granted in the absence of the applicant; and, lastly, the applicant's rights or interest must be affected by the judgment.

² SPUR STEAK RANCHES LTD AND OTHERS v SADDLES STEAK RANCH, CLAREMONT, AND ANOTHER 1996 (3) SA 706 (C) 714E.

³ BAKOVEN LTD v G J HOWES (PTY) LTD 1992 (2) SA 466 (E) 468I – 469 A; NYINGWA v MOOLMAN NO 1993 (2) SA 508 (Tk) 509I – 510 D.

⁴ MUTEBWA v MUTEBWA AND ANOTHER 2001 (2) SA 193 (Tk HC) para [15].

[7] It has also been held ⁵ that there is nothing in the language used in Rule 42 (1) (a) of the Uniform Rules of Court which indicates that the error relied upon must appear on the record of proceedings before the power conferred by the Rule can be exercised. Whilst the error should appear on the record in cases where the court acts *mero motu* or on the basis of an oral application from the bar for rescission or variation of the order, in cases where a written application is presented the court cannot ignore the facts set out in the affidavits and must have regard thereto. This is particularly so where no error can be picked up *ex facie* the record itself. Relief may be granted under this Rule if:

- (a) the court which made the order lacked competence to do so; or
- (b) at the time the order was made the court was unaware of facts which, if then known to it, would have precluded the granting of the order; or
- (c) there was an irregularity in the proceedings.

[8] Against the background of this statement of applicable legal principles, I turn now to a consideration of the relevant facts in this matter.

[9] It is apparent from the application papers that the applicants came to know of the default judgment taken against them only on 24 April 2012 when they attended a meeting in Maclear at the premises of the first respondent. They believed that the

⁵ MUTEBWA v MUTEBWA AND ANOTHER (*supra*) paras [20]-[22]; PROMEDIA DRUKKERS & UITGEWERS (EDMS) BPK v KAIMOWITZ AND OTHERS 1996 (4) SA 411 (C) 417 G –I.

meeting was intended to address the application for the eviction of the applicants (the subject matter of the judgment taken by default). On attendance the applicants established that the meeting had been called to arrange for the execution of the default judgment.

[10] According to the applicant, after service of the application papers upon them, they sought assistance from the offices of the Legal Aid Board in Mount Fletcher. There they were given the name of an attorney who would represent them and they were told that a notice to oppose the proceedings had been filed. They were also told that affidavits would be taken in order to communicate their case to the court. Thereafter, in November 2011, the applicants were told by an employee of the Legal Aid Board in Mount Fletcher that the matter had been settled and finalised with an order requiring the first respondent to find the applicants alternative accommodation and to compensate them for buildings which would be lost in the eviction.

[11] The question which arises is to consider whether the court would have granted the default judgment against the applicants on 9 February 2012 had the facts now set out in the founding affidavit by the applicants been known. In my view, there is no doubt that the application for judgment by default would have been refused. Although no notice of opposition would have appeared in the court file, the court would have known that the applicants were desirous of opposing the matter, had

taken specific steps to that end and were not responsible for the apparent failure of the Mount Fletcher Legal Aid Board offices to carry out their mandate. In such circumstances, judgment would not have been granted by default in favour of the first respondent.

[12] It follows that I am of the view that for the purposes of an application for rescission under Rule 42 (1) (a) of the Uniform Rules of Court the applicants have demonstrated that the judgment was erroneously sought or erroneously granted, that the judgment was granted in their absence and that the applicants' rights or interest were affected by the judgment. The application for rescission must be granted accordingly.

[13] Consideration must be given to an appropriate order for costs. In argument, MR NTSALUBA urged the court not to award costs against the first respondent. He based the submission upon the observation that no confirmatory affidavits had been obtained by the applicants from the attorneys named by them in the founding affidavits as having neglected to perform the mandate given to them by the applicants to oppose the application. MR NTSALUBA submitted that had such confirmatory affidavits formed part of the application for rescission, the first respondent would not have opposed it.

[14] In my view, the presence or absence of confirmatory affidavits should not be elevated to such an important role. For the purposes of Rule 42 (1) (a) of the Uniform Rules of Court, the applicants have placed detailed allegations under oath before the first respondent and before the court which explain convincingly why, notwithstanding service of the initial application papers upon them, the applicants appeared to do nothing to secure their position. The *bona fides* of the applicants and the seriousness of their circumstances are immediately evident from the founding papers. The merit in the application for rescission ought to have been appreciated by the first respondent and a decision taken not to oppose the application. In my view, no reason exists for costs not to follow the result.

[15] The following order will issue:

- "1. The judgment granted by default in this court on 9 February 2012 under Case Number 2400/2011 is hereby rescinded and set aside.
2. The applicants are hereby directed to notify the first respondent in writing within five (5) days of the date of this order whether the applicants intend to oppose the application under Case Number 2400/2011.
3. In the event that the applicants deliver notice of their intention to oppose the application under Case Number 2400/2011 they are hereby directed to serve and file their answering affidavits within fifteen (15) days of the date of the notice of opposition.

4. The first respondent is hereby directed to pay the costs of this application on the scale as between party and party, such costs to include the wasted costs which were reserved on 28 May 2015 and interest thereon to be calculated at the prescribed rate of interest from a date fourteen (14) days after allocatur to date of payment.”

RWN BROOKS

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For the applicant:

ADV A M BODLANI

Instructed by VV MSINDO & ASSOCIATES,
MTHATHA

For the first respondent:

ADV TM NTSALUBA

Instructed b FIKILE NTAYIYA & ASSOCIATES,
MTHATHA