

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

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED
5013-06-10
DATE
SIGNATURE

CASE NUMBER: 55926/12
DATE: 2013 - 06 - 10

BP ATLAS ROAD; trading name of
ALLADIN SERVICE STATION CC

FIRST APPLICANT

ROOKSANA AND RASHID SOOBRAYAN

JOINT SECOND APPLICANT

V

AZITEX CC Reg No. 2010/153454/23

FIRST RESPONDENT

EDOPAX CC Reg No. 2010/153457/233

ALTERNATIVE FIRST RESPONDENT

STAND 13 EASTWOOD ROAD DUNKELD (PTY) LTD
Reg No. 2000/003022/07

SECOND RESPONDENT

ENGEN PETROLEUM LIMITED
Reg No. 1989/03754/06

THIRD RESPONDENT

THE MEC; DEPARTMENT OF AGRICULTURE,
CONSERVATION AND ENVIRONMENT;
GAUTENG PROVINCIAL DEPARTMENT

FOURTH RESPONDENT

EKURHULENI METROPOLITAN MUNICIPALITY

FIFTH RESPONDENT

THE CONTROLLER OF PETROLEUM PRODUCTS

SIXTH RESPONDENT

THE MINISTER; NATIONAL DEPARTMENT OF
MINERALS AND ENERGY

SEVENTH RESPONDENT

THE MINISTER; NATIONAL DEPARTMENT OF
ENVIRONMENTAL AFFAIRS AND TOURISM

EIGHTH RESPONDENT

JUDGMENT: RESCISSION APPLICATION

MABUSE J:

1. This is an application for rescission of an order of court made on 28 January 2013 by this court on the ground that such order was granted in the absence of Applicants or their counsel or attorney and on the further ground that it was erroneously granted. On the said date the court made the following order:

"1) An amount of R200 000.00 be paid into the Applicants' Attorney's Trust Account, as evidenced from Annexure 'A' hereto, (in the application for security) is to be paid into the 1st and 2nd Respondents Attorneys Trust Account (Hirshowitz Flionis Attorneys, account no: 1950427323, Branch code 195005, Nedbank Braamfontein), subject to 3 below pending the final determination of the Main Application launched out of this Honourable Court under the abovementioned case number;

2) Such amount referred to in 1 above is to be retained in Hirshowitz Flionis Attorneys' Trust Account by consent and without any admission of liability, subject to 3 below as security for any costs order that the First and/or Second Respondents may obtain against the Applicants;

3) *Any costs orders obtained by the above named First and or Second Respondents may be satisfied, by a payment of same from the aforementioned amount of R200 000.00,*

4) *The costs of the Application for Security for Costs are reserved for determination at the hearing of the main Application launched under the abovementioned case number”.*

2. This application for rescission is brought by one Joseph Murray Kotze (“Kotze”), the Applicants’ attorneys who has for that purpose provided a founding affidavit. He applicant has, in the application, not seen it fit to describe the parties. In the notice of motion and founding affidavit the respondents are merely referred to as Azitex CC and Six Others.

3. The Applicant brings this application for rescission of the order of the said date in terms of the provisions of rules 42 of the Uniform Rules of Court by reason of the fact that the said order was, in its view, granted in its absence and furthermore that it had been erroneously granted after the Court had been misled and misinformed. The said rule provides in sub-rule (1) that:

“The court may, in addition to any other powers that it may have, mero motu or upon the application of any party affected, rescind or vary –

1(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.”

In paragraph 5 of the application for rescission the said Kotze states that:

"It will be seen that the order is given as a "consent" order. There is no possibility that such a "consent" existed or could have been shown to the honourable court. It stands to reason therefore that the honourable judge was deceived or misled and that the order was granted in error. It is also clear from the fact that the honourable judge was deliberately misled and misinformed."

4. This application for rescission is opposed by the First and Second Respondents who, apart from doing so on the merits, have also raised three points *in limine*.

The First and Second Respondents contend that the applicants have failed to adequately join the required parties to the application in terms of Rule 42(1) of the Uniform Rules of Court. In the second point *in limine* the first and second respondents contend that although the Applicants have asked for a special costs order against the First and Second Respondents as well as the attorneys firm Hirshowitz Flionis Attorneys, jointly and severally the one paying and the other to be absolved, they have not, in their application, described the second respondent, having made reference only to six others. The third and last point *in limine* raised by the First and Second Respondents is that the deponent to the founding affidavit in the application for rescission has failed to prove that he is authorised to make this application. On that basis they contended the deponent has no *locus standi* to bring this application.

5. I set out the history of this application for rescission as follows. The applicants in the application for rescission are the applicants in the Main Application. The Main Application has also been issued under the same case number 55926/2012. It

was issued by the Registrar of this court on 16 October 2012. It was on the urgent roll of this court on 23 October 2012 on which date it was struck from the roll due to lack of urgency.

6. On 19 October 2012 the First and Second Respondents demanded security for their costs in terms of the provisions of Rule 47(1) of the Uniform Rules of Court. This notice in terms of Rule 47(1) was delivered on the heels of the Applicants' urgent application. There was no positive response to the said demand from the Applicants. The First and Second Respondents then delivered another application in terms of Rule 47(1) for security on the applicants on 22 November 2012. Again there was no response from the applicants to the said notice. According to the evidence of Mr Carl Thomas Nord who deposed to the founding affidavit on behalf of the respondent in the application for security:

"the Applicants' Counsel made certain disparaging remarks in an email to his attorney which was deliberately sent to Mr Flionis, the First and Second Respondents' attorney,....". A copy of the relevant email was attached to the said application. Although I will not read it, I have however taken note of the attitude of the Applicants' legal team and the contempt and disdain in which they treated the other side. Such conduct, in my view, should at all times be discouraged. Members of this Court are obliged, in my view, to accord each other at least some modicum of respect and not insinuate that their colleagues are obtuse.

7. On 10 December 2012 a notice of set down of the application for security for costs was served by the First and Second Respondents' attorneys on the

Applicants. The date of set down for the said application was 17 January 2013.

On 17 January 2013 the applicants' counsel appeared in the unopposed motion court to oppose the security costs application without any answering affidavit. He demanded that the matter be removed from the roll. The application for security was consequently postponed to 18 January 2013 before Bertelsmann J.

8. On 18 January 2013 the matter was heard by the said Bertelsmann J. On this occasion there was a new counsel for the applicants. Counsel for the First and Second Respondents argued the matter and made his submissions. The Applicants' new counsel then requested the court to grant him an indulgence in order to enable him to supplement his oral submissions with written submissions by way of an opposing affidavit. Bertelsmann J, was prepared to grant the necessary indulgence and indeed did so. In addition he directed the matter to stand down until 28 January 2013 and ordered the Applicants to file their opposing papers by 25 January 2013. At the same time the Applicants were ordered to pay the costs.

9. On 21 January 2013 the Applicants' attorneys addressed a letter to the first and second respondents' attorneys in which the Applicants undertook to file security.

The said letter stated, *inter alia*, as follows:

"1. We hereby confirm, subject to what is set out further below that we hold sequestered in trust in the amount of R200 000.00, as security for any cost award, after the date hereof, that your client(s) might obtain in pursuit of case number 55926/2012 in the North Gauteng High Court.

2. *This security is given without the admission of any liability on our client's part to put up security and solely for the comfort for your clients, pursuant to their demands and the application and to avoid any claims by your clients to delays in the hearing of the main application in the week of 04 February 2013.*
3. *The pursuit by our clients of further opposition to your application for security is accordingly, for our clients, academic but you are free to persist therewith.*
4. *On advice of our principal advocate, we will not be filing any further papers, we will abide by the papers as they stand and will be filing an Appeal against the order of 18 January 2013, of the Honourable Mr Justice Bertelsmann.*
5. *Attached you will find proof of payment to our trust account of the aforesaid R200,000.00 by your clients."*

The security amount that had been demanded was tendered by the Applicants' attorneys to be held in their own trust accounts. In the said letter the Applicants' attorneys also gave an indication, as it is clear from paragraph 4 of thereof, that they wanted to appeal against the order of Bertelsmann J, which he made on 18 January 2013 and furthermore that they would not make use of the indulgence of the Court to file a further answering affidavit in support of its submissions and opposition to the application for security.

11. On 22 January 2013 the First and Second Respondents' attorneys addressed a letter to the Applicants' attorneys in which they accepted the offer to pay security and indicated that a draft order should be prepared to provide that the agreed

amount of security be paid into the Applicants' trust account. Attached to the said letter was copy of a draft order which they had proposed should by consent be confirmed by the Court. In the said letter the First and Second Respondents' attorneys had stated, about the draft order, that "Draft order which our clients have consented to being made an order of court on the 4th February 2013". On 23 January 2013 the Applicants rejected the said proposition. Instead they demanded that the security application be removed from the roll.

12. On 28 January 2013 the Applicants deliberately took a decision not to appear before Bertelsmann J. Mr. RG Bowles, who appeared for the First and Second Respondents on 28 January 2013 before Bertelsmann J, noted with regret that there was no appearance for the Applicants. He also informed the Court that there was an exchange of correspondence between his instructing attorneys and the then Respondents' attorneys and also referred the Court to the letter of 21 January 2013. He informed the court, among others, as follows:

"On 21 January - that is the Monday after we were in court the previous Friday – more specially the 18th of January, the Monday of 21st we received a letter from the respondents' attorneys of record indicating that he held an amount of R200 000.00 in their trust account for purposes of our security and that they attached thereto a certificate of that amount held in their trust. They have also indicated to us that they will not be filing anymore papers in this regard and they will abide by this application. If I may read to your lordship notice 3 it says:"

13. After he had listened to the submissions made by Mr. RG Bowels, Bertelsmann J, proceeded to deliver judgment in the above matter. He indicated in his judgment that the respondents in that matter had been granted the opportunity to file the papers in opposition to the application for security for costs. He also indicated that there were specific time frames laid by which affidavits in opposition to that application for security for costs ought to have been filed and a potential reply thereafter but regrettably there was no answering affidavit forthcoming. He referred furthermore to the correspondence that had been exchanged and in particular the letter of 21 January 2013. In his consideration of the matter he was opposed to the fact that security could be held in trust by the attorneys or the company against whom the order was sought. He stated as follows:

“In further correspondence the point was made on behalf of the applicants in the principal application that it would be quite sufficient to hold the amount of R200 000.00 in the attorneys’ trust account for purposes of the furnishing of security. That submission cannot be entertained. It is in the very essence of the provision of security that monies made available are provided by way of a bond or a bank guarantee or cash paid into an account to which the payee does not have access and over which the party furnishing the security has neither access nor does it exercise control thereover.”

14. The order that the court had made on 28 January 2013 was subsequently corrected by Bertelsmann J on 31 January 2013. (See p. 91).

15. It is clear that up to 18 January 2013 the applicants had taken part in these proceedings and it is also clear that the applicant made a tender of the costs in this matter. That, in my view, is indicative of the fact that the applicants were always prepared to tender security for costs in this matter but only in the manner that pleased them or their legal team and in the process exhibiting an unprofessional and undesirable proclivity to superimpose their wishes in a manner that would have eroded the Court's discretion. The applicants have not furnished any reasons why they failed to appear at Court on 28 January 2013 nor have they furnished any reason why they failed, as the Court had directed, to file their answering affidavit.

16. The Applicants' are clearly disgruntled by the order of the court that the said amount be held in trust by the Respondents' attorneys. In my view the court was correct in granting the order that it did on 28 January 2013.

17. I do not understand why little dust has gathered around the word "consent". Having regard to the contents of the third paragraph of the Applicants' letter dated 21 January 2013, I must presume that dissatisfaction with regard to the use of that word is directed against the impression that the Applicants had agreed to the amount of R200 000.00 being kept in the Respondents' attorneys' trust account. This is clear from paragraph 5.4 of the replying affidavit where in the last sentence thereof it is stated that:

"No court has the right to subject the security offered by one party to the whims of the parties' adversary ..."

In my view nothing turns on this word and for that reasons I accept that the use of the word, as counsel for the Respondent had aptly put it in his heads, was just unfortunate. It is clear, however, that in principle the applicants had demonstrated, in my view, an unequivocal preparedness to provide security in the amount of R200 000.00.

18. As for the Applicants' view that the amount of R200 000.00 should not be kept in the trust books of their adversary, I will also not approve of it being kept in the Applicants' trust books. Unless the parties come with an alternative solution to this problem, especially where this amount should be kept, I would not, if I were asked to approve the manner put forward by the applicants, approve of it. Control of security is, in my view, a procedural aspect focused on giving effect to the rule. It falls squarely within the powers of the court to grant security.

19. An order or judgment is erroneously granted in the absence of a party if, irrespective of whether or not such judgment or order is otherwise correct, the absent party was not notified or did not know of the date of hearing. In my view, Mr Kotze's affidavit does satisfy the touchstone on two bases. Firstly there exists a serious paucity of the explanation of the applicants' absence at Court on 28 January 2013. Secondly there is no indication in his affidavit that he did not know that the matter was on the roll on 28 January 2013.

20. From the inception of the First and Second Respondents' application for security until its conclusion before Bertelsmann J on 28 January 2013, the Applicants attorneys had, in my view, adopted a supine attitude to the matter. In the first place, after the said Respondents' attorneys had demanded the furnishing of security from them they did not respond. The Respondents brought an application, had it served on them, and even served the notice of set down for the matter on them and they still did not respond. Their first counsel appeared at court on 17 January 2013 without any answering affidavit and demanded that matter be removed from the roll. This shows clearly that either he was brought late onto the case or he was ill prepared to proceed with the matter. To accommodate the Applicants' counsel the court postponed the matter to 18 January 2013. On this day a new counsel appeared on behalf of the Applicants. Still he was not ready to proceed with the matter and it is for that reason that after he had made his submissions he requested the court to grant him an opportunity in order to supplement his oral submissions by way of an affidavit. The matter was then postponed especially for that purpose to the 28th of January 2013 and the Applicants were ordered to file an answering affidavit. On the 28th January 2013 there was no appearance for the applicants and the affidavits that the court had ordered to be filed had not been filed. All this can be attributed not to the Applicants themselves but the attorneys.

21. Rule 42(1)(a) is a procedural step designed to correct expeditiously a wrong judgment or order. These are circumstances in which the relief, under rule 42(1)(a) may be granted, namely (1) if there was an irregularity in the

proceedings; (2) if the court lacked competence; (3) if at the time it made the order complained of the court was unaware of the existence of factors that could have influenced it to decide differently or against the making of such an order. In the absence of these factors, which are jurisdictional in nature, the court lacks the necessary discretion either to rescind or even to perfect the order.

22. As I have pointed out earlier, the Applicants' main complaints with the order of 31 January 2013 are firstly, the two changes that were made to the order of 28 January 2013, secondly, the result flowing from the change to the first paragraph of the said order *vis avis* the second paragraph, and thirdly, the presence of the word "consent" in the order. The first change involves the insertion of the words "in the application for security" after the words "applicants in the first sentence of the first paragraph with the result that that paragraph then reads as follows:

"An amount of R200 000.00 to be paid into the applicants in the application for security."

23. The second change involves deleting the words "First and/or Second Respondents" in the third paragraph of the order dated 28 January 2013 and the insertion therein of the words, I believe, "Applicants" in the application for security with the result that it reads as follows:

"Any cost orders obtained by the above named applicants in the application for security."

It will be recalled or noted that while the change in the first paragraph is left as it is the second paragraph does not, in some respects, make any sense.

24. I have already dealt with the usage of the word “consent” earlier in the judgment.

It is however important to place it on record that the word “consent” seems to have come even with the original draft order that was placed before the court. It is unfortunate.

25. Even with the imperfections that Mr. Savvas referred to he gave a clear indication that all that the current applicants are dissatisfied with is the fact that the security be kept in trust of the Respondents’ trust account. I have dealt with this matter earlier.

26. About this application for rescission of the order of Mr. Bertelsmann of 31 January 2013, Mr. Putter, for the First and Second Respondents, submitted that this court is not at liberty to interfere with the judgment of Bertelsmann J. He submitted that if the Applicants are not happy with the order, their remedy lies in noting an appeal against it. Initially Mr. Savvas had referred this court to the authority of **Zweni v Minister of Law and Order 1993(1) S.A. 523** in support of his argument that the order that the court made on 31 January 2013 is an interlocutory order and therefore not applicable. Mr. Putter however referred the court to the authority of **Bookworks (Pty) Ltd v Greater Johannesburg TM Council 1999(4) S.A. 799** in particular at page 803. By way of abridgement his view is that the order that the court made on 31 January 2013 is appealable and he relies on this authority. I will refer to a few paragraphs of the said authority. At page 803 paragraph E the court stated that:

“The Supreme Court of Appeal held that the refusal of an application for security for costs is appealable: Shepstone & Wylie and Others v Geyser NO 1998(3) S.A. 1036 (SCA). The question whether the granting of such an application is appealable was expressly left open (at 1042G). In my view, for the reasons which follow, the latter type of order is also appealable.”

27. In paragraph D at page 803 the court had stated and set out the three essential issues which arose from the decision appealed against. Firstly it is the order given by the court below appealable, secondly, what is the test on appeal and thirdly, is the test satisfied. We are only concerned with the first issue, that is whether the order that Bertelsmann J made on 31 January 2013 is applicable. On page 804 the court stated as follows:

“As regards the first part of the relief: where an applicant’s entitlement to security and a respondent’s obligation to provide it has been determined by a Court, such order is final. It complies with the three requirements laid down in Zweni v Minister of Law and Order 1993(1) SA 523 (A) at 532I-533A, viz is not susceptible of alteration by the Court of first instance; it is definitive of the rights of the parties; and it disposes of at least a substantial portion of the relief claimed in the main proceedings (i e the application for security).”

28. I am satisfied that on the strength of these two authorities this judgment of 31 January 2013 is final in nature and therefore appealable.

29. Mr. Putter has asked for costs against the Applicants on attorney and client scale on the basis that in an email by Borris (Mr. Putter indicated that Borris is the Applicants' counsel) dated 19 October 2013 to one Murray, this I presume to be the Applicants' attorney of record, and copied to the First and Second Respondents' attorneys, Mr. Borris used obscene language against them. I am not sure if I must punish the Applicants for the sins of their legal team which are not in any way related to the manner in which the Applicants themselves conduct their litigation. I want to assume that this is a side issue; it does not entitle the court to unduly punish the Applicants. It is not something that fall, I presume, within the Applicants' mandate to use such language. For that reason I am just disinclined to grant the application for costs as prayed for by Mr. Putter.

30. Mr. Borris himself had argued against granting costs in respect of two counsel on the basis that only one counsel argued the matter. I do not think that this argument merits any further consideration. That is in any event not the test.

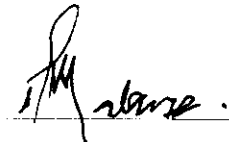
31. Finally Mr. Putter had expressed the First and Second Applicants' desire to increase or ask for a review of the amount of security and to have it increased before the registrar. He has asked the court to order the registrar to consider the increase of the security in terms of the provisions of Rule 47(6) of the Uniform Rules of Court. From the reading of Rule 47(6) it would appear that the first and second respondents do not require any court order in order to enable the registrar to determine any increase in the amount of security. The said Rule reads as follows:

"The registrar may, upon the application of the party in whose favour security is to be provided and on motion to interested parties, increase the amount thereof if it is satisfied that the amount originally furnished is no longer sufficient; and its decision shall be followed."

32. The Applicants have not made any good case for the relief they seek.

Accordingly I make the following order:

1. The application for rescission is dismissed with costs, which costs shall include the costs of two counsel.
2. The main application is hereby stayed until the applicants have complied with the court order dated 31 January 2013.



P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants:

Adv. B.G. Savvas

Instructed by:

Venn & Muller Attorneys

Counsel for the 1st and 2nd Respondents:

Adv. S.J. Grobler (SC)

Adv. LGF Putter

Instructed by:

Hirshowitz Flionis Attorneys

Counsel for the 5th Respondent:

Adv. S Mitchell

Instructed by:

Matsemela, Krause & Ngubeni Inc.

Counsel for intervening party:

Adv. S. Du Toit (SC)

Adv. J.J. Meiring

Instructed by:

Knowles Husain Lindsay Inc.

Date Heard:

10 June 2013

Date of Judgment:

2013 – 06 – 10