

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2022-006301

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO

DATE: 25 October 2024

In the matter between:

DEPARTMENT OF CORRECTIONAL SERVICES
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

First Applicant
Second Applicant

and

MAMOTABOLO ANNAH MOAGI
THE GOVERNMENT EMPLOYEES PENSION FUND
THE GOVERNMENT EMPLOYEES MEDICAL SCHEME

First Respondent
Second Respondent
Third Respondent

JUDGMENT

K. Strydom AJ

Introduction

- [1] In essence this application for rescission turns on the following determination: Should an order, which was granted in a party's presence, be rescinded if said party subsequently discovers a document it, at all times, had in its possession, but neglected to provide to its legal representatives to prepare a defence in terms thereof? What follows below is an examination of why the answer is "No".

Background

- [2] The first Respondent ("the Respondent"¹), was employed by the first applicant from 2005 until her retirement in January 2021. She was appointed as an assistant director on a personal notch, without pay progression. In 2006 it became apparent that her post class was incorrectly captured by the first applicant as one with pay progression. As a result, incorrect pension fund and medical aid deductions, shortfalls in subsidies and incorrect calculations of retirement benefits due to her, were made. On the other hand, the incorrect capturing also resulted in overpayments in terms of pay progression being made to her during this period.
- [3] After the error was finally corrected by the first Applicant, in March 2019, the first Applicant attended to a calculation of the resultant shortfall in payments that were due to the respondent for the period between her appointment in 2005 and the rectification in March 2019. On the 18th of July 2019, the second Applicant sent a request for payment of the calculated amounts to its Chief Deputy Commissioner of Human Resources ("the 2019 Request").
- [4] The 2019 Request confirmed that the following payments were calculated as due:
- a. R806 846.19 in respect of her pension fund
 - b. R366 759.00 in respect of her medical aid;
 - c. R52 334.82 in respect of her housing subsidy; and
 - d. R505 522.75 in respect of her service bonus.
- [5] Of these amounts, only that which was due in respect of her pension fund was paid in August 2021.
- [6] The Respondent instituted action for, *inter alia*, the payment of the remaining amounts per the 2019 Request. Summons was served on the Applicants in July 2022. Following service of what amounted to a so-called "bare denial plea" on the 16th of September 2022, she applied for summary judgment based on the amounts as calculated in the 2019 Request. In her affidavit in support of

¹ The second and third Respondents are cited as interested parties and played no active role in the rescission application.

summary judgment, she submitted that on the Applicants' own version as evidenced by the 2019 Request, they were indebted to her in the amount of R924 616-57.²

- [7] The Applicants did not file an affidavit resisting summary judgment. Upon direct questioning during the present proceedings it was, however, confirmed that, when the summary judgment application was heard on the 21st of November 2022, the Applicants were duly represented by counsel and that the judgment was not granted in default of appearance by the Applicants.

The grounds for rescission

- [8] According to the Applicants, an internal memorandum, dated 27 October 2021 ("the 2021 Memorandum") evinces the correct calculations in relation to the rectification of the Respondents' post class. In terms thereof, the Applicants do not owe any amounts to the Respondent. In arriving at this conclusion, the Applicants set off the alleged salary overpayments made to the Respondent. They also reduced the amounts calculated as owed to the Respondent to the last three years prior to rectification on the basis of prescription.
- [9] Initially, the Applicants asserted that they were entitled to rescission of the order by virtue of common error (per Rule 42(1)(c), alternatively on the common law grounds of fraudulent misrepresentation and/or the doctrine of *instrumentum noviter repertum* (the coming to light of as yet unknown documents).
- [10] At the hearing hereof, Counsel for the Applicants confirmed that they would no longer be relying on fraudulent misrepresentation as a ground for rescission.

General comments regarding rescission

- [11] In the Applicant's heads of argument, and during argument, it was seemingly argued that as the Applicants have proven a '*bona fide* defence' and have shown 'good cause', they would be entitled to rescission. Naturally this is conflation of the requirements for the rescission of a judgment granted in the absence of a

² The liquidity of the 2019 Request or the ascertainability of the amounts calculated therein were not in issue before me, nor was it submitted that same was disputed in the court *a quo*.

party and those relating to instances where judgment was granted in the presence of a party.

- [12] As was stated in *Freedom Stationery (Pty) Limited and Others v Hassam and Others*:³

"There are exceptions to this general rule. The requirements for relief under these exceptions depend on whether the judgment was given on the merits of the dispute between the parties after evidence had been led or whether the order was made in default of appearance of the party that seeks to have it rescinded. In respect of the first category the test is stringent. Such judgment can only be set aside on the ground of fraud or, in exceptional circumstances, on the grounds of justus error or the discovery of new documents.

A default judgment, on the other hand, may be set aside in terms of Uniform Rule 31(2)(b), rule 42 or the common law. " [Underlining my own]

- [13] In the heads of argument, the following submission is made:

*"To obtain a rescission in terms of the common law, the applicant bears the onus "to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence to the plaintiff's claim which prima facie has some prospect of success."*⁴

- [14] This restatement of the oft-quoted dicta in *Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (0)*, is correct, save for a glaring omission: It pertains to rescission in terms of common law of judgment granted in default, not those granted in the presence of the applicant.

- [15] Having admitted that *in casu* judgment was not granted by default, the Applicants are subject to the more stringent test for rescission based on the grounds discussed below.

Rule 42(1)(c): Common error

³ *Freedom Stationery (Pty) Limited and Others v Hassam and Others* (921/2017) [2018] ZASCA 170; 2019 (4) SA 459 (SCA) (30 November 2018) ("*Freedom Stationary*")

⁴ Applicants' Heads of Argument at para 49

[16] The Applicants submitted that the failure to disclose the content of the 2021 Memorandum during the summary judgment proceedings, is due to a common error between the parties.

[17] As to the error on the part of the Applicants, it is submitted that, when the application for summary judgment was argued, the Applicants legal representatives “...proceeded on the understanding that the 18 July 2019 memorandum was the only relevant memorandum.”⁵

[18] The reason for the failure of the Applicants’ legal representatives to present a defence based on the content of the 2021 Memorandum, is explained as follows:

“It was necessary for the office of the State Attorney to obtain all the necessary information and/or documents from all the relevant departments for purposes of fully ventilating the defence, however, not all the information was forthcoming and readily available.”⁶

and that:

“Because of the bureaucratic complexity and number of personnel involved in the office of the Department of Correctional Services and when the documents pertaining to this matter were collated, certain documents including the latest report containing the readjusted figures were erroneously not brought to the attention of the State Attorney.”⁷

[19] As to the Respondent’s error, the argument was that the 2021 Memorandum constituted an acceptance the Respondents proposals made in 2018 in relation to how the alleged salary overpayments should be dealt with. She supposedly erred by, inadvertently overlooking the fact that the 2021 Memorandum constituted a settlement when she instituted action against the Applicants.

[20] To succeed with an application for rescission based on this subrule, the Supreme Court of Appeal in *Tshivase* held that two broad requirements must be satisfied. Firstly, it must be proven that “...both parties are of one mind and share the same

⁵ Founding affidavit to the Rescission application para 56

⁶ Founding affidavit to the Rescission application para 58

⁷ Founding affidavit to the Rescission application para 56

*mistake; they are, in this regard, ad idem.*⁸ Secondly, there must be a causative link between the mistake and the grant of the order or judgment. In order to prove the causative link, no new evidence may be lead, unless it is aimed at proving that “...the factual material which led the court to make its original order was, contrary to the parties' assumption as to its correctness, incorrect”⁹

[21] *In casu*, the assertion is that the legal representatives, and not the Applicants, erroneously believed that the 2019 Request contained the correct amounts. There was no error on the part of the Applicant as a party, only the failure to properly brief their legal representative. This aspect will be further expounded on in the discussion below relating to the doctrine of *instrumentum noviter repertum*.

[22] Factually, the Applicants cannot succeed on the basis of this subrule as there was, in any event no commonality to the alleged error. Even if it were accepted (which it is decidedly not) that the Applicants intended the 2021 Memorandum to constitute a settlement between the parties, the concession during argument that it was not furnished to the Respondent prior to the summary judgment being granted, makes short shrift of this argument.

Doctrine of *instrumentum noviter repertum*

[23] In *Childerley Estate Stores v Standard Bank of SA Ltd*,¹⁰ De Villiers JP concluded that ‘*justus error is not a good ground for setting aside a judgment save in certain exceptional cases based on instrumentum noviter repertum.*’¹¹

[24] In argument, counsel for the Applicants cited the size, internal bureaucracy and turn-over of staff within the relevant departments of the Applicants as reasons for the late ‘discovery’ of the 2021 Memorandum. However, a perusal of the founding and replying affidavits of the Applicants makes it clear that this document was not lost or long forgotten or hidden from the knowledge of the Applicants. They simply failed to properly instruct their legal representatives. In the replying affidavit the simple truth is laid bare:

⁸ *Tshivhase Royal Council and Another v Tshivhase and Another; Tshivhase and Another v Tshivhase and Another* [1992] ZASCA 185; 1992 (4) SA 852 at page 37 (“*Tshivhase*”)

⁹ *Tshivhase* at page 38

¹⁰ *Childerley Estate Stores v Standard Bank of SA Ltd* 124 OPD 163 (“*Childerley*”)

¹¹ *Childerley* at para 166

*"It is accepted that this document ought to have been provided to the state attorney timeously in preparation for the plea on behalf of the applicants, however, an oversight occurred."*¹² [Underlining my own]

[25] The negligence or bureaucratic bungling of the Applicants is hardly an 'exceptional circumstance'. By comparison, one of the examples of 'exceptional circumstances' listed in *Childerley* is an instance where "...it was without the slightest fault on the part of the applicant seeking to introduce the new document or his legal representative that the document was not found and produced before judgment"¹³ [Underlining my own]

[26] As was aptly put in *Bakoven* by Erasmus J: '... the applicant who was negligent and the author of [their] own problem will not succeed with an application to have the judgment set aside.'¹⁴

Finding

[27] As indicated at the start of this judgment, the Applicants are not entitled to rescind the order made.

[28] I pause to add that the parties had raised certain points *in limine*, which by virtue of my finding have been rendered nugatory. However, for the sake of completeness I will briefly restate the objections and my responses thereto:

[29] The Respondent submitted that, as the judgment was not by default, rescission was the incorrect procedure to follow. This is incorrect in law. In this regard I refer to the excerpts from *Freedom Stationary* as set out in paragraph 12 *supra*. This finding should not be understood to imply that because rescission is a competent remedy *in casu*, appeal is not.

[30] Both parties objected to the other's late filing of affidavits. The Respondent's answering affidavit had been filed some eight months out of time, but approximately a year before the matter was heard. She explained that due to the non-payments of the Applicants her medical aid was cancelled. Not being able

¹² Applicant's replying affidavit at para 90

¹³ *Childerley* at para 166

¹⁴ *Bakoven Ltd v GJ Howes (Pty) Ltd 1992 (2) SA 466* (ECD) ('*Bakoven*') at 474A-C..

to obtain adequate care, she was rendered blind. She is reliant on Samaritans from the community and struggled to find and collate documents in response. No prejudice was suffered by the Applicants as a result of the late filing. I accordingly, at the hearing, granted her application for condonation.

- [31] The Applicants' replying affidavit (and heads of argument), on the other hand was filed a mere 5 days before this matter was to be heard. I reserved judgment on their application for condonation. In view of my finding and given that the replying affidavit was a restatement of the assertions in the founding, I grant condonation in respect thereof. In this regard, I am of the view that any prejudice suffered by the Respondent will be cured by the order as to costs set out below.

Costs

- [32] The Respondent submitted that she should be awarded her costs on an attorney client scale. I agree.

- [33] In coming to this conclusion, I had regard to the following factors:

- a. Judgment was granted against the Applicants in November 2022. On the 30th of January 2023, the application for rescission was served. In terms of Part A thereof, the Applicants sought an urgent stay of execution, pending the present determination. The Respondent, on the 5th of February 2023, consented to hold over execution proceedings pending the present determination. Having been granted this reprieve, the Applicants sat back on their laurels and did nothing to actively prosecute the application for rescission. It was the Respondent who, without the benefit of a replying affidavit or the Applicant's heads of argument, submitted her heads of argument and applied for a hearing date in May 2024. Despite being served with the notice of set down in June 2024, the Applicants took no action for four months. Finally, as indicated supra, five days before the matter was to be heard on the 21st of October 2024, the replying affidavit and Applicants' heads of argument were forthcoming.
- b. The Applicants' affidavits are littered with unfounded attacks on the Respondent's integrity. Throughout the theme was that she was aware of the 2021 Memorandum and intentionally and unlawfully failed to disclose

this to the Court *a quo*. Elsewhere, she is accused of egregious conduct and misleading the court *a quo*.¹⁵ The blatant incorrectness of such statements was confirmed at the hearing hereof by Counsel for the Applicants. Imputations of fraud were unreservedly withdrawn and, as shown *supra*, it was later conceded that the Respondent had never been provided with the 2021 Memorandum.

- c. The reliance on the discovery of the 'new' document (the 2021 Memorandum) as a basis for rescission, was, in effect, a thinly veiled attempt to obtain a 'second bite at the cherry'. The Applicants all but admitted that they neglected to properly prepare their case *a quo* and wanted this Court to sanction a 're-do' at defending the Respondent's claim.

[34] In *Mkhatshwa and Others v Mkhatshwa and Others*,¹⁶ the Constitutional Court explained the rationale behind costs on an attorney-own client scale as follows:

"[20] The primary underlying purpose of any costs award is to minimise the extent to which a successful litigant will be out of pocket as a result of litigation that she or he should not have had to endure. Indeed, this Court has recognised that costs orders often do not even achieve this objective, and fall short of assisting the successful litigant in fully recovering her or his expenses. It follows that, at times, it may be just and equitable to award costs on a punitive scale, not just to punish vexatious litigation, but also to assist the successful litigant in recouping their often substantial expenses."

[35] In view of the lackadaisical and, at times, dilatory conduct of the Applicants in defending their case or briefing their legal representatives, this stillborn application was brought. One takes a rather dim view of an applicant that requests that a validly obtained court order not be enforced pending rescission and who, once such indulgence is granted by the other side, fails to bring the matter to finality.

[36] The awarding of punitive costs herein should not be understood as an imputation of the conduct of the Applicants' legal representatives. By all accounts, they acted as far as they had instructions. During the hearing, concessions were made

¹⁵ See for instance Founding affidavit to the Rescission application paras 77 and 78

¹⁶ *Mkhatshwa and Others v Mkhatshwa and Others* [2021] ZACC 15 – references omitted

voluntarily where the law indicated same should be made. The blameworthy conduct is laid squarely at the door of the Applicants themselves.

ORDER

[37] In the result, the following order is made:

1. The application for rescission is dismissed.
2. The Applicants are to pay first Respondent's the costs on an attorney and client scale.



K STRYDOM
ACTING JUDGE OF THE HIGH
COURT, GAUTENG DIVISION,
PRETORIA

Judgment reserved: 22 October 2024

Judgment handed down: 25 October 2024

For the Applicant:

Adv A. Mare instructed by Jacobson & Levy Inc

For the Respondent:

Adv N. Jongani instructed by the State Attorney Pretoria