



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

CASE NO: 2022 - 12595

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

2/8/2024

DATE

SIGNATURE

In the application by

MBALATI, DZUNISANI ALDWORTH

Applicant

and

CSG SECURITY PROJECTS (PTY) LTD

Respondent

In re

CSG SECURITY PROJECTS (PTY) LTD

Plaintiff

and

MBALATI, DZUNISANI ALDWORTH

Defendant

JUDGMENT

MOORCROFT AJ:

Summary

Application for leave to appeal – section 17(1)(a)(i) and (ii) of the Superior Courts Act - reasonable prospect of success or there is some other compelling reason why the appeal should be heard – application dismissed

Good cause – absence of arguable defence

Good cause – no explanation for delay between coming aware of judgment in July 2022 and application for rescission in December 2022

Rule 42 (1) (a) – judgment not erroneously granted by Registrar

Order

[1] In this matter I make the following order:

1. *The application for leave to appeal is dismissed;*
2. *The applicant for leave to appeal is ordered to pay the costs of the application on scale B.*

Judgment

[2] The applicant seeks leave to appeal against a decision¹ handed down by me on 29 February 2024 after argument on the 22nd.

[3] Section 17(1)(a)(i) and (ii) of the Superior Courts Act provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.² Once such an opinion is formed leave may not be refused.

¹ *Mbalati v CSG Security Projects (Pty) Ltd* [2024] ZAGPJHC 1791; 2024 JDR 0943 (GJ); [2024] JOL 63355 (GJ)

² See *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae)*; *S v O'Connell and others* 2007 (2) SACR 28 (CC), *S v Smith* 2012 (1) SACR 567 (SCA) para 7, *Mont Chevaux Trust (IT 2012/28) v Tina Goosen* 2014 JDR 2325 (LCC); [2014] ZALCC 20 para 6, *S v Notshokovu* 2016 JDR 1647 (SCA), [2016] ZASCA 112 para 2, *Member of the Executive Council for Health, Eastern Cape v Mkhitha and another* [2016] JOL 36940 (SCA) para 16, *The Acting National Director of Public Prosecution v Democratic Alliance* [2016] ZAGPPHC 489; JOL 36123 (GP) para 25; *South*

Importantly, a Judge hearing an application for leave to appeal is not called upon to decide if his or her decision was right or wrong.

[4] An appeal lies against a decision; not against the reasons for the decision.

[5] In *Ramakatsa and others v African National Congress and another*³ Dlodlo JA placed the authorities in perspective. The learned Justice of Appeal said:

“[10] .. I am mindful of the decisions at high court level debating whether the use of the word ‘would’ as opposed to ‘could’ possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”

[6] In the judgment I dismissed an application for the rescission of a judgement granted by the registrar of this Court on 6 July 2022. It was common cause that -

- 6.1 the applicant learned of the judgment in July 2022;
- 6.2 a settlement offer was made and rejected on 11 August 2022, and the applicant intimated on the same day that he would bring an application for rescission, and
- 6.3 The application was launched in December 2022.

African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services [2017] ZAGPPHC 340 para 5, *KwaZulu-Natal Law Society v Sharma* [2017] JOL 37724 (KZP) para 29, *Lakaje N.O v MEC: Department of Health* [2019] JOL 45564 (FB) para 5, *Nwafor v Minister of Home Affairs* [2021] JOL 50310 (SCA); 2021 JDR 0948 (SCA) paras 25 and 26, *Lephoi v Ramakarane* [2023] JOL 59548 (FB) para 4, *Mphahlele v Scheepers* NO 2023 JDR 2899 (GP), and Van Loggerenberg *Erasmus: Superior Court Practice* A2-55.

³ *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA), also reported as *Ramakatsa v ANC* 2021 ZASCA 31.

[7] I dealt with the explanation⁴ for the delay between July and December 2022 in paragraphs 8 to 10 of the judgment and with the requirement of a *bona fide* defence in paragraphs 11 to 14. I then addressed rule 42 (1) (a) in paragraphs 15 to 18. I pointed out that the applicant chose not to file a replying affidavit to deal with the averments made by the respondent in the answering affidavit.⁵

[8] I concluded that the applicant had now shown good cause⁶ to have the judgment rescinded as there was neither a reasonable explanation for the delay nor a *bona fide* defence.⁷

[9] In respect of the applicant's reliance on rule 42 (1) (a) I accepted that though the summons was properly served⁸ it did not come to the notice of the applicant before the judgment was taken. The applicant had not been given a copy of the summons by the staff of the company managed by him that also employs him. This was however not a ground for rescission in terms of rule 42 (1) (a). A possible defence not known to the court or registrar is not a ground for rescission.

[10] Counsel for the applicant referred me to *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*.⁹ Khampepe J¹⁰ pointed out that the discretion to set aside a judgment or order must be exercised judicially and it does not follow that the applicant is entitled to rescission even when all the requirements have

⁴ See also *Beira v Raphaely-Weiner and Others* 1997 (4) SA 332 (SCA) 337C.

⁵ See also *Nedbank Limited v Ramparsad and Another* [2021] ZAGPPHC 746 para 4, referring to *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

⁶ See also *Gool v Policansky* 1939 CPD 386 at 390, *Meintjies v H D Combrinck (Edms) Bpk* 1961 (1) SA 262 (A) 263H–264B, *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) 138E–F, *Dalhousie v Bruwer* 1970 (4) SA 566 (C) 571F–H, *Ford v Groenewald* 1977 (4) SA 224 (T) 225H, *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) 1044, *Dreyer v Norval & others* [2006] JOL 18574 (T); and *Van Wyk v. Unitas Hospital* 2008 (2) SA 472 (CC) para 20.

⁷ Paras 10 and 14 of the judgment.

⁸ Rule 4(1)(a)(ii) provided at the time for service of process on a person “by leaving a copy thereof at the place of residence or business of the said person, guardian, tutor, curator or the like with the person apparently in charge of the premises at the time of delivery, being a person apparently not less than sixteen years of age. For the purposes of this paragraph when a building, other than an hotel, boarding-house, hostel or similar residential building, is occupied by more than one person or family, ‘residence’ or ‘place of business’ means that portion of the building occupied by the person upon whom service is to be effected;” Subparagraph (ii) was subsequently substituted by GN R4477 of 8 March 2024 with effect from 12 April 2024.

⁹ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC); 2021 JDR 2069 (CC) paras 52-53 and 62. See also *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) paras 7-9.

¹⁰ Khampepe J (Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Tlaletsi AJ and Tshiqi J concurring).

been met.¹¹ When the application for default judgment came before the Registrar for consideration, the Registrar would ordinarily have been concerned with the question of service. The Registrar could not have known that even though the summons was properly served¹² in accordance with the rules of court, it was not placed before the applicant because of some or other error in his offices. The judgment was not granted erroneously.

[11] I am satisfied that there is no reasonable prospect of success on appeal and I make the order in paragraph 1 above.


J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **2 AUGUST 2024**

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ATTORNEYS

DATE OF ARGUMENT:

29 JULY 2024

DATE OF JUDGMENT:

2 AUGUST 2024

¹¹ The decision in *Williams v Shackleton Credit Management* 2024 (3) SA 234 (WCC) paras 59-60 to the effect that the court has no discretion to decline rescission in circumstances where the requirements of rule 42(1)(a) have been met, is with respect in conflict with the Constitutional Court judgment in *Zuma*.

¹² See also *Interactive Trading 115 CC & another v South African Securitisation Programme & others* 2019 (5) SA 174 (LP) paras 7-14 and *ABSA Bank Ltd v Mare & others* 2021 (2) SA 151 (GP) paras 16-28.