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

**CASE NO: 32438/2022**

|       |                                            |
|-------|--------------------------------------------|
| (1)   | <u>REPORTABLE: YES / NO</u>                |
| (2)   | <u>OF INTEREST TO OTHER JUDGES: YES/NO</u> |
| (3)   | <u>REVISED.</u>                            |
|       |                                            |
| ..... | .....                                      |
| DATE  | SIGNATURE                                  |

In the matter between:

**MAJOMANE MMABATHI MABATLENG**

1<sup>st</sup> Applicant

**MAJOMANE MOSEHLANE MARIA**

2<sup>nd</sup> Applicant

And

**MADIHLABA GOODMAN KGAKANA**

1<sup>st</sup> Respondent

**MADIHLABA OLGA MAPOME**

2<sup>nd</sup> Respondent

In re:

**MADIHLABA GOODMAN KGAKANA**

1<sup>st</sup> Applicant

**MADIHLABA OLGA MAPOME**

2<sup>nd</sup> Applicant

And

|                                                                         |                            |
|-------------------------------------------------------------------------|----------------------------|
| <b>MAJOMANE MMABATHI MABATLENG</b>                                      | 1 <sup>st</sup> Respondent |
| <b>MAJOMANE MOSEHLANE MARIA</b>                                         | 2 <sup>nd</sup> Respondent |
| <b>UNLAWFUL OCCUPIERS OF ERF 2[...]<br/>LOMBARDY EAST, JOHANNESBURG</b> | 3 <sup>rd</sup> Respondent |
| <b>CITY OF JOHANNESBURG, MUNICIPALITY</b>                               | 4 <sup>th</sup> Respondent |
| <b>THE REGISTRAR OF DEEDS, PRETORIA</b>                                 | 5 <sup>th</sup> Respondent |

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## JUDGMENT

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**MAKUME J:**

### **INTRODUCTION**

[1] This is an application to rescind and set aside the order granted on the 6<sup>th</sup> April 2023 by Adams J which order was granted in the absence of the Applicants.

### **BACKGROUND FACTS**

[2] During or about the 23<sup>rd</sup> June 2020 the City of Johannesburg Metropolitan Municipal transferred ownership of Erf 2[...] (the Property) to the first Applicant. A title deed was issued in her name by the fifth Respondent bearing the reference T25214/2020. She and the second Applicant are in occupation of the property.

[3] On the 11<sup>th</sup> October 2022 the first Respondent approached this Court by way of Motion Court proceedings seeking an order that the title deed mentioned above be set aside and declared invalid, Secondly that the fifth Respondent cancel the registration, lastly that the Applicants vacate the property within 30 days of the order.

[4] On receipt of the notice of motion the Applicants who are both unemployed approached Legal Aid South Africa and sought legal assistance as they qualified for such assistance. Legal Aid did not act on the instructions. Later the Applicants approached a private Law Firm of one Michael Maluleke who placed himself on record as acting for the Applicants but later withdrew because the Applicants were not able to raise the R15000.00 (Fifteen Thousand Rand) fees.

[5] The Respondents attorneys proceeded to apply for a date of hearing on the unopposed roll but served the notice of set down being the 6<sup>th</sup> April 2023 on the law firm of Maluleke. When they received a notice of withdrawal as attorneys of record for the Applicants the Respondents correctly so instructed the Sheriff to serve the notice of set down on the Applicants at the property.

[6] On the 8<sup>th</sup> March 2023 the Sheriff records that on that day at 11h00 he could not serve the notice of set down on the Applicants as the community of that area blocked him from doing so.

[7] On the 6<sup>th</sup> April 2023 Adams J granted the order as prayed for on an unopposed basis. It must be recalled that no answering affidavit had been filed and served as on that date.

[8] The order was served on the Applicants on the 18<sup>th</sup> May 2023. On receipt of the order the Applicant say she contacted Legal Aid for assistance and on the 5<sup>th</sup> June 2023 she deposed to an affidavit in support for her application to set aside the order.

## **THE LEGAL PRINCIPLES GOVERNING RESCISION OF JUDGEMENT AND ORDERS**

[9] It is trite law that a court that has duly pronounced a final judgement has no authority to correct, alter or supplement the substance of the judgement save as is provided for in the rules.

[10] Uniform Rule 31(2)(b) of the Uniform Rules of Court reads as follows:

“A Defendant may within 20 days after acquiring knowledge of such judgement apply to court upon notice to the Plaintiff to set aside such judgment and the Court may upon good cause shown set aside the Default judgement on such terms as it deems fit.”

[11] A court is also empowered to set aside a default judgement in terms of the Common Law on condition an Applicant is able to demonstrate good cause and a *bona fide* defence. The Appellate Division in the matter of **De Wet and Others vs Western Bank Ltd 1979(2) 1031 (A) at 1042 -H** held as follows:

“It follows from what I have said that the courts’ discretion under the common law extended beyond and was not limited to, the grounds provided for in Rules 31 and 42(1) and those specifically mentioned in the Childerley Case. Those grounds do not for example, cover the case of a litigant or his legal representative whose fault is due to unforeseen circumstances beyond his control, such as sudden illness, or some other misadventure, one can envisage many situations in which both logic and common sense would dictate that a defaulting party should as a matter of justice and fairness be afforded relief. In the result I have come to the conclusion that the court of first instance erred in taking too rigid a view of the ambit of the courts’ discretionary power to rescind default judgements.”

[12] In opposing the application for rescission the Respondents decided to first rely on a technical point in *limine* which in my view had no application in the present matter. The first was that the Applicants should have joined Attorney Maluleke the second was that they should have also joined the Sheriff in the proceedings and lastly that the Applicants had no locus standi. I gave an *ex-tempore* judgement dismissing all three points in *limine* as being baseless and granted a costs order against the Respondents.

[13] This non-joinder point in *limine* was in my view a dead issue from the start and should never have been brought up. Uniform Rules 10 (3) read with case law is very clear and unambiguous. The question as to whether all the necessary parties had been joined does not depend upon the nature of the subject matter of the suit, but upon the manner in which and the extent to which court order may affect the interests of third parties (See **Amalgamated Engineering Union vs Minister of Labour 1949 (3) SA 637 (A)**; **Collins vs Toffie 1944 AD 456 at 464**)

[14] In the present matter it is common cause that at all times the Applicant wanted to defend the application to that extent she consulted lawyers who unfortunately did not act diligently one of them withdrew after receiving the notice of set down.

[15] The crux of the matter is whether the Applicants had knowledge of the trial date and whether their attorneys had done what they were supposed to have done. The answer is simply that the Applicant did not have knowledge about the trial date it can therefore not be argued that she was in willful default.

[16] In the matter of De Wet and Others (*supra*) the Applicants attorneys had withdrawn and failed to inform the Applicants about the date of hearing. At page 1043 paragraph B-C Trengove AJA said the following in the form of a question:

“That being the position it now becomes necessary for this Court to consider whether having regard to all the circumstances of the case, including the Appellants explanation for their default, this is a proper case for the grant of indulgence. The Appellants explanation in a nutshell is that they were let down by Coligionis and Lebos who failed to notify them timeously that their case had been set down for hearing on 16<sup>th</sup> August 1976 and that Lebos had withdrawn from their case.”

[17] This Court is persuaded that the Applicants have shown good cause for their absence in court on the 6<sup>th</sup> April 2023. The next issue is whether they have a *bona fide* defence. In my view there could never be a better *bona fide* defence than in the present case which gives them the necessary *locus standi* to challenge the court order.

[18] The Applicant is the registered title deed holder and occupier of the property. It was transferred to her based on an administrative action taken by the City of Johannesburg. That decision has not been challenged on review and still stands. This therefore means that the Applicants have good prospects of success in the main application.

[19] The first Respondent's reliance on the Administration of Estate is flawed. He says that because of the Letter of Authority issued to him by the Magistrate Nebo he had authority to deal with the property as an asset in the estate. This reasoning is also flawed with no basis, firstly the Letter of Authority does not list the property as an asset in the deceased's estate. Secondly since the year 2018 when he was appointed, he did nothing to deal with that property.

[20] In the result I make the following order:

20.1 The order granted on the 6<sup>th</sup> April 2023 is hereby rescinded and set aside.

20.2 The first and second Applicants are granted leave to oppose the main application.

20.3 The first and second Applicants are ordered to file their answering affidavit to the main application within 14 days from date hereof.

20.4 The costs order granted in respect of the point in *limine* is hereby recalled.

20.5 Each party shall pay its own costs.

DATED at JOHANNESBURG this the    day of August 2024.

**M A MAKUME**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**APPEARANCES**

|                                |   |                                      |
|--------------------------------|---|--------------------------------------|
| DATE OF HEARING                | : | 30 July 2024                         |
| DATE OF JUDGMENT               | : | August 2024                          |
| FOR APPLICANT                  | : | Adv S Keka                           |
| INSTRUCTED BY                  | : | Legal-Aid South Africa, Johannesburg |
| FOR 1 <sup>ST</sup> RESPONDENT | : | Adv Kela                             |
| INSTRUCTED BY                  | : | Uys Matyeka Schwartz Attorneys       |
|                                |   | Ref: N.C. Matsepe                    |