

REPUBLIC OF SOUTH AFRICA



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

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES/NO

Case Number: 101450/2023

13/01/25

DATE

SIGNATURE

In the matter between:

**PRECISION TOWING (PTY) LTD
T/A PRECISION TOW-IN
(REG NR 2021/516417/07)**

Applicant

and

**MARIA MAGDELINA HANEKOM
(REG NR 730216 0263 086)**

Respondent

JUDGMENT

Joyini J

INTRODUCTION

[1] This is an application for rescission of the judgment of Honourable Justice Baqwa dated 23 October 2023 ("the judgment" or "the order"). It was granted against the applicant.

- [2] The application is brought in terms Rule 42 (1) (a) of the uniform rules of this court as well as the common law.
- [3] The respondent opposes.

APPLICANT'S EVIDENCE AND ARGUMENT

- [4] In so far as reliance is placed on Rule 42 (1) (a) of the uniform rules of this court, counsel for the applicant contends that the default judgment was erroneously granted.
- [5] More specifically, counsel argues that the matter was set down for hearing on Tuesday, 24 October 2023. However, the matter was heard and the order was granted on Monday, 23 October 2023 in the absence of the applicant.
- [6] Counsel submits that the respondent was informed in an electronic mail on 20 September 2023 of its intention to oppose the proceedings and by implication, that it would attend court to debate the application. The applicant stated in the email that:

"You may proceed with court application for a date where these matter will be debated....."

- [7] Counsel argues that a judgment is erroneously granted if there:

*"existed at the time of its issue a fact of which the Judge was unaware, which would have induced the Judge, if he had been aware of it, not to grant the judgment."*¹

- [8] Counsel referred the court to *Morudi v NC Housing Services and Development Co Limited*² where the Constitutional Court held:

"[33] It must follow that when the High Court granted the order sought to be rescinded without being prepared to give audience to the applicants, it committed a procedural irregularity. The Court effectively gagged and

¹ *Nyingwa v Moolman* NO 1993 (2) SA 508 (TK); etc.

² 2018 JDR 1643 (CC).

prevented the attorney of the first three applicants – and thus these applicants themselves – from participating in the proceedings. This was no small matter. It was a serious irregularity as it denied these applicants their right of access to court.”

- [9] The court was also referred, by counsel, to *Topol and Others v LS Group Management Services (Pty) Ltd*³ where after referring to various cases which dealt with Rule 42(1)(a), the Court rescinded a judgment which had been granted on the premise that the defaulting parties had been given notice and were in wilful default, whereas they had in fact not been given notice.
- [10] Counsel argues that the applicant’s constitutional right of access to court was infringed by the respondent by not informing the applicant of the Honourable Justice Baqwa’s directive, and by not informing the applicant that the matter would proceed on 23 October 2023 when the respondent’s legal representative became aware that the matter would be called “*next*”.
- [11] Counsel concludes by submitting that the order was granted erroneously.

RESPONDENT’S EVIDENCE AND ARGUMENT

- [12] Counsel for the respondent explains that an urgent application was served upon the applicant on 9 October 2023.⁴ Counsel further explains that the aforementioned application was the result of the applicant’s failure to provide an undertaking to the respondent that the vehicle that is currently in the applicant’s possession would not be sold pending the finalization of the dispute between the parties pertaining to the legality of the applicant’s possession of the respondent’s vehicle.
- [13] It is the respondent’s version that an email was transmitted by the Secretary of the Honourable Justice Baqwa on 20 October 2023 containing the directive for the week of 23 to 27 October 2023 and the urgent court roll. The attorneys for the respondent did not realise at that stage that the matter was scheduled for

³ 1988 (1) SA 639 (W).

⁴ Caselines 011-17.

23 October 2023. They only realised when they receive an email from the Secretary of the Honourable Justice Baqwa on 23 October 2023 saying “*Judge would be calling the matter next*”.

[14] It is also the respondent’s version that the urgent application’s notice of motion had stated that the matter was set down for 24 October 2023 and also provided the applicant with an opportunity to oppose the application by 10h00 on 11 October 2023 and to file an answering affidavit if any by 14h00 on 16 October 2023.⁵ No notice to oppose and/or answering affidavit was received from the applicant. Subsequently, the matter proceeded on an unopposed motion basis.

[15] Counsel referred the court to Rule 6(12)(a) of the Uniform Rules of Court which reads:

“In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.”

[16] In light of this Rule, Counsel argues that the Honourable Court and Judge allocated to an urgent matter may dispose of such as they deem fit, to such an extent that the matter may be allocated to another date than the setdown date. Therefore, the Honourable Justice Baqwa acted within the scope of his discretion and in accordance with the uniform rules by hearing the urgent application on 23 October 2023.

[17] Counsel argues that the applicant’s email of 20 September 2023 cannot be considered as notice to oppose the urgent application. Counsel further argues that, as the matter proceeded before court on an unopposed motion basis as no notice to oppose and/or answering affidavit was received from the applicant, Honourable Justice Baqwa, obviously did not expect any representation for the applicant. As such, having heard the argument from

⁵ Caselines 011-18 to 011-22.

the respondent's counsel and having considered the papers before court, he granted the order in favour of the respondent.⁶

- [18] Counsel for the respondent argues that there was no procedural irregularity when the order or default judgement was granted. Over and above that, the default judgment was not erroneously sought and/or erroneously granted. Similarly, a validly obtained judgment cannot be transformed into an erroneously granted judgment by a subsequently disclosed defence. He refers the court, in this regard, to case law in support of his argument.
- [19] Regarding the absence of the applicant when the order was granted, counsel submits that the applicant from the beginning took a decision not to oppose the application and relief sought against him. Therefore, his non-attendance was done deliberately, intentionally, and out of his own choice. For the reasons and argument referred to above, he has failed to make a case for rescission in terms of rule 42 (1) (a).

ISSUES FOR DETERMINATION

- [20] The main issue for determination is firstly whether the applicant has met all the legal requirements either in terms of Rule 42 (1) (a) of the uniform Rules of this court, or at common law, for the rescission of the default judgment. What remains and is crucial for determination herein are two issues: Whether firstly, the judgment was erroneously granted and secondly, whether same was granted in the absence of the applicant. I find it necessary to deal with and individually consider each of these two jurisdictional facts under the following heading: "*RESCISSION OF JUDGEMENT/ORDER UNDER RULE 42*".

RESCISSION OF JUDGEMENT/ORDER UNDER RULE 42

- [21] Rule 42 (1) (a) provides as far as is necessary as follows:

⁶ Caselines 00-1- 00-2.

"[1] The court may, in addition to any other power it may have, mero muto or upon the application of any party affected rescind or vary;

(a) An order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby."

- [22] It is trite that an applicant who places reliance on Rule 42 (1) (a) for rescission, must show and prove firstly that the order sought to be rescinded, was granted in their absence, and secondly, that same was erroneously sought or granted. Once the two requirements are met, that is not the end of the enquiry. The court will then be entitled to exercise its discretion, and in doing so take into account considerations of fairness and justice. In other words therefore, a court is not compelled to rescind an order or judgment, but has a discretion, which discretion must be exercised judicially.
- [23] It follows from the provision and wording of the rule that there are, for the purpose of this matter, at least three jurisdictional facts. The first, being the existence of a court order and or judgment which is common cause in this case.
- [24] As indicated above, what remains and is crucial for determination herein are two issues: Whether firstly, the judgment was erroneously granted and secondly, whether same was granted in the absence of the applicant. I find it necessary to deal with and individually consider each of these two jurisdictional facts.

Erroneously sought or granted orders

- [25] In order to satisfy this requirement an applicant has to show on a balance of probabilities that at the time the orders were granted, there were material facts that the court was unaware of, and that had these facts been known to the court, the court would not have granted the order. In other words, the applicant has to show and demonstrate that there was a deliberate and intentional non-disclosure and/or withholding of crucial and material facts and information to

the court, which induced the court to grant the order. This simply means that the court must have been misled, into granting the order.

- [26] In *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 446 (ECD) the court explained the position as follows: *"An order or judgment is 'erroneously granted' when the court commits an 'error' in the sense of 'a mistake in a matter of law appearing on the proceedings of a Court of record'. It follows that in deciding whether a judgment was 'erroneously granted' is, like a Court of Appeal, confined to the record of proceedings."* (at page 47 F).
- [27] Similarly, in *Rossitter v Nedbank* [2015] ZASCA 196 at paragraph 16, the Supreme Court of Appeal held: *"The law governing an application for rescission under uniform rule 42 (1) (a) is trite. The applicant must show that the default judgment or order had been erroneously sought or erroneously granted"*.
- [28] In *Zuma v Secretary of Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* 2021 (11) BCLR 1263 (CC), the Constitutional Court found that Mr Zuma had the opportunity to present his case and raise the defences he was trying to rely on in his rescission application. He failed to do so. For this reason, his argument that the judgment was erroneously sought and granted was rejected. The court held: *"Mr Zuma's bringing what essentially constitutes his "defence" to the contempt proceedings through a rescission application, when the horse has effectively bolted, is wholly misdirected. Mr Zuma had multiple opportunities to bring these arguments to this Court's attention. That he opted not to, the effect being that the order was made in the absence of any defence, does not mean that this Court committed an error in granting the order. In addition, and even if Mr Zuma's defences could be relied upon in a rescission application (which, for the reasons given above, they cannot), to meet the "error" requirement, he would need to show that this Court would have reached a different decision, had it been furnished with one or more of these defences at the time. (At paragraph 64).*

- [29] In *Naidoo v Matlala No 2012 (1) SA 143 (GNP)* Southwood J said the following: *"In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment."* (At page 153).
- [30] It is also trite that a judgment will be erroneously granted if it is obtained through fraud. Fraud includes deliberate failure by a litigant to disclose to the court material facts that are relevant to the proceedings before it.
- [31] In *Naidoo (supra)* Southwood J puts the position as follows: *"It states that if material facts are not disclosed in an ex parte application or if fraud is committed (i.e., facts are deliberately misrepresented to the court), the order will be erroneously granted"*.

Absence or otherwise of the applicant

- [32] In the case of *Zuma (supra)*, the Constitutional Court had to decide and determine whether or not Mr. Zuma the applicant had met and satisfied the requirements for rescission of judgment either in terms of rule 42 (1) (a) or the common law. The court summarized the legal position and correct approach as follows: *"It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that the court "may", not "must", rescind or vary its order – the rule is merely an "empowering section and does not compel the court" to set aside or rescind anything. This discretion must be exercised judicially."*
- [33] In *Zuma (supra)*, the court drew a distinction between two litigants: In the first place, there is a litigant who was physically absent because he or she was not present in court on the day the judgment was granted. In the second place there is a litigant whose absence, she or he chose or elected. Accepting this approach, the court held that on the facts, Mr. Zuma was given notice of the case against him and also, sufficient opportunity to participate in the matter by opposing same if he wanted to. He deliberately chose not to participate. The

court therefore found that a litigant who elects not to participate in despite knowledge of legal proceedings against him or her is not absent within the meaning of Rule 42 (1) (a). In other words, the court emphasized that the word "absence" in the rule, "...exists to protect litigants whose presence was precluded, not those whose absence was elected."

- [34] In summarising this requirement, the Constitutional Court (CC) put the position as follows: *"Our jurisprudence is clear: where a litigant, given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42 (1) (a). And it certainly cannot have the effect of having an order granted in absentia, into one erroneously granted."*

RESCISSION OF JUDGEMENT/ORDER UNDER COMMON LAW

- [35] A party seeking rescission of judgment in terms of the common law, bears the onus to show good cause. This essentially entails prove of two requirements which are (1) reasonable and satisfactory explanation for its default and (2) that on the merits the party has a *bona fide* defence which carries some prospects or probability of success. See: *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A).
- [36] In *Zuma (supra)*, the court once again emphasized the onus that rest upon an applicant and the requirements he has to prove. The CC held: *"Requirements for rescission of a default judgment are twofold. First, applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospects of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in the refusal of the request to rescission."*
- [37] In *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 (3) SA (3) 801 (CPD), the court referred with approval to an earlier decision of *Hendriks v Allen* 1928 CPD, where the following was said: *"If he knows that a case is coming on, and whatever his motive, deliberately refrains from*

entering appearance, then it seems to me there is wilful default. His reason need not be, to my mind, that he knows he has no defence; he may have some other motive, but, knowing that he is summoned to appear, if he deliberately fails to enter an appearance, from whatever motive, it seems to me there is wilful default."

APPLYING THE LAW TO THE FACTS

- [38] Having regard to facts and all circumstances surrounding this matter, I am of the view that the applicant has failed to discharge the onus that rests on him of proving on a balance of probabilities the requirements of Rule 42 (1) (a). These are that (1) the order was granted in his absence and (2) that same was erroneously granted.
- [39] Firstly, with regard to the absence requirements, it is so that the applicant was not physically present in court when the order was granted. However, his absence was not precluded. On the contrary and as on his own version under oath, his absence was elected because he took a decision not to oppose the application. As such, the application proceeded before court on an unopposed motion basis. He was fully aware of the relief sought against him, including a costs order.
- [40] Secondly, the applicant has failed to prove that the default judgment was erroneously granted. He has also failed to show and prove that there was fraudulent misrepresentation and/or withholding of crucial facts to the court.
- [41] The applicant has dismally failed to give a reasonable and satisfactory explanation for his default.
- [42] Similarly, at common law, the applicant has failed to show good cause. He was throughout aware of the court application and the specific relief sought against him including a costs order. He had ample opportunity to oppose same. He had all the opportunity to present to court what he now states are his defence. He failed and deliberately chose not to do so. In my view, and based on authorities to which I have referred, he was in willful default (See: *Zuma (supra)* *Maujean (supra)*).

[43] Lastly, the applicant has also failed to show that he has a *bona fide* defence to the relief sought against him.

CONCLUSION

[44] Taking into account the totality of the evidentiary material, arguments and submissions by parties' counsel, applicable legal principles as well as case law, I am of view that the applicant has failed to prove all the elements and the requirements, for the rescission of judgment, either in terms of Rule 42 (1) (a) and/or at common law.

COSTS

[45] One of the fundamental principles of costs is to indemnify a successful litigant for the expense put through in unjustly having to initiate or defend litigation. The successful party should be awarded costs.⁷ The last thing that our already congested court rolls require is further congestion by an unwarranted proliferation of litigation.⁸

[46] It is so that when awarding costs, a court has a discretion, which it must exercise after a due consideration of the salient facts of each case at that moment. The decision a court takes is a matter of fairness to both sides. The court is expected to take into consideration the peculiar circumstances of each case, carefully weighing the issues in each case, the conduct of the parties as well as any other circumstances which may have a bearing on the issue of costs and then make such order as to costs as would be fair in the discretion of the court.

[47] No hard and fast rules have been set for compliance and conformity by the court unless there are special circumstances.⁹ Costs follow the event in that the successful party should be awarded costs.¹⁰ This rule should be departed from only where good grounds for doing so exist.¹¹ The respondent submits that the current application has no merit and amounts to an abuse of the court process.

⁷ Union Government v Gass 1959 4 SA 401 (A) 413.

⁸ Socratous v Grindstone Investments (149/10) [2011] ZASCA 8 (10 March 2011) at [16].

⁹ Fripp v Gibbon & Co 1913 AD 354 at 364.

¹⁰ Union Government v Gass 1959 4 SA 401 (A) 413.

¹¹ Gamlan Investments (Pty) Ltd v Trillion Cape (Pty) Ltd 1996 3 SA 692 (C).

This, submits the respondent, calls for a punitive cost order. On this I agree, albeit to a limited extent.

[48] It is common cause that the ordinary rule in this court is that costs should follow the results. However, I have a wide discretion in making costs orders, and I am entitled to depart from the general rule in appropriate circumstances.

[49] I have considered both parties' argument relating to the costs of this application. I am accordingly inclined to grant costs in respondent's favour on a party and party scale.

ORDER

[50] In the circumstances, I make the following order:

[50.1] The application for rescission is dismissed with costs on a party and party scale.



T E JOYINI

JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

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Date of Hearing: 12 November 2024

Date of Judgment: 13 January 2025

This Judgment has been delivered by uploading it to the Court online digital data base of the Gauteng Division, Pretoria and by e-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 13 January 2025 at 10h00.