



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

Reportable

CASE NO: 3396/2022

Matters heard on: 19 September 2024

Judgment delivered on: 17 October 2024

In the matter between:

**CALCULUS ENGINEERING AND PROJECT
MANAGEMENT (PTY) LTD**

Applicant

and

WBHO CONSTRUCTION (PTY) LTD

First Respondent

**THE COEGA DEVELOPMENT CORPORATION
(PTY) LTD**

Second Respondent

INGA VANQA CONSORTIUM

Third Respondent

**SERAPHIM PHOTOVOLTAICS SOUTH AFRICA
(PTY) LTD**

Fourth Respondent

**INGA VANQA QUANTITY SURVEYORS AND
PROJECT MANAGEMENT (PTY) LTD**

Fifth Respondent

JUDGMENT

BRODY AJ:

[1] On the 21st of September 2023 a judgment was handed down by my sister, Collett (acting) in case number 3396/2022 and the portion of the judgment, which is relevant to this application for rescission is clauses 2, 3 and 4, which reads as follows:

“2. The First Third Party is ordered to pay the respondent:

2.1 The sum of R16 171 003.33;

2.2 Compound interest at the prescribed legal rate from 16 February 2022 to date of final payment on the amount of R15 261 410.25;

2.3 Compound interest at the prescribed legal rate from 17 February 2022 to date of final payment on the sum of R909 593.08;

3. The Second Third Party is jointly and severally liable with the First Third Party to the respondent in respect of the amount set out in paragraph 2 above but only up to the sum of R12 681 333.30 together with compound interest thereon at the prescribed legal rate from 18 May 2022 to date of final payment.

4. The First and Second Third Party are jointly and severally liable for the respondent’s cost in the application.”

[2] The pleading heading of that judgment reads as follows:

“WBHO CONSTRUCTION (PTY) LTD

Applicant

and

THE COUGA DEVELOPMENT
CORPORATION (PTY) LTD

Respondent”

- [3] The main disputes between the parties WBHO Construction (Pty) Ltd (“WBHO”) and the Coega Development Corporation (Pty) Ltd (“Coega”) arose from a written agreement, construction work, and various payment certificates.
- [4] I don’t intend repeating all the facts in the judgment of Collett AJ, however, what is relevant to the present application is a third-party notice.
- [5] Coega issued a Third Party Notice in terms of rule 13(1)(b) of the uniform rules of court to Inga Vanqa Consortium (“Inga”) (first third party) and Seraphim Photovoltaics South African (Pty) Ltd (“Seraphim”) (second third party). Collett AJ found that the Third Party Notices, and the set down was served on both parties during January 2023 and neither party filed a notice of opposition thereto.
- [6] It is clear therefore that the judgment of Collett AJ was given in the absence of Vanqa and Seraphim.
- [7] In the first third party notice, Coega sought to join the Consortium to the main application.
- [8] The Consortium, however, comprised of three contractors, namely, Inga, Seraphim, and Calculus Engineering and Project Management (Pty) Ltd (“Calculus”).
- [9] The main application related to a tender and procurement initiated by Coega, and where WBHO was appointed as the successful tenderer for the construction of the Akacia Medical Facility in Coega Zone 3 (“the Akacia

project”). On completion of the project, Akacia, a medical and healthcare group, was to occupy the facility.

- [10] The main agreement is essentially between Coega and WBHO. In early October 2017, the WBHO and Coega entered into a service level agreement. A “fee split” was concluded between the various parties.
- [11] The project commenced during 2018, and shortly thereafter, Akacia resiled from the agreement, which resulted in the project being suspended.
- [12] In 2019 Seraphim concluded an agreement with Coega in terms of which Seraphim would occupy the premises, which was to be built in terms of the Akacia project.
- [13] Seraphim, however, required its own modifications and variations to the project to meet its specific requirements, which were not envisaged in the initial scope of work. These modifications and variations comprised of the building of a wastewater treatment facility, special waste room and a gas room for the treatment of effluent water prior to its discharge into the sewage system. This necessitated a variation in the scope of works, which required approval in accordance with the various amended agreements.
- [14] As a result of Coega’s failure to pay on certain payment certificates, WBHO issued the main application in case number 3396/2022 against Coega.
- [15] In response to the main application, Coega filed answering papers and issued the various third-party notices, (referred to above).
- [16] Attached to the third-party notice was an affidavit which summarised the relief sought in the main application and although Calculus received the third-party proceedings, Mr Peter Charles O’Kennedy (“Mr O’Kennedy”), on behalf of Calculus stated the following:

“52. I recall receiving the third-party annexure/affidavit, however, did not fully appreciate the legal ramifications of the document. I had regard to the heading which made no reference to the applicant and failed to appreciate that the applicant was at risk of an adverse order. I also believed that my explanation (albeit in respect of other complaints) had been accepted.

53. I was also under the impression that the lead/principal consultant, the fifth respondent, which was specifically named in the hearing, would protect the Consortium’s collective interests. Unfortunately, it did not.

54. Accordingly, the applicant did not file an intention to oppose. My decision was solely predicated on my incorrect understanding, and not on any sort of wilful default. Had I understood what was at stake, I would have taken immediate steps to protect the applicant’s interests.”

[17] As soon as the order of Collett AJ was received by Calculus, an application for rescission was brought, as summarised by Mr O’Kenndy:

“55. Upon receipt of the judgment, I immediately engaged my legal representatives. Our first consultation took place in that same week. The legal ramifications were explained to me, and this was the first time that I fully appreciated the nature of the proceedings and the effect thereof.

56. Due to the importance of the matter, this application for rescission was launched just over two weeks after receipt of the judgment. The matter was prioritised and no time was wasted.”

[18] In Mr O’Kennedy’s founding affidavit he alleged that the application for the joinder of the Consortium, the first party, and the second third party, was purportedly brought in terms of rule 13(1)(b).

[19] In this regard he stated the following:

“61. However, under rule 13 all that can be sought against one alleged wrongdoer against another is an apportionment of fault in the form of a declaratory order, not an amount sounding in money. This is an important distinguishing feature between rule 13 and section 2 of the Apportionment of Damages Act, 1956, the latter allowing for a monetary order.”

[20] He also alleged that the order holding the first and second third parties “jointly and severally liable” is also incompetent at law. In this regard he stated the following:

“65. The joint and several liability implies a right by the party paying more than his share to claim a contribution in respect of the excess of the other party. The order appears to be consistent with the third-party notice, but the existence of a legal basis for such joint and several liability as was ordered in paragraphs (3) and (4) of the order cannot be sustained in law. This is because the cause of action is not one based in delict. Nor is there a contractual basis for such liability.”

[21] He also alleged that there was non-joinder of entities comprising the Consortium, when he stated the following:

“71. As the Consortium comprises of three individual contractors, it was incumbent of the third party issuing the third-party notice to have cited all the entities comprising the Consortium, and not just the Consortium itself.”

[22] He emphasised the following:

“78. The third-party notice, although served on the applicant, did not bear the applicant’s name in the hearing. I did not appreciate the risk facing the applicant.”

[23] Coega opposed the application for a rescission and an answering affidavit was deposed to by Mr Zuko Mqhatu (“Mr Mqhatu”).

[24] Mr Mqhatu stated the following in regard to the variation for orders:

“14. A variation order setting up the extent of the required varied works was authorised by the second respondent and provided to the first respondent, and he was instructed to proceed with construction on 15 October 2020. This variation order was the only variation order issued in respect of the Seraphim project.”

[25] He also alleged the following:

“29. As will be evident what is set out below, the third respondent failed to obtain written instructions in respect of a Variation Order which was required in terms of clause 10.4 of the Service Agreement in respect of the Unauthorised Additional Works and accordingly, by virtue of the provisions of clause 10.6, the Second Respondent is not liable to pay for any work in respect of such services.”

[26] He further went on to say the following:

“47.1 It is evident that the Applicant is either attempting to mislead the Court by suggesting that the Unauthorised Additional Works constituted part of the Variation Order, alternatively, failed to understand that the Unauthorised Additional Works did not form part of the Variation Order.”

[27] Mr Mqhatu also alleged that certain correspondence was not placed before this court and in regard to paragraph 3 of the order he stated the following:

“65.2 To the extent that paragraph 3 of the Order should read that the Second Third Party is liable for the sum of R12 681 333.30 together with compound interest thereon at the prescribed legal rate from 18 May 2022 to date of final payment in respect of the principal debt, this is noted. However, this aspect in no way prejudices the applicant and at best for the applicant, such a variation to paragraph 3 should be ordered.”

[28] This was a concession made by Mr Mqhatu which was later dealt with in argument by Coega’s legal representative, Mr Williams.

[29] Mr O’Kennedy replied to the answering affidavit and referred to annexure “POK5” to his founding affidavit, and alleged that this was a written confirmation of the variation by Mr Lunga Tungugu on 7 September 2020.

[30] In regard to the citation of the parties in the third-party proceedings, O’Kennedy stated the following:

“22.1 The Second Respondent incorrectly cited the Consortium only, which has no locus standi in its own right.

22.2 The individual entities comprising their consortium are not named in the heading, and I did not appreciate the legal ramifications facing the applicant.

22.3 It was only upon legal advice as explained in my founding affidavit, that I understood that the applicant was at risk.

22.4 In any event, I believed the Fifth Respondent (as it was cited) would take steps to protect the interests of the Consortium. For reasons unbeknown to me, this was not done.”

- [31] This matter initially came before Eksteen J on the 1st of August 2024, and thereafter removed from the roll. It then came before my sister Watt (acting) on the 20th of August 2024 and an order was granted for leave to deliver supplementary founding affidavits and supplementary answering affidavits, where necessary.
- [32] When this matter came before this court, there were multiple paginated bundles of documents, and it was clear from all the bundles, that the third-party notice and affidavit, complained of by Calculus, was not in the court file.
- [33] With the assistance of counsel, the third-party notice and the affidavit was handed in.
- [34] The third-party notice in terms, refers to Coega as the respondent, Vanqa, as the first third party and Seraphim as the second third party. The affidavit, attached to the third-party notice, also has a pleading heading in those terms.
- [35] Mr Beyleveld SC acted on behalf of Calculus and Mr Williams acted on behalf of Coega.
- [36] Mr Beyleveld's first argument was that under the Apportionment of Damages Act, a wrongdoer sued in an action can seek relief from a wrongdoer not so sued in the form of a judgment for the payment of an amount of money determined by the court¹, however, under Rule 13 all that can be sought and ultimately granted by the court is an apportionment of fault in the form of a declaratory order. He further argued that paragraphs 2 to 4 of the order constituted judgments sounding in money against the Consortium and which went beyond the ambit of Rule 13. As a result, the order was incompetent and stood to be rescinded on this ground alone.

¹ Shield Insurance Co Ltd vs Cervoudakis 1967(4) SA 735(E) at 739C

- [37] He also argued that there was non-joinder as Calculus was not cited in the third-party notices. As the Consortium was not a separate legal entity, they cannot sue and be sued in its own name, and therefore it had no *locus standi*. Calculus should have been cited in its own name as a member of the Consortium.
- [38] Mr Beyleveld SC further argued that the order had a direct bearing on Calculus and should not have been granted in the absence of the court being properly satisfied that effective notice had been given to all the parties.² He further argued that the effect of the order would be highly prejudicial to Calculus.³
- [39] Mr Beyleveld SC confirmed that the application for rescission was in terms of rule 42 and/or the common law and the order granted was erroneously sought, or erroneously granted in the absence of Calculus. His argument was further that a reasonable explanation for the default must be given together with a *bona fide* defence against the claim, which has reasonable prospects of success.⁴ Mr Beyleveld SC also took issue with the “joint and several” part of the order, where he argued that this usually flows from delict and only in limited circumstances can it be applicable in a contractual setting, such as deeds of suretyship. He advised that the claim against Calculus was based on breach of contract whilst the claim against Seraphim was based on a breach of an undertaking. These were dissimilar and did not relate to the same contract.
- [40] Mr Beyleveld SC’s further argument was that the orders were essentially damages, and such orders could not be granted without the hearing of evidence.
- [41] Mr Williams referred to all the relevant authorities relating to rescissions and contended that Calculus was in wilful default as it did indeed receive the third-party notice and annexures. He also referred to an email sent by Coega’s erstwhile attorney to Calculus, attaching a notice of set down, on 8 June 2023.

² Morgan vs Salisbury Municipality 1935 AD167 at 171

³ Council for the Advancement for the SA Constitution vs Ingonyama Trust 2022(1) SA251 (LCP) at paragraph 63

⁴ Silber vs Ozen Wholesalers 1954(2) SA 345(A) at 353

[42] He argued that Calculus had knowledge of the third-party notice, deliberately refrained from entering the proceedings, and was “unconcerned” of the consequences of the default.

[43] Mr Williams further contended that there was no *bona fide* defence to Coega’s claims in that Calculus did not have the necessary authority for the additional works. He contended that the application for rescission should be dismissed, with costs.

[44] Mr Williams did, however, contend that paragraphs 3 and 4 of the order was an error and *mero motu* and applied for an amendment of those orders to remove reference to “jointly and severally” in the orders.

[45] Mr Williams also conceded that this court had a wide discretion in regard to the rescission and further contended that the amounts ordered were “liquidated” and therefore there was no need to lead evidence, as suggested by Mr Beyleveld SC.

[46] Mr Williams requested that the application be dismissed with costs, such costs to be on scale B, in terms of rule 69(7) and also that the applicant was to pay for the wasted costs of the 1st of August 2024.

[47] It is trite that a third-party notice is issued when a party wishes to involve another party who may be liable for part, or all, of the applicant’s claim. It is further trite that a third-party notice should include the following:

[47.1] A pleading heading which reflects:

[47.1.1] the case number and court;

[47.1.2] the parties’ names, applicant and respondent, and the third party;

[47.2] A brief description stating that the party referring, is serving a third-party notice to join the third party to the proceedings;

[47.3] An explanation for the basis on which the third party is being joined. This typically involves outlining how the third party may be liable to the other party, based on contract, delict, or any other legal basis;

[47.4] A clear and concise summary of the claim that is relevant between the parties;

[47.5] A summary of the allegations made by the parties, detailing the legal and factual basis on which a party believes the third party is liable;

[47.6] A statement of the relief the referring party seeks from the third party such as a contribution to damages, indemnity, or any other relief a court may deem appropriate;

[47.7] Reference to the relevant rule namely rule 13, which governs third-party joinder in all civil matters; and

[47.8] A statement that the third-party may file a notice of intention to oppose, within the applicable period.

[48] It is also trite that once the third party is joined, in terms of rule 13, the pleading heading is amended to reflect the joined third party to the proceedings. I am in agreement with Mr Beyleveld SC that a Consortium is not a separate legal entity that can sue, and be sued, in its own name. It has no *locus standi* and there can be no doubt that the members of the Consortium should have been cited individually in the third-party notice and in the annexure attached thereto.

[49] In fact, the final order that was granted in the matter did not reflect the third parties at all.

- [50] I am also satisfied that the reasons given by Calculus for not opposing the matter indicate that Calculus was not in wilful default, especially having regard to the third-party notice and annexure issued by WBHO prior to the order being granted.
- [51] Calculus has relied on uniform rule 42(1)(a) and/or the common law and on the basis that the default order was “erroneously sought or erroneously granted in the absence of any party affected thereby.”
- [52] This application falls squarely under rule 42, whose purpose, this court has held, is “to correct expeditiously and obviously a wrong judgment or order.”⁵
- [53] The Supreme Court of Appeal has held, the phrase “erroneously granted” in rule 42(1)(a) “relates to the procedure followed to obtain the judgment in the absence of another party and not the existence of a defence to the claim”⁶. Thus, “a judgment to which a party was procedurally entitled cannot be said to have been erroneously granted in the absence of another party” but a judgment to which a party was not procedurally entitled would fall to be summarily set aside under rule 42⁷. Without any consideration of the merits⁸.
- [54] In *Lodhi 2 Properties Investments CC vs Bonde Redevelopments* 2007(6) SA87 (SCA) at paragraphs 26 – 27, the Supreme Court of Appeal stated:

“[26] Nepgen J [in *Stander and another vs Absa Bank* 1997(4) SA 873(e)] found support for his conclusion in *Theron NO vs United Democratic Front (Western Cape Region) and Others* 1984(2) SA 532(c). In that case an order being granted against Theron in his absence after short notice of the application and although no

⁵ 22. *Bakoven Ltd vs GJ Howes (Pty) Ltd* 1992(2) SA 466(E) at 4171E – F (per Erasmus J), quoted with approval in *Promedia Drukkers and Uitgewers (Edms) Bpk vs Kaimowitz* 1996(4) SA 411 (C) at 417B - I

⁶ *Freedom Stationery (Pty) Ltd and Others vs Hassam and Others* 2019(4) SA 459 (SCA) at paragraph 18

⁷ *Occupiers, Berea vs De Wet NO and Another* 2017(5) SA 346(CC) at paragraph 22, where Mojapelo AJ, writing for the court, stated: “An order is erroneously granted where there was no procedural entitlement to it.”

⁸ *Minnaar vs van Rooyen NO* 2016(1) SA 117(SCA) at paragraphs 18 - 19

papers of any kind had been filed and no papers had been served on him. The order was nevertheless granted on the basis of an assumption on the part of the Judge that Theron had been given sufficient notice and that he had deliberately decided not to appear at the hearing of that application. In the application Vivier J found, on the facts placed before him, that these assumptions were wrong and that the order had for that reason been granted erroneously. In my view the judgment cannot be faulted. Regard was had to evidence external to the record of proceedings as it existed at the time the order was granted in order to determine whether proper notice had been given. Whether Theron wanted to appear at the hearing was a relevant consideration in determining whether sufficient notice had been given. Nepeen J found that proper notice had not been given. As a result, the UDF was procedurally not entitled to the order sought when it was granted. The order was, for that reason, erroneously granted. In Stander the plaintiffs who obtained an order in their favour, unlike the UDF in Theron, procedurally entitled to the order when it was granted and the fact that it subsequently transpired that the defendants were not in wilful default could not transform that order, which had validly been obtained, into an erroneous order.

- [27] Similarly, in a case where a plaintiff is procedurally entitled to judgment in the absence of the defendant, the judgment, if granted, cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant doesn't have a defence: He grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the Rules, that the defendant, not having given notice of intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order

sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently discouraged, transforms a validly obtained judgment into an erroneous judgment.”

[55] This court finds that, in the present matter, the main applicant was not entitled to the order sought “in terms of the rules” and was not “procedurally entitled to judgment in the absence of the defendant”.

[56] On the contrary, the pre-procedure adopted, and the third-party notices, were irregular and contrary to precedent in this court. In terms of rule 42(1)(a), the order in terms of paragraphs 2, 3 and 4, granted on 21 September 2023 should be rescinded in terms of uniform rule 42(1)(a).

[57] I also find, that once Calculus can point to an error in the proceedings, it is without further ado entitled to rescission.⁹

[58] Calculus should have been cited as a third party in the rule 13 proceedings as a member of the Consortium, and I am further in agreement with Mr Beyleveld SC that, (as correctly conceded by Mr Williams) that a joint and several liability order was not appropriate, in the circumstances.

[59] It is accordingly ordered that:

[59.1] Paragraphs 2, 3 and 4 of the order granted by this court on 21 September 2023 be rescinded in terms of uniform rule 42(1)(a);

[59.2] The applicant is directed to file its answering affidavit to the second respondent’s third-party annexure and affidavit dated, 17 December 2023, within fifteen days from date of this order;

⁹ Bakhoven *supra*, Hardroad (Pty) Ltd vs Oribi Motors (Pty) Ltd at 578F – G and Tshabalala and Another vs Peer 1979(4) SA 27(T) at 30C – D.

[59.3] The applicant is awarded the costs of the rescission application on scale C as contemplated by rule 69(7), such costs to include all the reserved costs;

[59.4] The applicant is ordered to pay the respondents wasted costs of the 1st of August 2024 on scale B as contemplated by rule 69(7).

B.B. BRODY
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant	:	Adv. Beyleveld SC
Instructed by	:	S Lungu Attorneys 10 Market Street North End GQEBERHA
Counsel for the Second Respondent:		Adv. Williams
Instructed by	:	W Langson & Associates Inc. Unit 3 Alexander Square 44- Second Aveue Newton Park GQEBERHA (Ref.: WL/lm/WBHO/COEGA)