

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No. 14090 / 2022

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **YES**

DATE **14 March 2025**

SIGNATURE

In the matter between:

BRIZA PUBLICATIONS CC

APPLICANT

and

TJAART NICOLAAS BRITS

RESPONDENT

JUDGMENT

NEUKIRCHER, J

[1] On 23 March 2022 Mngqibisa-Thusi J granted the following order in an urgent application launched by the present respondent (Brits) against the applicant (Briza) in an urgent application.

- “1. Dispensing with the forms and service provided for in the rules and allowing the matter to be heard as one of urgency in terms of Rule 6(12);
2. ...
3. An order directing the respondent to take all such steps necessary to pass transfer of the property known as Portion 3 of Erf 1[...] R[...] (PTA) Township to the applicant within 14 (fourteen) days of this order;
4. ...

5. That the respondent be ordered to pay the costs of this application on an attorney and client scale.”

[2] It is common cause that:

- a) the application was properly served on Briza;
- b) Briza neither filed a Notice to Oppose nor an answering affidavit;
- c) there was no appearance for Briza on 23 March 2022;
- d) Briza had knowledge of the terms of the order as it was served on it on 29 March 2022.

[3] On 29 March 2022 Briza complied with paragraph 3 of the order by signing the transfer documents to allow the transfer of the property to be made to Brits.

[4] On the same day, Brits served a Notice of Taxation on Briza. This then appears to have galvanised Briza into action, and on 13 May 2022, it served an application for rescission of the March order on Brits. The Notice of Motion seeks the following relief:

- “1. Rescinding and setting aside the Court Order, granted by the Honourable Justice Mngqibisa-Thusi J on the 23rd of March 2022 as provided for in terms of Rule 42(1)(a);
2. Alternatively, extending the time, as prescribed by Rule 31(2)(b) in which the Applicant had to file the application, in terms of Rule 27(1), insofar as it may be necessary;
3. Rescinding and setting aside the Court granted by the Honourable Justice Mngqibisa-Thusi J on the 23rd of March 2022 on the common law grounds;
4. Each party to bear their own costs, except if opposed, costs on an appropriate scale.”

[5] In paragraphs 3.3 and 3.4 of the founding affidavit, Briza states:

- “3.3 I am advised by the Applicant’s attorneys of record, which advice I accept as correct that the setting aside and / or rescission of prayers 1 to 4 of the Court Order is academic in nature, since the application was adjudicated on an urgent basis and in particular, the transfer documents have already been signed on the 29th of March 2022.

3.4 It is however the cost order (prayer 5) that was granted on an attorney and client scale that the Applicant wishes to have rescinded and set aside, on the grounds as set out hereunder.”

[6] Thus this application is directed only at the costs order that was granted - this was in fact the focus of the argument before me.

[7] In its founding affidavit Briza appears to seek a rescission based on Rule 42(1)(a) alternatively on common law but states:

“3.5 The applicant is not relying on the provisions of Uniform Rule 31(2)(b) for the relief sought however, Rule 31(2)(b) will be dealt with hereunder in so far as it relates and applies to the common law grounds.”

[8] The applicant relies on the following common law grounds: fraud “and / or newly discovered documents.”

Background

[9] On 12 December 2019 the parties entered into a written deed of sale in terms of which Brits purchased the property from Briza for an amount of R1,1 million. Occupation would be given to Brits upon registration and Brits would be liable for all rates, taxes, services and water.

[10] The parties then entered into another agreement in terms of which:

- a) Brits would take occupation of the property on 1 April 2020;
- b) Brits would be liable for the property’s municipal costs.

[11] He took occupation on 1 April 2020.

[12] Briza had an agreement with Constantia Metering in terms of which Constantia would install an electricity meter and would bill them for the amount charged by the Municipality for electricity usage. When he took occupation, this obligation fell to Brits (according to the applicant). Each month Constantia sent its invoice to Brits for payment of the municipal account and between April 2020 and November 2020 Brits paid Constantia – this is common cause.

[13] Suddenly, between November 2020 and August 2021, Brits only paid R9300 (on 18 January 2021) and owed an amount of R55 048-45.

[14] Ultimately this led to Briza cancelling its agreement with Constantia and in an e-mail to Brits dated 26 August 2021, Briza sent him Constantia's final account and told him “julle sal nou asb self met die statstraat moet skakel.”

[15] The impasse that followed, flowed directly from the R55 048-45 owed to Constantia: Briza refused to sign transfer of the property until this account was paid; Brits refused to pay the account as he maintained he had no contract with Constantia and his account was up to date.

[16] On 4 November 2021 the parties were informed that the clearance certificate had been received from the Municipality and that the transfer documents were ready for signature.

[17] Briza said it would sign the transfer document if Brits signed an acknowledgement of debt or provided it with proof of payment - Brits refused.

[18] On 10 March 2022 Brits then sent an e-mail to Constantia in which:

- a) he tendered to pay the amounts paid by Constantia to the Municipality between 1 October 2021 and August 2021;
- b) and he stated:
“In order to confirm which payments was (sic) made, we need the following:
 - 1. A cash reconciliation statement;
 - 2. Proof of payment to the municipality”

Thus the tender was conditional upon fulfillment of paragraph 18(b) supra.

[19] The e-mail forwarded to Mr. Reitz (of Briza) by Brits attorneys reads:

“Please note that our client Mr. Brits made a tender to Constantia, wherein he would pay all amounts paid by Constantia to the municipality. Please see the email below.

Our client was only made aware yesterday that Constantia paid the municipality out of their own pocket. We however await proof thereof.

In light of the above, we see no reason, why the transfer should be delayed any further.

Please note that should you give the below required undertaking, then the urgent application does not have to proceed.

Kindly urgently provide us with your undertaking by close of business today, that you will to sign the required transfer documents no later that close of business tomorrow.”

[20] Mr Reitz then responded as follows:

“...

Briza Publikasie bevestig dan hiermee dat:

1. U klient verantwoordelik is vir die uitstaande bedrag by Constantia Metering vir die periode (1 Oktober 2020 tot Augustus 2021);
2. Briza Publikasies vir geen regskostes of enige ander kostes wat uit hierdie regsaksie mag ontstaan het, verantwoordelik gehou sal word nie.

In die lig van bg is Briza Publikasies bereid om die oordragdokumentasie te gaan teken. Ons wag dan om te hoor van die oordragsprokureurs om ons in kennis te stel van n voegste moontlike datum om te teken.”

Thus, these conditions set by Mr Reitz required a response from Brits.

[21] No response is received to this e-mail by either Brits or his attorney. The applicant assumed that the matter had been resolved and that the hearing on 23 March 2022 would not continue. This until receipt of the court order and the e-mail from Brits’ attorneys on 24 March 2022 which states:

“Die hofbevel het ons regskostes teen u toegestaan. U kan nie weier om dit te betaal nie.

Die proses om ons regskostes van u to verhaal sal volg.”

[22] The fact is that Brits denies receipt of the e-mail of 10 March 2022 (see paragraph 20 supra). If the e-mail was not received, the e-mail of 24 March is suspicious as it has the trailing e-mail of 10 March as part of its content.

[23] Be that as it may, the question is whether the judgment is susceptible to rescission on the basis sought.

Rule 42(1)(a)

[24] The rule reads:

“(1) the court may, in addition to any other powers it may have, mero moto or upon the application of any party affected, rescind or vary –
(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.”

[25] Brits alleges that, as he was not present when the order was granted, it was given in his absence. He also alleges that had the court been aware of the emails of 10 March 2022 and the concession made by Brits, it would not have granted the order. Therefore the order was erroneously sought and erroneously granted.

[26] But Brits misconceives the purpose of Rule 42(1)(a) which has been explained in several SCA judgements. In *Freedom Stationery (Pty) Ltd v Hassam and Others*¹ it was said:

“6.1 When a party invokes Rule 42(1)(a), a material question is whether the party that obtained the order was procedurally entitled to it.

"As Streicher JA explained in *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) ([2007] ZASCA 85) paras 25 - 27, the phrase 'erroneously granted' 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. See also *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) H ([2003] 2 All SA 113; [2003] ZASCA 36) paras 6 and 9. Thus, a judgment to which a party was procedurally entitled cannot be said to have been erroneously granted in the absence of another party."

6.1.1 In casu: The Respondent launched the urgent application and set out all the facts in the urgent application, and that the Respondent was entitled to the relief to order the Applicant to sign the transfer documents. The urgent application was duly served on the Applicant by way of email and more significantly, by the sheriff. Accordingly, the Applicant was duly and fully

¹ 2019 (4) SA 459 (SCA) at [18]

aware of the urgent applicant, but more specifically, and the relief sought therein.

6.1.2 Wherefore, the Respondent has complied with all of the procedural requirements and procedurally entitled to the relief sought.”

[27] Insofar as Briza's absence on 23 March 2022 is concerned on this very issue, in *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*² (Zuma) endorsed the dictum in *Lodhi 2 Properties Investments CC v Bonder Developments (Pty) Ltd*³ as follows:

“A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgement on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff's claim as required by the rule, that the defendant, not having given notice of an 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 nonexistence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed cannot transform a validly obtained judgment into an erroneous one.”

[28] Thus both *Zuma* and *Lodhi 2* effectively dispose of Briza's Rule 42(1)(a) argument.

Common law

[29] On this ground, Briza is required to prove that there is sufficient or good cause present. In *Zimbabwe v Fick*⁴ the Constitutional Court confirmed the requirement of a rescission at common law:

“85. At common law the requirements for decision of a default judgement are twofold. First, the 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 prospect of success.

² (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021)

³ 2007 (6) (SCA) paragraph 27

⁴ 2013 (5) SA 325 (CC) paragraph 85

Proof of these requirements is taken as showing that their sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.”⁵

[30] Briza relies on the grounds of fraud and / or newly discovered documents - both vis-à-vis the trail of emails between the parties of 10 March 2022.

[31] Briza argues that it was under the impression that, given Brits’ concession and undertaking that he would pay Constantia's account, the urgent application would be removed from the role. It argues that by moving the application on 23 March 2022 and failing to disclose the emails of 10 March 2022 it deliberately failed to disclose evidence crucial to the court exercising its discretion in the grant of the attorney-client costs order against it.

[32] But the concession made by Brits was not unconditional as seen from the e-mail set out in paragraph 18 supra: it was conditional upon the fulfillment of the conditions ie the provision of a cash reconciliation statement and proof of payment to the Municipality. Brits also set his own conditions as is seen from paragraph 20 supra.

[33] Had these all been fulfilled by 23 March 2022, Briza's argument would have stood on firmer grounds - but no proof is provided (nor any allegation made) that this had been done and Brits nonetheless moved the application.

[34] But even more concerning is Briza's laissez-faire conduct: after sending the emails of 10 March 2022 it never followed up; it never sought an undertaking that the matter would be removed from the roll or withdrawn; it never attended court nor engaged the services of a legal representative to attend court on its behalf. It did nothing at all until it received the order on 29 March 2022.

[35] In my view, given the above, Briza has failed to make out good cause as regards its default or its bona fide defence.

⁵ In Fick, the Constitutional court confirmed the decision in Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 756 A-E

Costs

[36] Briza seeks an order that the application be dismissed with costs on a punitive scale. I am of the view that this is not warranted. Whilst Briza's argument may be misguided I am not of the view that its conduct attracts a punitive cost order. I am also of the view that this matter is not complex and the issues are narrow. Thus costs on scale A are ordered.

Order

1. The application for decision is dismissed with costs to be taxed in accordance with scale A.

B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This judgment was prepared and authored by the 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 for hand-down is deemed to be 14 March 2025.

For the applicant	:	Adv Visser
Instructed by	:	De Korte Du Plessis Inc. Attorneys
For the respondent	:	Adv M Coetzee
Instructed by	:	Taute, Bouwer & Cilliers Inc
Matter heard on	:	11 March 2025
Judgment date	:	14 March 2025