

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 53948/21

DATE: 18-02-2025

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

DATE

SIGNATURE

10 In the matter between

FLORA MASEBEBALO

Applicant

and

LERATO MATENJI

Respondent

J U D G M E N T

KOOVERJIE, J: The applicant has instituted the rescission application in terms of Rule 42(1)(a) of the Rules of Court, on the premises that the judgment was erroneously sought or erroneously granted in their absence. In the alternative, the rescission application was instituted in terms of the common law.

The dispute between the parties concerns an immovable property. The respondents were given access to

the property in terms of the court order which is the subject matter of this rescission. The applicants now seek to regain access to such property.

It is common cause that the property forms part of the estate of the late Johannes Tlaka. Both the applicants, as well as the respondent were related to the deceased. The respondents are the daughters of the deceased, and the second applicant was the surviving son of the deceased.

10 The first applicant is the grandson of the deceased. The first applicant's mother was also a daughter of the deceased.

The applicants wish to rescind the court order which granted the respondents exclusive use of the property. The applicants allege that the order was granted in their absence, and more so, had the court been aware of all the material facts, it would not have granted the order in the respondents favour.

20 It is common cause that the deceased's estate has not as yet been finalised. The deceased died intestate and there remains a dispute regarding the claims to his estate, more particularly the property. Both the applicants as well as the respondents claim they have a right of access to the property.

The applicants particularly allege that they were residing on the property since 2019. They also pointed out that there is a Deed of Donation that was not disclosed to the court, whereby the property was donated to the second applicant before the deceased's death. I have noted that the Deed of Donation is dated in 2002.

It is settled law that, in order for the applicants to succeed in terms of Rule 42(1)(a) three requirements have to be met, namely that the judgment must have been
10 erroneously sought or erroneously granted. The second requirement is that the judgment must have been granted in the absence of the applicant, and the third requirement, the applicant's right or interest must be affected by the judgment.

The applicant's version is as follows. The applicant argued that the court would not have granted an order if it was made aware of all the relevant material facts, which were presented before this court. Furthermore, the respondents, when obtaining the order in their favour, made
20 various misrepresentations, thus misleading the court. For instance, they alleged that they were the only surviving children of the deceased. I have noted the applicants' explanation for not opposing the application instituted by the respondents as well as their reasons for not filing their answering affidavit.

The applicant gave a detailed explanation, namely that their first attorney Githiri failed to attend to their matter timeously and with due diligence expected her in her position as their legal representative. They entrusted the application to her and had even contacted her on various occasions for a follow up. She not only failed to file their answering affidavit but failed to carry out their instructions. I have noted that the applicants prepared a draft response, to the answering affidavit and same was sent to her to
10 finalize.

It was only on 6 May that they learned that a court order had already been obtained in their absence. At that time they attempted to contact Githiri. As she failed to respond, they proceeded to instruct another attorney. Due to them not having sufficient funds to pay fees they eventually received assistance from Legal Wise.

It took some time until a firm of attorneys on Legal Wise's panel assisted them. The applicant argued that this caused the delay in bringing this application, and it was not
20 wilful on their part. I am satisfied that a full explanation for the delay was furnished. The applicant dealt with the events prior to the order being granted as well as the events that followed after.

The applicants have alleged there were various misrepresentations and possibly fraud that had been

committed by the respondents. The applicants submitted that upon receipt of the court order the applicants went to inspect the file at the Master's office and noted certain alterations which were unlawful. In particular that Mr Da Silva was no longer the executor of the estate and the new death notice contained false information, which recorded the respondents as the remaining children of the deceased.

At this point in time, the said allegations remain
10 untested and should be proven. The respondents deny the applicant's version and placed a different version before the court. The first applicant explained that prior to him occupying the property, the respondents were not residing at the property. He further alleged that he resided on the property most of his life, except for a period where he was working elsewhere. Since 2019, he has been residing on the property, together with his family and the second applicant (his uncle).

The respondent's case essentially is that no fraud
20 was perpetrated on their part. It was explained that the letter of executorship was cancelled by the Master and currently no executor was appointed. The Master in fact, appointed an interim curator for the time being.

They further contended that the Deed of Donation was fabricated and according to their recollection no such

document existed prior to it surfacing in these papers. They argued that if such Deed of Donation was in existence in 2002, it would have formed part of the papers of the deceased's estate that was before the Master.

The respondents further persisted with the argument that the applicants remain in wilful default, as they were aware of the application and there was no reason for them not to have filed the answering papers. They were also aware of the date on which the matter was to be heard.

10 I am satisfied with the explanation of the applicant and noted that the notice of set-down for the hearing and the papers was served on the attorney, Githiri at the time. Hence the applicant's would not have received notice directly since Githiri was instructed at the time.

Having considered both parties versions I am satisfied that all three requirements has been met in terms of Rule 42(1)(a) has been met.

I particularly wish to spend more time on the third requirement, namely that the judgment was erroneously
20 granted or sought.

In this regard it was alleged that a Deed of Donation was in existence. Same was not before the court at the time. Whether or not this Deed of Donation is genuine was not an issue for determination before the court. I have also been advised that the applicants had launched an

application where the court was seized with issues concerning the Deed of Donation and had in fact furnished an order and a judgment.

The findings of the court will thus have to be presented before the court hearing this matter. For the purpose of this judgment, what is necessary for me at this point is to determine whether the three grounds in terms of Rule 42(1)(a) had been met.

It cannot be disputed that the new facts alleged
10 were not before the court at the time and the respondent's version has to be tested before the court. A court hearing the matter in future would have the benefit of all the facts as well as the documentation.

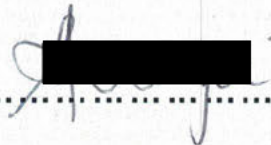
I am therefore of the view that a rescission order should be granted in terms of Rule 42(1)(a) of the Rules of Court. Insofar as costs are concerned. The issue of costs are in the discretion of this court, and in exercising my judicial discretion, there is no reason why the general principle, that costs follow the result, should not be applied.
20 I therefore grant an order that the application for rescission is to succeed with costs. The order read as follows:

Prayer 1: The judgment granted under case number 53984/21 on 25 April 2022 is hereby rescinded.

Prayer 2: The first and second respondents are to pay the costs hereof jointly and severally, the one

to pay the other to be absolved.

Prayer 3: The applicants and the respondents both have the right to access the property until the dispute regarding the entitlement to the property is resolved.


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KOOVERJIE, J

10 JUDGE OF THE HIGH COURT

DATE: 13/3/2025
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