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**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

Case Number: 4614/21

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

In the matter between:

BAFOREGILE TRADING ENTERPRISE

First Applicant

THE OCCUPANTS OF ERF 1[...] W[...] A[...]

Second Applicant

and

CITY OF MBOMBELA

Respondent

IN RE:

CITY OF MBOMBELA

Applicant

and

BAFOREGILE TRADING ENTERPRISE

First Respondent

THE OCCUPANTS OF ERF 1[...] W[...] A[...]

Second Respondent

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 14 May 2025.

JUDGMENT

COETZEE, AJ

BACKGROUND:

[1] This matter concerns an application brought in terms of Rule 42(1)(a) of the Uniform Rules of Court for the rescission of a default judgment granted on 22 July 2022 in favour of the Respondent, the City of Mbombela, against the Applicants. The order interdicted the Applicants from utilizing Erf 1[...], W[...] A[...], Mbombela, situated at 6[...] B[...] Street, Nelspruit ("the subject property") as student accommodation in contravention of the City of Mbombela Land Use Scheme, 2019, and the Mbombela By-Law on Spatial Planning and Land Use Management ("the initial application"). The order also included ancillary relief regarding the removal of related structures and a cost order against the Applicants.

[2] The Respondent had launched the initial interdictory application on 15 November 2021 seeking relief based on unauthorized land use. The matter proceeded unopposed and was adjudicated in the absence of the Applicants, resulting in the default order of 22 July 2022. The First Applicant now seeks rescission of that order, alleging that it was erroneously granted due to procedural and substantive irregularities. It is necessary to observe at this stage that the First Applicant's application lacks clarity and coherence. The application is marked by inconsistencies, including repeated references to incorrect erf numbers and the erroneous inclusion of a "Third Respondent," who is not a party to these proceedings.

FIRST APPLICANTS' CONTENTIONS:

[3] The First Applicant contends that he only became aware of the default judgment in December 2022, upon receipt of documentation pertaining to contempt proceedings founded on the original order. He avers that the notice of motion in the main application was served at a former business address which he had not occupied for more than eight years. He attributes this to an oversight in failing to update his registered address with the Companies and Intellectual Property Commission (CIPC) and maintains that this deprived him of the opportunity to participate in and oppose the application. However, the First Applicant fails to specify the alleged business address at which service purportedly took place. In contrast, the sheriff's return of service clearly reflects that the application was served at the subject property itself, rather than any business address.

[4] The First Applicant further submits that the Second Applicant was properly served with the application. This submission, however, is equally ambiguous, as the return of service also indicates that the application was served at the subject property. Moreover, the present application is neither brought nor supported by the Second Applicant, raising further doubt as to the basis upon which this aspect of the procedural irregularity is asserted. Nonetheless, the First Applicant contends that the alleged defects in service amount to a procedural irregularity warranting rescission of the default judgment in terms of Rule 42(1)(a).

[5] The First Applicant further relied on the existence of rezoning applications allegedly submitted to the Respondent in terms of section 58 of the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA), on 30 April 2021, 18 August 2021, and 9 May 2022, respectively. He submitted that these applications were pending at the time the original interdict was granted and that the Respondent's failure to disclose them constituted a material non-disclosure. According to the First Applicant, this omission was significant and may have influenced the Court's decision, particularly given that no objections had been raised in response to the rezoning applications.

[6] However, the affidavits from the initial application were not before the Court when the present matter was heard, and the Respondent disputed the relevance and accuracy of the rezoning documents relied upon. The Respondent submitted that two of the rezoning applications referred to by the First Applicant pertained to S[...] 5[...] and S[...] 5[...], W[...] A[...] Extension 4, properties unrelated to the present proceedings. The third document, although referencing the subject property, was authored by the Respondent and expressly records that the municipality did not support the rezoning application, citing various grounds detailed therein.

[7] Further, the First Applicant asserted that the Respondent failed to exhaust available internal remedies and disregarded the ongoing municipal processes. In support of this contention, he referred to a directive issued by the Municipal Housing Tribunal of the Respondent, dated the 14th of March 2023, calling for legal clarification regarding the zoning status of the subject properties and the ongoing legal processes.

[8] The First Applicant conceded that the rescission application was brought outside the time ordinarily expected but argued that a valid explanation exists, primarily due to the parallel contempt proceedings and their lack of knowledge of the original order.

RESPONDENT'S CONTENTIONS:

[9] The Respondent opposed the application and submitted that service was properly effected at the registered address of the subject property being Erf 1[...], W[...] A[...], Mbombela, situated at 6[...] B[...] Street, Nelspruit. The Respondent relied on the sheriff's return of service in support of its contention that it complied with the Uniform Rules.

[10] On the merits, the Respondent asserted that the Applicants were using the properties in contravention of the municipal zoning laws and failed to comply with repeated warnings. It argued that the interdict was sought only after attempts at voluntary compliance proved unsuccessful.

[11] The Respondent disputes that any procedural or substantive error occurred in the granting of the order and maintains that the First Applicant failed to demonstrate a *bona fide* defence. It further submitted that the rescission application is an abuse of process aimed at delaying compliance with the court order and obstructing pending contempt proceedings. The Respondent also raises the point that no formal application for condonation was brought despite the acknowledged delay in filing the rescission application.

LEGAL PRINCIPLES:

[12] Rule 42(1)(a) of the Uniform Rules of Court provides that a court may, in addition to any other powers it may have, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.

[13] In *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E), it was held that an order is erroneously granted if a fact existed at the time the judgment was granted which, had the court been aware of it, would have precluded the granting of the judgment.

[14] The Supreme Court of Appeal in *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) clarified that an order is not erroneously granted merely because the affected party later establishes a defence. There must have been a procedural irregularity or material non-disclosure that would have altered the Court's decision.

ANALYSIS AND COSTS:

[15] The principal issue for determination is whether the default judgment granted on 22 July 2022 was "erroneously granted" within the meaning of Rule 42(1)(a). The First Applicant's primary contention was that service of the initial application was effected at a former business address, which he had vacated years prior. However, this allegation is contradicted by the sheriff's return of service, which confirms that service was effected at the subject property, Erf 1381, West Acres, Mbombela, being

the very premises that formed the basis of the relief sought. The First Applicant fails to provide any cogent explanation as to why service at the subject property would not have come to his attention, and his version on this point is not only speculative but internally inconsistent.

[16] The First Applicant further relied on the alleged non-disclosure of pending rezoning applications as a basis for rescission. However, two of the applications referenced in the founding affidavit relate to properties entirely unrelated to the subject property and are thus irrelevant to these proceedings. The third document, which does refer to the subject property, emanates from the Respondent itself and does not indicate that the rezoning application was supported or favourably considered by the municipality. Importantly, the affidavits filed in the initial application were not placed before this Court, making it impossible to determine the extent or materiality of the alleged non-disclosure. Furthermore, the First Applicant has not established that the rezoning application in respect of the subject property was complete, compliant with the applicable statutory requirements, or at a stage of progression that would have materially influenced the outcome of the initial application.

[17] In addition, the First Applicant has failed to identify with any specificity which internal remedies, if any, the Respondent allegedly failed to exhaust prior to approaching the Court for relief. The directive from the Municipal Housing Tribunal, dated 14 March 2023, which was issued some eight months after the default order, does not retrospectively render the order irregular or erroneous.

[18] The application for rescission is further undermined by the lack of clarity and coherence in the founding papers, which are replete with factual inaccuracies, erroneous references to unrelated events, and the inclusion of a party who is not before the Court. No formal application for condonation was made, despite the delay being conceded, and no acceptable explanation was furnished for the failure to bring the application timeously. On the totality of the evidence, the Court is not satisfied that the First Applicant has established that the order was erroneously sought or granted, or that any procedural irregularity or material non-disclosure existed that would have influenced the Court to reach a different conclusion.

[19] With regard to costs, there is no basis upon which to deviate from the general principle that costs follow the result. The application is to be dismissed with costs.

ORDER:

1. The application for rescission is dismissed.
2. The First Applicant is ordered to pay the costs of the application.

L. COETZEE
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

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Date heard: 25 July 2024

Date of judgment: 30 September 2024

Judgment delivered: 14 May 2025