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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO. 2399/2023

(1) REPORTABLE: YES/NO

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

(3) REVISED.

DATE: 09/09/2025

SIGNATURE:

In the matter between:

MOAGABO ELIZABETH MOLAPO

FIRST APPLICANT

THE SPORTS TAVERN (PTY) LTD

SECOND APPLICANT

Registration number: 2011/277919/07

THE OCCUPIER/S OF THE PROPERTY

THIRD APPLICANT

SITUATED AT 1[...] WITKLIP, POLOKWANE

And

17 WITKLIP (PTY) LTD

FIRST RESPONDENT

Registration number: 2015/420542/07

SHERIFF, POLOKWANE

SECOND RESPONDENT

REASONS FOR JUDGMENT

MASHAMBA AJ

INTRODUCTION

[1] On the 27TH May 2024, the First Applicant, Moagabo Elizabeth Molapo, the Second Applicant, the Sports Tavern (Pty) Ltd, the Third Applicant, the Occupier/s of the property situated at 1[...] Witklip Street, Polokwane ("the Applicants") brought a rescission application in terms of rule 42(1)(a) of the Uniform Rules of Court¹ ("the Rules") against the order granted by honourable Deputy Judge President Semanya on the 29th February 2024.

[2] In brief the Applicants were ordered to vacate a property situated at 1[...] Witklip Street, Ladanna, Polokwane. The Applicants were further ordered to jointly and severally pay the rental amount of R 31 705.32 per month subject to annual escalation of 10%. The Applicants were further ordered to pay party and party costs. On the 07th May 2024 a Warrant of Execution as well as Writ of Ejection was issued by the Registrar of the above honourable court and served to the First and Second Applicant's attorneys.

[3] The First Respondent is 17 WITKLIP (Pty) Ltd, and the Second Respondent is Polokwane Sheriff. The First Respondent opposed the application by serving and filling a notice of intention to oppose dated 30th of May 2024. The Second Respondent did not oppose the application. On the 07th June 2024, the First Respondent served and filled his answering affidavit. The Applicants did not reply to the First Respondent's answering affidavit.

¹ Uniform Rules of Court of South Africa, as amended on the 01 July 2019 (the rules)

[4] The application was rolled on unopposed roll on the 06th August 2024; however, the matter was removed from unopposed roll as it was opposed. The matter was further set down to be heard on opposed roll on the 06th November 2024. The Applicants' legal representatives Ramusi Attorneys withdrew as attorneys of record a day before the hearing date on the 05th November 2024 which led the matter postponed sine die and costs were reserved. Since the 06 November 2024 the Applicants have not taken action until April 2024 when the First Respondent took an initiative by writing a letter to the office of the Judge President requesting the matter to be allocated on a special opposed roll.

[5] The matter was allocated on a special opposed motion roll of the 21st May 2025 and both parties were informed of the date of hearing.

[6] On the 21st May 2025, the Applicants' counsel indicated to court that he had an intention to make an informal application for postponement as he just received the brief on the 20th May 2025, a day before the hearing. The First Respondent vehemently opposed the application for postponement and illustrated the history of the matter. The First Respondent indicated that the postponement is made to frustrate the First Respondent and to delay the finalisation of the matter.

[7] The court dismissed the application for postponement after considered that the Applicants were aware of the court date in time but decided to brief counsel at the last minutes. The court considered that the Applicants issued the application for rescission but reluctant to pursue it until the First Respondent had to take an initiative to approach the Judge President's office in order to set down the matter on a special opposed roll.

[8] Both parties made submissions in their favour, subsequent to that the court made an *ex-tempore* order and the reasons were also given on record. the application for rescission was dismissed with cost. The First and Second Applicant's application to have the writ of ejection stayed was dismissed. The Applicants requested written reason for the order granted on the 21st May 2025.

BACKGROUND OF THE CASE

[9] The First Respondent instituted a combined summons against the Applicants on the 14th March 2023. The First and Second Applicants entered their notice of intention to defend dated the 19 April 2023. The Applicants did not serve their plea within 15 days as required by the Rules. On the 22 May 2023 the First Respondent served and filled a notice of bar which required the Applicants to plead within 5 (five) days, failing which they will be barred from doing so. The Applicants did not serve their plea within 5 (five) days as required, therefore, they were barred from doing so. The First Respondent made an application for default judgment and the said application was set down to be heard on the 29th February 2024.

[10] On the 29th February 2024, the Applicants did not attend court, therefore, default order was granted in favour of the First Respondent.

LEGAL QUESTIONS

[11] The court is called to determine the following two (2) legal questions;

11.1 whether the Applicants have met all the legal requirements either in terms of rule 42 (1)(a) of the Rules, or at common law, for the rescission of the default judgment?

COMMON CAUSE

[12] The following are common cause between parties;

8.1 The First Respondent is the legal registered owner of the premises in question.

8.2 The Applicants are in occupation thereof.

8.3 The previous owner of the premises, being Mr Agostinho Pestana Santos ("Mr Santo") entered into lease agreement with the late Mr Molapo. The date the agreement was entered into, and terms thereof are in dispute as neither party is in possession of a copy of the said lease agreement.

8.4 both Mr Santo and Mr Molapo passed away in 2016 and cannot corroborate the version of either party.

8.5 There was no new lease agreement concluded in writing between the parties.

THE LAW

[13] In terms of rule 42(1)(a) of the Rules, states that;

*"(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary-
An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;"*

[14] 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) (56]

[15] **In the case 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 court once again emphasized the onus that rests 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."

Absence or otherwise of the Applicant

[16] In the case of Zuma in 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) of the Rules 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."

[17] 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) of the Rules, 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."

Erroneously sought or granted orders.

[18] In order to satisfy this requirement, the 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 if the court had been privy to these facts, 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 from the court, which induced the court to grant the order. This simply means that the court must have been misled, into granting the order.

[19] 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." Para 47 F

[20] In Zuma (Supra) the Constitutional Court found that Mr. Zuma had the opportunity to present his case and raise the defences but he failed to do so, and trying to cue it by bringing his defence in his application for rescission. Therefore, his argument that the judgment or order was erroneously sought 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". Para 64.

DISCUSSIONS AND COURT'S FINDINGS

[21] The First Applicant referred the court to a long-term lease agreement which was allegedly entered between Mr Molapo and Mr Santos, who are both deceased; however, such an allegation was not supported by evidence. The First Respondent disputes the existence of the alleged long term lease agreement. The First Respondent further avers that he did not enter into any oral or written lease agreement with the Applicants. The First Respondent submitted that the Applicants occupied the business property unlawfully and without payment of the monthly rental.

[22] The First Respondent argued that the Applicants are in wilful default because they failed to participate in the legal proceedings by failing to plead after their notice of intention to defend. The Applicant was aware of the date of hearing of the default application on the 29th February 2024 but chose not to appear in court. The First Respondent submitted that the Applicants' strategy is to delay the finalisation of the matter while continuing enjoying the benefits of occupying the business property in question without the payment of monthly rental amount.

[23] The First Respondent further submitted that on the 05th November 2024, the Applicants' attorneys notice of withdrawal as attorneys of record was orchestrated to delay the matter. The First Respondent further indicated that the matter was delayed as it was postponed *sine die* because the Applicants were not represented on the 06 November 2024. The First Respondent mentioned that subsequent to the postponement referred above, the Applicants did not take further step but became mute with intention to delay the matter.

[24] The First Respondent indicated that the Applicants' founding affidavit is full of hearsay evidence which are disputed. The First Respondent further mentioned that the Applicants failed to reply to the First Respondent's answering affidavit and it is precise that they are in wilful default. The First Respondent argued that the Applicants have no bone tide defence in this matter. The First Respondent argued that the court should dismiss the application with punitive costs. The court considered the case of ***Wightman t/a JW Construction v Headfour (Pty) Ltd and Another***²

² 2008 (3) SA 371 (SCA) at para 12

"An applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers".

[25] The court finds that there is no existing long-term lease agreement between the Applicants and the First Respondent. The court further find that the Applicants did not enter into an oral or written lease agreement with the First Respondent, therefore, the Applicants' occupation of the property is unlawful. The court finds that the Applicants have no *bona fide* defence in this matter and further that the Applicants was in wilful default as they were aware of the procedure but decided not to plead and to appear in court.

[26] The most interesting case of Zuma referred in paragraph 15 *supra*, the Constitutional court found that a litigant who elects not to participate in legal proceedings is not absent within the meaning of rule 42 (1)(a) of the Rules. Precisely, rule 42(1)(a) of the Rules protects only litigants who were absent in court for reasons other than their own decisions.

[27] The court finds that the Applicant failed to prove both requirements for rescission application stipulated in rule 42 of the Rules and in terms of the common law, therefore, the application should be refused.

COSTS

[28] The general rule is that the cost should follow the successful party and the court has discretion to grant or refuse costs at the end of each matter. The court is of the view that the First Respondent should be compensated for his legal cost as he successfully opposed the application. The court has discretion when it comes to issues of costs and I am of the view that the First and Second Applicant should pay to the First Respondent a Party and party costs. The costs which were reserved on

the 06 November 2024, as a result of the postponement the Applicants sought should be unreserved and be borne by the First and Second Applicant.

ORDER

[29] In the circumstances, the court make the following Order;

- [1] The Applicants' application for rescission of judgment granted by this court on the 29th February 2024 is dismissed.
- [2] The Applicants' application to have the writ of ejectment stayed is also dismissed.
- [3] The First and Second Applicant is hereby ordered to pay the First Respondent's costs in respect of the Applicants' rescission application issued on the 27th May 2024, including the costs which were reserved on the 06 November 2024, on scale the scale between party and party scale B

E MASHAMBA
ACTING JUDGE OF THE HIGH COURT,
POLOKWANE; LIMPOPO DIVISION

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Heard on: **21ST MAY 2025**
Reasons for Judgment dated: **09th September 2025**