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IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 3621/2021

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

_07/10/2025_____
Date

Signature

In the matter between:

MOGALAKWENA LOCAL MUNICIPALITY

APPLICANT

AND

CUM LAUDE PROJECTS (PTY) LTD

RESPONDENT

JUDGMENT

NGOBENI J

- [1] The applicant is Mogalakwena Local Municipality, an organ of the state which is a local municipality within the Waterberg District Municipality, Limpopo Province, with its principal place of business at number 5[...] R[...] Street, Mokopane, Limpopo Province.
- [2] The respondent is Cum Laude Projects (Pty) Ltd, a company duly registered in terms of the company laws of the Republic of South Africa c/o Mabasa SK Attorneys Inc., 2[...] B[...] Street Neuw Muckleneuk suite 1[...] Optiplan House, Pretoria.
- [3] This is an application in which the applicant seeks rescission of the default judgment that was granted against it on 05 October 2023 (the applicant wrote the date of the default judgment wrongly as 09 October 2023 on the notice of motion). The submission by the applicant is that the respondent misled the court by saying that the applicant had not filed the notice of intention to defend and plea even though the applicant was served with the letter of demand and combined summons. The applicant contends that the judgment should be set aside in terms of Rule 42(1)(a)

of the Uniform Rules (Rule/s) on the basis that the respondent applied for default judgment despite having received both the notice of intention to defend and a plea from the applicant.

[4] In issue between the parties is whether the default judgment that was granted by the court on 05 October 2023 for an amount of R150 000-00, plus interest at 10.25% per annum should be rescinded or not, based on the reasons under which it was granted. This court must examine the reasons under which the court of first instance granted the order, to be able to decide as to whether the said default judgment can be rescinded or not.

[5] The court is empowered to apply different principles when dealing with a rescission application under Rule 42 as compared to how the court will deal with the rescission application under the auspices of the provisions of Rule 31(5)(a) and (d). I will restate those provisions for the sake of completeness and clear understanding of the difference and application between the provisions mentioned.

Rule 42 reads as follows:

"42 Variation and Rescission of Orders

(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:

- (a) *an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby,*
- (b) *an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission,*
- (c) *an order or judgment granted as the result of a mistake common to the parties,*
- (2) *Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.*
- (3) *The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.*

[6] The relevant provisions that I want to refer to in Rule 31 are the following:

"31 Judgment on Confession and by Default and Rescission of Judgment

(1)(a)...

(b)...

(c)...

(2)(a) Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a

defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit.

(3)...

(4)...

(5)(a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff who wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than five days' notice of the intention to apply for default judgment.

(b)...

(6) ..."

- [7] I will firstly deal with the point *in limine* which the respondent raised, being that the application for rescission of the judgment granted on 05 October 2023 is moot because the duly authorized representative of the applicant, Tumishang Ntsoane has already on behalf of the applicant acknowledged the debt claimed by the respondent through a telephonic conversation and an e-mail and even acknowledged that failure to make

payments by the applicant was just an oversight on the part of the applicant.

- [8] In response to the point *in limine* raised by the respondent, one Motengo Morris Maluleka, who is the Municipal Manager (MM) of the applicant states that the said Tumishang Ntsoane is employed as a Legal Advisor of the applicant, and do not have the authority to acknowledge any debt on behalf of the applicant, nor were those powers delegated to him because they are vested in the MM.
- [9] The issue of whether one has authority to act on behalf of another or not is not a simple issue that can be decided without evidence being provided to the court to support or negate that. The person who is said to have acknowledged the debt on behalf of the applicant, if that was the case, has reneged on the alleged acknowledgement of debt because he deposed to a confirmatory affidavit that confirmed the contents of the affidavit of the MM in as far as the founding affidavit refers to him. The point *in limine* that was raised by the respondent is therefore bound to fail, and it is consequently dismissed. The issue of costs for the whole application will be determined at the end.

[10] I now turn to the merits of the rescission application that must be decided. In *Saphula v Nedcor Bank Ltd*¹, it was held that the object of rescinding a judgment is to restore a chance to air a real dispute. In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*², Ackermann J held that: "A case is moot and therefore not justiciable if it no longer presents an existing or have controversy which should exist if the Court is to avoid giving advisory opinion on abstract propositions of law"

[11] The applicant instituted this application on the basis that the application was erroneously sought or that the court granted an order by default against the applicant erroneously. The error that is alleged by the applicant is that the respondent informed the court that the applicant after receiving summons failed to enter a notice of intention to defend, which was not correct because the plea of the applicant was filed on 13 April 2022, and a plea was subsequently filed on 12 May 2022.

[12] The question which this court must ask itself is as to whether the court granted the default judgment solely on the reason that was presented being that the applicant had failed to enter a notice of intention to defend the action. On the documents presented to this court in the court file, there is a notice of intention to defend that has been received by the

¹ 1999(2) SA 76 (W).

² 2000(2) SA 1 (CC); 2000 (1) BCLR 39.

Registrar clerk of this court on 13 April 2022, as it appears from the stamp of the Registrar clerk on Annexure C to this application. Annexure D to this application is the plea of the applicant that was received by the Registrar clerk on 12 May 2022, which is confirmed by the date stamp of the said Registrar clerk which is affixed or imprinted on the said plea.

[13] On 24 July 2023 the Registrar clerk received an application for default judgment, which was set down for hearing on 05 October 2023. The application was based on the founding affidavit of one Tetelo Vanita Ramontsho, which on paragraph 04, subparagraph 4.1 of the founding affidavit states that: *"This is an application for default judgment in terms of Rule 31(2) of the uniform Rules (sic) that emanates from the Respondent's failure to file its Notice of intention to defend the main action, despite being properly served with the letter of demand and combined summons, ..."*

[14] The background that I have outlined on paragraphs 12 and 13 of this judgment is a clear indication that it is not correct that the applicant did not enter a notice of intention to defend the action. The question that now boggles one's mind is as to what documents were presented to Kganyago J. when he granted the default judgment on 05 October 2023. I don't want to speculate as to what might have happened because I don't honestly know as to what happened. It is however clear from the

founding affidavit of the applicant that the judgment was granted in its absence. The applicant states that it only became aware of the order on 11 October 2023 when it was served with the copy of the Court Order and the letter of demand.

[15] The issue that this court cannot escape to decide is the fact that the case for any applicant in an application is made out in the founding affidavit of that applicant. The applicant in the default judgment application in this case founded the application on the basis that the applicant (respondent in that application) did not enter a notice of intention to defend, which I have already demonstrated in this judgment that, that was not correct. The court was therefore misled when the application for default judgment was brought before it on 05 October 2023. It is then safe to say that the respondent erroneously sought an order which was then granted.

[16] The normal procedure is usually that once the defendant pleads to the allegations in the summons, the parties will then exchange or discover documents between themselves, and pre-trial procedures would also be dealt with before the matter can be set down for hearing. It appears from the founding affidavit of Tetelo Vanitia Ramontsho that there were at some stage settlement negotiations between the parties, but on the other hand the MM states that there was no contract between the parties, the Legal Advisor had no authority to enter into settlement negotiations with

the respondent and also that they are in the process of recovering money paid to the respondent.

[17] In the High Court, a judgment may be rescinded in terms of Rule 31 and Rule 42 of the Uniform Rules of Court or the common law³. The reasons that I have mentioned above have to be examined as to whether they are sufficient to establish good cause for the rescission of the judgment by either common law, Rule 31 or Rule 42. On erroneously sought or granted order in terms of Rule 42, an applicant has to show on a balance of probability that at the time the order was granted, there were material facts that the court was unaware of, and that had these facts been known to the court, the court would not have granted the order.

[18] 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 to the court, which induced the court to grant the order⁴. Having said that the application was erroneously sought by the respondent, it therefore means that the relevant provision applicable to the facts of this case is Rule 42(1)(a).

³³ Government Employees Pension Fund v Kuppen and Another In re: Kuppen and Another v Government Employees Pension Fund (26669/05) [2006] ZAGPHC 88 (5 September 2006), De Wet and Others v Western Bank Ltd 1977 (4) SA 770 (T).

⁴ Matseke v Maine (M198/2020) [2024] ZANWHC 13 (26 January 2024), National Pride Trading 452 v Media 2010 (6) SA 587 (ECP), Berea v De Wet NO 2017 (5) SA 346 (CC), Fraind v Nothmann and Another 1991(3) SA 837 (W), where the default judgment was rescinded on the basis that it was granted erroneously.

[19] In this application the applicant is not seeking rescission of the judgment in terms of common law or Rule 31(2)(b), in which he would bear the onus to show the court 'good cause' for the rescission, and also whether the applicant has a '*bona fide*' defence to the action with prospects of success⁵. The applicant further states that even though it is not required to show good cause because it is not a requirement for a Rule 42 rescission application, the applicant states that the applicant is an Organ of the State, and as such cannot enter into an oral agreement, and one Matimba Ngobeni who is said to have entered into that agreement with the respondent, had no authority to do so. He did not also have the capacity to represent the applicant.

[20] The Constitutional Court clarified as to what the expectation would be from a court once it is established that an order was granted erroneously in the *Zuma* case (*supra*- footnote 5), and the court said the following:

"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. This precise wording of rule 42, after all, postulates that a court "may", not "must" , rescind or vary its order- the rule is merely an

⁵ Chetty v Law Society, Transvaal 1985 (2) SA 756 (A), Zuma v Secretary of Judicial Service 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).

"empowering section and does not compel the court" to set aside or rescind anything. This discretion must be exercised judicially"

[21] In the case at hand I have already stated that wrong information as stated in the application for default judgment was placed before the court. The applicant went further to state as to what the case for the applicant would be if the court rescinds its judgment that was granted on misrepresented facts. In my view the parties must go back to the drawing board so that their case can be decided fairly on correct facts. The general rule is that costs should follow the result. Neither of the parties can be said to have been frivolous in either bringing or defending this application. It is on that basis that I find it proper that each party bears its own costs.

[22] In the result, the following order is made:

- (i) The default judgment that was granted against the applicant on 05 October 2023 is hereby rescinded and set aside,
 - (ii) Each party shall pay its own costs.
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J.T. NGOBENI
Judge of the High Court

Appearances

Counsel for the Applicant : Adv. Rakau
Instructed by : Malumbete & Makhubele Attorneys
Counsel for the Respondent : Adv. P.P. Baloyi
Instructed by : Mabasa S.K. Attorneys
Date of hearing : 11 September 2025
Date of judgment : 07 October 2025

Judgment transmitted electronically