

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 2846/2024

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

DATE..... SIGNATURE... 

In the matter between:

**THE MEC: DEPARTMENT OF CO-OPERATIVE
GOVERNANCE AND HUMAN SETTLEMENTS**

Applicant

And

KIPP CONSULTING ENGINEERS NORTH (PTY) LTD

Respondent

In Re:

KIPP CONSULTING ENGINEERS NORTH (PTY) LTD

Applicant

And

**THE MEC: DEPARTMENT OF CO-OPERATIVE
GOVERNANCE AND HUMAN SETTLEMENTS**

First Respondent

VHEMBE DISTRICT MUNICIPALITY

Second Respondent

COLLINS CHABANE DISTRICT MUNICIPALITY

Third Respondent

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be 25 November 2025.

JUDGMENT

Makoti AJ

Introduction

- [1] This is an opposed application is for rescission of a court order and it is predicated upon the provisions Rule 42 of the Uniform Rules of Court, or so the applicant suggests. The MEC for the **Department of Co-operative Governance, Human Settlements and Traditional Affairs** in Limpopo. I shall henceforth refer to the applicant as the MEC or simply as the Department. The respondent is **KIPP Consulting Engineers North (Pty) Ltd** (Kipp).
- [2] On 09 April 2024 the Court granted an order against The order directed the Department to pay an amount of **R3 048 033-69** (Three Million and Forty-Eight Thousand, Thirty-Three Rand and Sixty-Nine Cents) within a period of 30 (thirty days) of its issuing. Also, the MEC was ordered in the same court order to pay interest at the rate of 11.25% on the amount mentioned above, and starting from 2 August 2023 to date of final payment.

- [3] The order was granted in default as the MEC did not file any papers to oppose the application which led to its granting. The MEC wants the said order rescinded, and on the basis that I shall address later in this judgment. The applicant initially also wanted a consequential cost order to also be rescinded. The rescission application pertaining to that part of the order has since been abandoned.

Events that preceded the court order

- [4] I have already mentioned the impugned order and the date on which it was granted. There is no need to restate that fact here.
- [5] Kipp was appointed as a service provider (contractor) by the Department during or about 22 October 2021.¹ It was contracted as a designer and engineer for the installation of a water pipe line of 8 (eight) kilometres and a sewer pumping line of 2 (two) kilometres in Malamulele D. These facts are common cause, including the contract value of **R15 388 160-00** (Fifteen Million, Three Hundred and Eighty-Eight Thousand, One Hundred and Sixty Rand). The contract between the Department and Kipp was later amended on or about 19 August 2022. The facts of the amendment take us nowhere and I do not concern myself with them.
- [6] That Kipp rendered services is also a matter of common cause. It charged fees amounting to **R4 224 262-02** (Four Million, Two Hundred and Twenty-Four Thousand, Two Hundred and Sixty-Two Rand and Two Cents). The Department did not pay the said amount due to its dissatisfaction with the fees. It has been explained in this application that the Department had taken issue with the fees that Kipp had charged it for the services. A verification

¹ COGHSTA B19/18-19FY/31.

process that it requested as well as its invitation to Kipp to make itself available for discussion meetings were not heeded by the latter.

- [7] Realising that Kipp was not willing to attend the proposed verification process the Department later paid to it an amount of **R1 767 242-58** (One Million, Seven Hundred and Sixty-Seven Thousand, Two Hundred and Forty-Two Rand and Fifty-Eight Cents). That was for payment which the Department averred to have been verified. The balance of **R2 457 019-44** (Two Million, Four Hundred and Fifty-Seven Thousand, Nineteen Rand and Forty-Four Cents) was not paid.
- [8] On 06 September 2023 the Department had a meeting with the contractor for the objective of resolving the impending dispute. Kipp still kept away from the meeting. It held on to its position that the Department did not have any legal or factual entitlement to not pay the full value of the fees charged. However, Kipp agreed to attend a meeting with an official of Vhembe District Municipality which was called by the latter on or about 01 December 2023.
- [9] At this juncture I note a worrying trend of annexure being tagged and referred to in heads of argument without being properly referenced out of the pleadings. Annexure A – F have been mentioned in the MEC's summary of the arguments but without any attempt to provide the court with the page numbers where they appear in the pleadings. They were not appended to the affidavits and their contents have not been properly pleaded. I leave the point here as it does not take the case anywhere.
- [10] The parties had clearly reached deadlock and Kipp sued the Department for payment of the monies that it alleged were not paid, plus interest at the rate that I have already mentioned. It issued an urgent court application for that purpose, with the date of hearing set as 02 April 2024. On that date the case

did not proceed for reason that an official from the Department attended court and disclosed an intention to oppose the application. The case was postponed to 09 April 2024 on which date the impugned order was made.

- [11] The next day on 03 April 2024 the parties held a meeting and reached an agreement that the outstanding fees amounted to **R3 048 033-69** (for three invoices of **R161 226-43**, **R1 336 272-51** and **R1 520 534-75**) and not the claimed amount of **R3 216 886-63**. Thus, according to the Department, the date on which interest was to start running on the outstanding debt was 03 April 2024 not an earlier date.
- [12] When mounting the court application Kipp contended that it had rendered services to the Department during the period starting from 19 August 2022 up to 03 July 2023. Also that, a result of having rendered engineering services and having issued invoices(s) it was entitled to be paid for the services by the Department. It further contended that it was entitled to the court order as the fees [or part of the fees] were still owing and remained unpaid.
- [13] On its version the Department paid Kipp the outstanding fees that they had agreed on, which would have reached the latter on or about 15 April 2024. It stated that payment was captured on BAS System on 03 April 2024, which is on the day on which the parties met and resolved on the amount of indebtedness. According to it payment was made on the date on which the debt crystallized and no interest was due to Kipp. Also because, its contention continued, a period of thirty days had not elapsed after the parties had settled the issue and amount of the Department's indebtedness.

- [14] The Department blames Kipp for holding facts from the court when the case was ultimately held on 09 April 2024. That part of the discourse is unimportant as it is important to rather focus on the real issues at hand.

Circumstances under which Rule 42 rescission may be granted

- [15] When the Department still owed Kipp money, the latter took to urgent Court proceedings on 2 April 2024. I say even at this stage that it is not the case of the Department that Kipp was not entitled to be paid, only the amount. What was to be paid appears to have been settled by the parties on 03 April 2024, the capital amount of which the parties confirmed to the court on 09 April 2024.
- [16] The order granted by Naudé J was made on 9 April 2024, which was at least 6 days before payment was made to the company Kipp. This implies that as at the date when payment was received or made to Kipp, the order of Court compelling the Department to make such payment was already out.
- [17] It is trite that once a court has pronounced its judgment or order it becomes *functus officio*, and may revisit the matter only in limited instances. One such instance is where the court may, rescind or vary its order or judgment if, *inter alia*, it was erroneously sought or erroneously granted in the absence of any party affected by it.² The Rule grants the court discretion to rescind its earlier order where circumstances permit.
- [18] The Department relies on Rule 42 to seek rescission of the order granted on 09 April 2024. Its case is that the order was erroneously sought or erroneously granted in its absence. It also contends, albeit in heads of argument, that the order was vitiated by a patent error. The patent error is

² Rule 42(1)(a) of the Uniform Rules.

concerned mainly with the order in respect of the interest portion of the court order. The Department stated in the founding affidavit the following:

“26. Again, the first respondent has signed for the amount of R3 048 033.69 and was also informed that payment was processed on the same date to be released on 15 April 2024 and it cannot be gainsaid that the first respondent was much aware that interest was not payable on the amount due and payable yet they seem to have insisted with an interest claim when such is not yet due to them.”

[19] An order or judgment is said to have been erroneously granted where a court commit ‘*an error in the sense of a mistake in a matter of law appearing on the proceedings of a Court of record.*’³ Likewise, an order is erroneously granted where a court has committed a mistake in law which is apparent from the record of the proceedings.

[20] To succeed in such a case the Department must satisfy three requirements. First, the order must have been erroneously sought or granted. Second, the order must have been granted in the absence of a party that is affected by it. Lastly, the rights or interests of the party asking for rescission must be affected by the order.⁴

Whether rescission of the order of 09 April 2024 should be granted

[21] On the facts presented by Kipp the Department was present at court, represented by an attorney from the Office of the State Attorney, Polokwane. Not only did the attorney attend court, but he was there to confirm the order. The legal representative made oral submissions in court to confirm the order. As confirmed by the transcript, the legal representative for the Department said *inter alia* that:

³ Bakoven Ltd v GJ Howes (Pty) Ltd 1990 (2) SA 446 p 471E-F.

⁴ Mutebwa v Mutebwa & Another 2001 (2) SA 193 Tk HC at 198F.

“ ... firstly I will like to confirm that the matter has become settled, and in terms of the draft order that has been handed up to Her Ladyship. By however, my instructions are that it is not out of whim of the department to say that they do not want cost.”

- [22] One has to accept that the legal representative was duly instructed to appear on behalf of the Department and that he was given mandate to confirm the order by agreement. That he was instructed to object to the granting of costs against the Department. On this basis alone it seems that reliance on the notion of erroneously sought and erroneously granted in the absence of the party affected by the order is hard to maintain.
- [23] And also, it should be remembered that an official from the Department itself was in attendance at court on the initial set down date of 02 April 2024, and caused the case to be postponed to 09 April 2024. The Department may not have filed an answering affidavit, but it was physically represented in court.
- [24] Furthermore, it is to be noted that the parties met and agreed the settlement terms, which were then made part of the court's order. The court was advised of the agreement which was then confirmed by the representatives from both parties. Importantly, the parties had met and resolved the [litigation] dispute before the case went back to court on 09 April 2024. What they had resolved was the capital amount, made of three separate invoices, which represented the consummate figure that was due and payable by the Department.
- [25] Kipp relied on the SCA authority in *Rossitter and Another v Nedbank Limited*⁵ to make the point that the Department did not satisfy the test for rescission in terms of Rule 42. I understand the authority to be affirming that the applicant in a case of this nature should prove that the order was erroneously granted and in its absence. It restated the authority in *Lodhi 2*

⁵ Rossitter & Others v Nedbank Ltd (96/2014) [2015] ZASCA 196 (1 December 2015).

*Properties Investments CC v Bondev Development (Pty) Ltd*⁶ in which it was held that:

“[24] Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. . . .”

[26] The Department had been present in the proceedings and had the opportunity to raise the issue pertaining to interest. No reason was pleaded why that was not done, seemingly due to the agreement that had been reached between the parties.

[27] Kipp further raise the principle in *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*⁷ in which court were minded to note the difference between two types of litigants. The first kind being a litigant who is physically absent in court when the order or judgment was granted, for no reason of their choice. The second type is one who elected to not be present or to participate in the proceedings. Where absence is at issue, the court said in *Zuma* that the rule was designed to:

“... protect a litigant whose presence was precluded, not those whose absence was elected.”

[29] I mentioned earlier that the Department was present in court and that it confirmed the draft order, except for the cost issue. That should put paid to

⁶ Lodhi 2 Properties Investments CC v Bondev Development (Pty) Ltd 2007 (6) SA 87 (SCA) at para 24.

⁷ 2021 (11) BCLR 1263 (CC).

any reliance by the Department on the provisions of Rule 42(1)(a). A contention based on that question should fail.

- [30] I deem it apposite to briefly address another basis upon which the Department sought rescission. In that respect the Department's case was that there was a patent error which vitiated the granting of the order. Its contention being that the interest part of the court order ought not to have been granted. It is quite obvious that the entirety of this application was instituted to afford the Department and opportunity to debate the issue of interest that was awarded by the Court on 09 April 2024.
- [31] Rule 42(1)(b) can be used for purposes of expeditiously correcting obvious mistakes contained in an order or judgment. In *Rae v Road Accident Fund*,⁸ the appellant had instituted appeal proceedings against parts of Khwinana AJ's judgment, where the draft order in relation to the apportionment percentage in respect of contributory negligence in favour of the plaintiff erroneously read "less 75%" instead of "less 25%" of the plaintiff's proven or agreed damages.
- [32] In *Seattle v Protea Assurance Co Ltd*,⁹ the court reaffirmed the principle that a patent error or omission must be an error that causes the judgment to fail to reflect the judicial officer's true intention at the time of pronouncement. In that case the court refused to amend its judgment despite the emergence of an actuarial report that had been available but which was not presented to it before it delivered the judgment. When doing so it held that a court's error must be its own mistake rather than a failure by a party to submit relevant evidence.

⁸ (3473/20) [2022] ZAGPPHC 119 (9 February 2022).

⁹ 1984 (2) SA 537 (C).

[33] Additionally, where a judgment is clear and unambiguous, it cannot be varied simply because new evidence or different calculations later become available. In the present case the parties had sat down and agreed a settlement. That settlement was made an order of court. The argument is that the interest portion of the order was an error because the parties only agreed to the value of the capital debt on 03 April 2024.

[34] The notice of motion for the urgent application was clear as to the rate and the date on which interest was to start running, being 23 August 2023. The order was confirmed by the parties with full knowledge of the interest date. No objection was raised on behalf of the Department. I struggle to see what, then, was the court's error in this regard. This too is an unconvincing argument which should fail.

[35] Costs of the application to follow the result.

Court's order

[35] The application is dismissed with costs on party and party scale B.



M. Z. MAKOTI
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION

APPEARANCES:

FOR APPLICANT	:	ADV K NONDWANGU
		OFFICE OF THE STATE ATTORNEYS
		POLOKWANE

FOR FIRST RESPONDENT : ADV P MTHOMBENI
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POLOKWANE

DATE HEARD: 03 JULY 2025

DATE DELIVERED: 25 NOVEMBER 2025

POLOKWANE HIGH COURT