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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 35748/2018

**REPORTABLE: YES / NO
OF INTEREST TO OTHER JUDGES: YES / NO
REVISED: YES / NO
1 February 2023**

In the matter between:

JULIA MOITHERI RATSHITANGA

1ST APPLICANT

ESTHER MGIJIMA

2ND APPLICANT

and

HOPE MATSHIDISO MADIMA N.O.

1ST RESPONDENT

VUSUMUZI ISAIAH ZWANE N.O.

2ND RESPONDENT

MABELINDILE ARCHIEBALD LUHLABO N.O.

3RD RESPONDENT

BENNETT MLAMLI NIKANI N.O.

4TH RESPONDENT

THE REGISTRAR OF DEEDS, PRETORIA

5TH RESPONDENT

In re

HOPE MATSHIDISO MADIMA N.O.

1ST PLAINTIFF

VUSUMUZI ISAIAH ZWANE N.O.

2ND PLAINTIFF

MABELINDILE ARCHIEBALD LUHLABO N.O.

3RD PLAINTIFF

BENNETT MLAMLI NIKANI

4TH PLAINTIFF

THE REGISTRAR OF DEEDS, PRETORIA

5TH PLAINTIFF

And

JULIA MOITHERI RATSHITANGA

1ST DEFENDANT

ESTHER MGIJIMA

2ND DEFENDANT

HENRY MGIJIMA

3RD DEFENDANT

THE REGISTRAR OF DEEDS, PRETORIA

4TH DEFENDANT

JUDGMENT

FLATELA J

Introduction

[1] This is an opposed rescission application. It came before me on 28 November 2022. On 30 November 2022, I granted an order dismissing the applicant's rescission application with costs. I indicated that I would provide the reason for the order. These are they.

[2] On 1 August 2019, Malungana AJ granted summary judgment against the first applicant in favour of the first respondent. The first applicant was ordered to pay first respondent R13 338 334.[....]. (Thirteen Million and three hundred and thirty-eight thousand, three hundred and thirty-four rands, eighty-three cents) with the interest rate at 10.25% per annum and costs of suit.

[3] Aggrieved by the judgment, the applicants instructed Grove & Dormehl Attorneys to file an application for leave to appeal to the full bench of this court and or to the Supreme Court of Appeal (SCA). The application for leave to appeal was filed on 23 August 2019. Malungana AJ dismissed the leave to appeal on 21 February 2020. The applicant did not petition the SCA for a leave to appeal.

[4] It is the judgment of 1 August 2019 which is the subject of this rescission.

Factual Background

[5] The parties have long history of litigation. Although the historical background is summarised in Malungana AJ judgments, a detailed background is unavoidable for the determination of this matter.

[6] The first applicant, Ms. Julia Moitheri Ratshitanga (Ratshitanga), is a former administrator of Peermont Children's Trust (the Trust). The Trust is represented in this matter by first, second, third, and fourth respondents; in their capacity as Trustees of the Trust. She was employed from 1 June 2008 until March 2017 when she resigned from her employment after the Trust charged her for misappropriating Trust monies.

[7] The Trustees allege that, in March 2017, they uncovered that the first applicant misappropriated the Trust monies through an elaborate scheme of payments which she processed or approved. These payments were made to at least thirteen (13) service providers whom the Trustees allege acted on the first applicant's instructions or under the control of her relatives and friends. A forensic investigation was conducted and it concluded that the first applicant misappropriated the Trust monies to the amount of R13 338 334.[...]. (Thirteen Million and three hundred and thirty-eight thousand, three hundred and thirty-four rands, eighty-three cents).

[8] The first applicant was as a result suspended from her employment with full pay and her disciplinary proceedings were initiated. She tendered her resignation on 15 March 2017, the day of her disciplinary hearing.

[9] The Trustees instituted legal proceedings against her which can be categorized as anti-dissipation applications under case 8651/19(the anti-dissipation application) that were granted by court against in favour of the respondents and action proceedings fall under case number 35748/2018.

[10] The Trustees contended that the first applicant had purchased various properties with the misappropriated funds namely:

- a) La Camargue Private Country Estate -Hartbeespoort further described as Erf [...] Portion 0 in the Township of La Camargue.

b) A vacant stand situated at Erf [...], Eye of Africa Extension 1 (Eye of Africa Property; and A sectional title unit, Unit 328 in the SS Sparrow Gate Sectional Title Scheme (The Sparrow Gate Property).

[11] The Trustees further contended that when the first applicant realized that her misappropriation of trust monies was discovered, she deliberately dissipated and concealed the misappropriated funds and the proceeds by selling her properties and transferring monies to various accounts. The Trustees added that the first applicant managed to sell the Eye of Africa Property and the Sparrow Gate Property during 2018 before the Trust could take any steps to prevent the sales.

[12] In March 2017, the first applicant sold La Camargue Property to her mother, the second applicant in these proceedings, for R 290 000 (two hundred and ninety thousand rands). It was listed for sale for R5 500 000 in 2018. On 3 July 2018, the Trustees brought an urgent application under the case number 24147/2018 to interdict and restrain the sale of the La Camargue property pending the institution of action proceedings. The order was granted on 3 July 2018.

[13] On 28 August 2018 the Trustees instituted an action against the applicants to set aside the sale of La Camargue; to declare La Camargue property to be the first applicant's property; and an order directing the fifth respondent to maintain the caveat against the title deed of the La Camargue property against the alienation and in favour of the interest of the Children's Trust.

[14] On the same papers the Trustees contended that they had a reasonable basis to believe that the first applicant has defrauded the Trust in the amount of approximately R 13 338 342.33

[15] The Trustees listed about thirteen entities and the amounts it alleged were approved or paid to each entity by the applicant. All the amounts added amounted to R13 338 342 .33.

[16] The Trustees further alleged that the first applicant was indebted to the Trust in an amount of R13 338 342.33 due to her fraudulent misappropriation of the Trust funds.

[17] The trustees applied for summary judgment which served before Malungane AJ on opposed court. The first applicant was legally represented throughout the proceedings.

Rescission Application

[18] In the notice of motion, the applicants sought an order in the following terms:

1. That the late filing of this application is hereby condoned;
2. That the judgment granted by Malungana AJ on 1 August 2019 is hereby rescinded and set aside;
3. That the judgments granted against the applicants, inclusive of the following court orders be rescinded and set aside
 - 3.1 the order granted by Wepener J on the 12th day of March 2019 under case number 8651/2019
 - 3.2 the order granted by Senyatsi AJ on the 31st day of May 2019 under case number 8651/ 2019;
4. That the applicants are granted leave to file supplementary affidavits resisting the granting of summary judgment, and the applicants to supplement opposing affidavits resisting summary judgements and the applicant to supplement opposing affidavit within 10 days of the granting of the order.
5. The respondents be ordered to pay costs of this application, in the event of opposition
6. Further and/alternative relief.

[19] The orders that the applicants sought to rescind in paragraph 3 of the Notice of Motion are anti -dissipation orders. During the hearing counsel on behalf of the applicants abandoned the relief sought in paragraph 3. There were no allegations supporting the relief sought in the founding affidavit.

[20] The applicants base the rescission application on rule 42 and common law.

[21] The first applicant contends that her erstwhile attorneys failed to carry their mandate in opposing the summary judgment. She contended that her attorneys were negligent in the way they conducted their defence and it was not according to their instructions. The summary judgment that was granted against her was due to their negligence. The first applicant submitted that she was advised that rule 42 gives court permission to rescind the judgement in circumstances wherein the attorneys acted outside their mandate.

[22] The respondents oppose the application on the basis that the applicant has not met the jurisdictional requirement of rescission in terms of rule 42 and common law.

Issues for determination

[23] The issues for determination is whether the first applicant has met the jurisdictional requirements as set out in rule 42 of the Uniform Rules as well as common law.

Rescission in terms of rule 42 of the Uniform Rules of Court.

[24] Rule 42 states:

“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 judgement 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 therefore 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.”

The respondent’s submissions

[25] The respondents oppose this application on the grounds that it is bad in law. It is the respondents’ contention that the applicants have not met the jurisdictional requirements for a rescission under rule 42(1) (a). Rule 42 contemplates a situation where an error or mistake was committed.

[26] The allegation that the applicant’s legal representation failed to carry their mandate is not ground for a rescission in terms of rule 42(1) (a). The applicants attempt to introduce rescission on common law ground in the replying affidavit is not permitted. The applicants also do not meet the requirements for condonation. The application was brought almost 3 years after an order was granted and the applicants have failed to adequately explain the delay and there is no *bona fide* defense.

[27] The respondent aver that the applicants have not made out a case for rescission at common law in that the common law ground of fraud and Justus error are not made out in the application. Failure of attorney to carry out a mandate is not one of the grounds for rescission at common law.

Legal Principles governing Rule 42

[28] The legal principles governing the rescission of judgment under rule 42 have long been settled by the courts. In terms of rule 42(1)(a), a judgment may be rescinded on the basis that the it was erroneously sought or erroneously granted in the absence of any party thereby.

[29] In *Kgomo and Another v Standard Bank of South Africa and Others* ¹ Dodson AJ has neatly summarised the legal principles as follows:

1. The rule must be understood against its common law background.
2. The basic principle of common law is that once a judgment has been granted, the judge becomes *functus officio*, but subject to certain exceptions of which rule 42(1)(a) is one.
3. The rule caters for mistakes in the proceedings.
4. The mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgement.
5. A judgment cannot be said to have been granted erroneously in light of a subsequently disclosed defence which was not known or raised at the time default judgment.
6. The error may arise in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court.

¹ 2016 (2) SA 184(GP).

7. The applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission.

[30] It has been stated that the purpose of the rule is to 'correct expeditiously and obviously wrong judgement or order.'² In order to succeed in an application to rescind the judgment, the applicant must meet the jurisdictional requirements contained in rule 42(1)(a)-(b).

[31] It is trite that an applicant who invokes this rule must show that the order sought to be rescinded was granted in his or her absence and it was erroneously granted or sought. Both grounds must be shown to exist.³

[32] Once the applicant meets these jurisdictional requirements the court has a discretion whether or not to rescind its own order.

Was the order erroneously sought and erroneously granted?

[33] Generally, a judgement would have been erroneously granted if there existed at the time of its issue a fact of which the court was not aware of which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment.⁴

[34] The first applicant contended that her erstwhile attorneys failed to carry or disclose their defense before the court. In their heads of argument, the applicants submitted that the negligence of an attorney is not in itself ground for a rescission. However, the first applicant contends that she is entitled to a rescission if it existed at the time of the issue of a judgment a fact which the judge was unaware of, which would preclude the granting of a judgment.

² *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466.

³ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* [2021] ZACC 28.

⁴ See *Promedia Drukkers & Uitgawers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C).

[35] The first applicant states that after the summons were issued, she instructed Botha Attorneys to oppose the action. She attached certain commentary in which she says were arguments which the attorney was to and should have advanced in resisting the summary judgement. She states that if her defenses were disclosed, the judge who heard the matter would not have granted the summary judgement.

[36] The first applicant states that she discovered during consultation with her current legal representative that her affidavit resisting summary judgement failed to deal with her defence instead it raised legal technical defenses and did not put forth her defense.

[37] The first applicant concedes that the attorney's negligence is not a ground for a rescission of judgement under this rule, but she submits that her defenses were not put forth by her attorneys and if the judge was made aware of her defenses, those facts would have precluded the granting of a summary judgement.

[38] It has been held that an order or judgment is erroneously granted if there was an irregularity in the proceedings or if it was not legally competent for the court to have made such order.⁵ There is no allegation of irregularity in these proceedings. The applicant was not absent. He was legally represented through the proceedings.

[39] In *Lodhi 2 Properties Investment CC v Bondev Developments (Pty) Ltd* ⁶, the appellant argued that 'the judgments were granted erroneously because certain facts of which the judge who granted the judgments were unaware would have precluded him from granting the judgments had he been aware of such facts.' The court held that the existence or non-existence of a defence on the merits is an irrelevant consideration and,

⁵ See *Promedia Drukkers & Uitgawers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 471 G-H.

⁶ 2007 (6) SA 87 (SCA) ('*Lodhi*') at 94E.

if subsequently disclosed, cannot transform validly obtained judgment into an erroneous judgment.⁷

[40] In *Colyn v Tiger Food Industries t/a Meadow Feed Mills (Cape)*⁸, the Supreme Court of Appeal refused to grant a rescission of judgment where an attorney failed to file a notice to oppose a summary judgement. The attorney operated in two offices, in Cape Town and in Bellville. The appellant's attorney was based in Bellville offices. The application for summary judgment was served in their Cape Town office. A summary judgment application was not forwarded to the to the attorney in Bellville. As a results, no notice of intention to oppose was given and no opposing affidavit was filed. Summary judgment was then granted. This error was due to the filing error in the attorneys' offices.

[41] The Supreme Court of Appeal accepted that the defendant wanted to defend the action and that he would have done so if the application had been brought to the attention of his attorney in Bellville.

[42] The Supreme Court of Appeal held that rule 42(1)(a) was essentially a restatement of the common law. The position of the courts in interpreting the Rules had been to vary and expand their application as little as possible. Rule 42(1)(a) was intended to provide for rescission of an order that had been erroneously sought or erroneously granted.

[43] On whether the judgment was erroneously sought or granted, the Supreme Court Appeal held that the rule properly applied, depended on the nature of the error and not whether the error appeared from the record of the proceedings. The error had to be one related to the proceedings themselves. A filing error in the Cape Town office of the appellant's legal representatives was not such an error. There had been no good reason

⁷ *Id.*

⁸ 2003 (6) SA 1 (SCA) at 9F.

not to award summary judgment in the absence of a notice of intention to oppose, or appearance. There had therefore been no error in the proceedings.

[44] Regard being had to the jurisdictional requirements of rule 42(1)(a)-(b) , the rule is not available to the first applicant. The requirements have not been met to have the judgment rescinded under this rule.

[45] I now turn to consider the first applicant has made a case for rescission on common law grounds.

[46] An application for rescission on common law grounds must be brought within a reasonable period. For the applicant to succeed with the application for rescission on common law grounds, the applicant must show good cause or sufficient cause by giving a reasonable explanation for delay and showing that application for rescission was bona fide and showing a bona fide defence to the claim with a *prima facie* prospect of success.

[47] In *Chetty v Law Society, Transvaal*⁹ Miller J dealing with the concept of “sufficient cause” or “good cause” stated that, “these concepts defy precise or comprehensive definition, for many and various factors require to be considered.” The learned Judge stated that “it is clear that in principle the two essential elements of “sufficient cause” for rescission of a judgment by default are:

- ‘(I) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
- (ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospect of success.

It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospects of success on the merits will fail in an application for

⁹ *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 765 A-E

rescission of a default judgement against him, no matter how reasonable and convincing the explanation of his default. An orderly judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgement against him rescinded on the ground that he had reasonable prospects of success on the merits.”

[48] The first applicant brings this application 3 years after the summary judgment was granted. The first applicant’s basis for condonation for the delay in bringing this application is that she is a lay person and after the dismissal of their application for leave to appeal she was moving from attorney to attorney for legal advice and each told her that she had no prospects of success upon appeal.

[49] As stated earlier in this judgment that the judgment was not taken in default, the applicants were represented by legal representatives, their explanation in delaying in bringing this application is unreasonable. Their explanation for the delay is unreasonable

[50] Initially the applicants appealed the judgment of Malungana AJ. The applicant had no intention of rescinding the judgment.

[51] What the applicant has done in this matter is to sneakily introduce new facts which are entirely different from the pleaded one. In her notice of motion, the applicants seek leave to file an affidavit resisting the summary judgment. The applicant was legally represented by attorneys and counsel and has previously filed an affidavit resisting summary judgment.

[52] The rescission proceedings are not meant to reopen cases; the disgruntled litigants must approach the appeal court as the applicants initially intended to do.

[53] In *Colyn*¹⁰ the court held that the guiding principle of the common law is certainty of judgments. Once judgment is given in a matter it is final. It may not thereafter be altered by the judge who delivered it. He becomes *functus officio* and may not ordinarily vary or rescind his own judgment. (Footnotes omitted).

[54] Regard being had to my findings that the applicants had failed to proffer any reasonable or satisfactory explanation, I did not consider the allegations of *bona fide defence*.

[55] I accordingly made the following order

1. The application is dismissed with costs.

FLATELA J
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties' and or parties representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 1 February 2023.

Date of Hearing:	30 November 2022
Date of Order:	2 December 2022
Date of Reasons Judgment:	01 February 2023

¹⁰ Footnote 9 above.

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