

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 45321/11

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
1. REPORTABLE: YES /NO	
2. OF INTEREST TO OTHER JUDGES: YES /NO	
3. REVISED.	
<u>5/12/12</u>	<u>[Signature]</u>
DATE	SIGNATURE

In the matter between

MEADOWSTAR INVESTMENTS 87

PLAINTIFF

and

MATSHILISA RUTH LEOTLELA

DEFENDANT

J U D G M E N T

MYBURGH AJ:

This is an application for the rescission of a judgment granted by my brother Francis J on 10 April 2012 the relevant portions of which reads as follows.

1. The order of Justice Mailula issued on 22 October 2005 is set aside.
2. The property situated 155 Hartebees Avenue Leondale is reregistered and transferred to the applicant with immediate effect.
3. The respondents are to pay the costs.

As I have said, this is an application for rescission of that judgment. In fact, the application as originally formulated was for the rescission of the second order only but Mr Kades, who appeared for the applicant, indicated that rescission is sought also in respect of paragraph 3 namely that of costs - which seems to follow automatically.

The history of the matter is essentially as follows. During 2004 the current respondent instituted proceedings against inter alia, the current applicant, in which she sought a variety of relief. The notice of motion contained two parts and the relief claimed under part B was as follows:

"That the Court grant a rule Nisi calling upon the respondents to show cause why on Tuesday 29 November 2011 at 14:00 the following order should not be made final.

1. *That the Court condones non-compliance with the rules of Court and has regard to the matter as urgent.*
2. *That the Court hereby issues a declarator declaring the eviction of the applicant from the property is unlawful.*
3. *That the Court hereby interdicts the respondents from further harassing unlawfully occupying the applicant's property to wit 155 Hartebees Avenue Leondale.*
4. *Declaring the ejectment order attached hereto as a forgery to deprive the applicant of the property unlawfully.*
5. *Referring any factual dispute which may arise to the Action Court for adjudication.*
6. *Further and/or alternative relieve.*
7. *Costs on the basis of the employment of counsel."*

That application was initially opposed by, inter alia, the then 1st respondent BOE Bank Limited. It appears from the papers that there was a substantial coincidence of interest between the then 5th respondent, Meadowstar Investments and BOE Bank Limited who, as I have indicated, was the 1st respondent. In the result Meadowstar Investments did not play an active role in those proceedings - this as that company was of the view that its interests would be satisfactory represented by the bank.

It is unnecessary for me to traverse the history of that litigation on a blow by blow basis. Suffice to say that after the matter had been set down for hearing and that shortly before the hearing the bank withdrew its opposition - this on the basis of advice which it had obtained.

Consequently the matter came before my brother Francis J on 10 April 2012 on an unopposed basis.

For reasons which are not clear from the record, the draft order which was handed up on that occasion differed considerably from the terms of the notice of motion to which I have just referred. As I have said, it is not clear exactly how that happened. The explanation given by the current respondent in course of her argument was that she was under the impression (as one could understand a layperson might be) that all of the issues arising from her occupation of the property were, so to speak, "on the table" and so she handed up a draft which included the order which the current applicant is now seeking to have rescinded namely one for the re-registration of transfer to the then applicant which is the current respondent with immediate effect.

The applicant's case is that the order was in the circumstances sought and/or granted in error. The only response put up by the respondent in this regard is in the form of a reliance on the inherent discretion of the Court to grant such order as it may consider appropriate and presumably, although she does not say as much, reliance in that regard was placed on her prayer for further or alternative relieve. In this regard I refer to paragraph 22 of her answering affidavit which appears on page 23 of the paginated bundle.

Suffice to say I consider it to be settled law that one of the most fundamental rules of fair and proper legal process is that a party should not have a judgment granted against him of which he has not given prior notice; certainly not a final judgment which is precisely what the order in

issue amounted to. I should add in that regard that not only has there, in the circumstances, been an instance of a judgment being sought and granted in error within the meaning which has been attached to that expression, but also that all considerations of equity and fairness require that the order be set aside.

As I have explained to the respondent in the course of her argument, the effect of such an order would not be to cause her to lose the case or the case which she had pending against the bank or the respondents. On the contrary what the existing (default) judgment would simply be set aside and she would be at liberty to prosecute whatever claims were then pending or may still be pending in the ordinary course.

The order which I therefore make is that paragraphs 2 and 3 of the order granted by my brother Francis on 10 April 2012 are rescinded and set aside and the respondent is ordered to pay the costs of these proceedings.



G S MYBURGH AJ