

REPUBLIC OF SOUTH AFRICA



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

**CASE NO: 19691/2013
And 19059/2013**

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
..... DATE SIGNATURE

In the matter between:

IRVIN PERUMAL

Respondent/Applicant

And

SHAHEEN BHYAT

First Applicant/Respondent

DUNNEWELS BODY CORPORATE

Second Applicant/Respondent

SANNETTE ERASMUS

Third Applicant/Respondent

JANINE TARGETT

Fourth Applicant/Respondent

OLIETE PERESTRELO

Fifth Applicant/Respondent

VHUMBANAI PROPERTY SOLUTIONS

Sixth Applicant/Respondent

J U D G M E N T
THE RANCHOD JUDGMENT

MAKUME, J:

[1] In this application the applicants seek an order rescinding and setting aside the court order handed down against the applicants by the learned Judge Ranchod on the 12th June 2013 plus costs on an attorney and client scale.

THE BACKGROUND LEADING TO THIS APPLICATION

[2] On the 6th June 2013 the respondent served two urgent applications on the applicants. In the applications the respondent sought amongst others an order declaring an earlier judgment by Spilg J a nullity.

[3] On receipt of the two applications the applicants addressed and hand delivered a letter to the respondent on the 7th June 2013. I deem it appropriate to quote the letter in full as it has a great bearing on the outcome of this application.

[4] The letter reads as follows:

- “(i) We refer to the above matter as well as to your Urgent Applications served upon our offices under Case Numbers 19059/13 and 19691/13.
- (ii) Without conceding to the fact the relief sought in your Notice of Motion herein are competent, we advise that your applications are simply not urgent, nor do you make out a case as to why the ordinary time limits prescribed in the Uniform Rules of Court ought to be condoned. The time limits which you have defined for the filing of affidavits herein in circumstances when your matters are simply not urgent, does not afford us a sufficient time within which to file Answering Affidavits herein.
- (iii) In the circumstances we request that your Urgent Application be removed from the roll forthwith by Notice and the ordinary time limits prescribed for the filing of Affidavits in terms of the Uniform Rules of Court be applicable to the Applications. Once the papers have been filed herein, either party may thereafter attend to set the matter down for hearing on the ordinary Motion Roll.
- (iv) In the event of you refusing to remove the matter from the roll as aforesaid will we have no choice but to attend at Court in order to oppose your Application and to seek a punitive costs order against you.
- (v) We await to hear from you as a matter of extreme urgency.”

[5] Simultaneously with this letter the applicants delivered a notice to oppose the urgent application. It is common cause that the applications were set down for hearing in the urgent court on the 12th June 2013.

[6] On the 10th June 2013 the respondent served on the applicants two notices of withdrawal under both case numbers. In the notices the respondent was removing the matters from the roll of the urgent court.

[7] The notices of withdrawal from the urgent court could be interpreted to mean that the respondent will reinstate the matter on the normal motion court roll for which he will give notice of set down after close of pleadings.

[8] In the notice of withdrawal the respondent did not tender wasted costs. This prompted the applicants to address a letter to the respondent on the 11th June 2013 in which letter the applicants called upon the respondent to tender wasted costs failing which the applicants threatened to enrol both applications and seek a punitive costs order. The applicants hand delivered the letter to the respondent personally at 15h15 on the 11th June 2013. The respondent refused to sign for receipt thereof. However the letter was left in his possession after he had read it in the presence of one Dagan James Rego a candidate attorney in the employment of applicants' attorneys.

[9] It is common knowledge that the applicants received no response to the letter. However what was settled in the mind of the applicants' attorneys is that the two applications were off the roll and that all that remained was the issue of costs.

[10] Unbeknown to the applicants and their attorneys the respondent proceeded to court on the 12th June 2013 and obtained an order effectively setting aside the costs order granted by Spilg J against the Respondent in the original application by them during June 2013.

[11] It is evident that when Ranchod J dealt with the respondent's application there was no notice of withdrawal of the applications from the

urgent roll neither was the applicants' notice of intention to oppose. The learned Judge was made to believe that the matter was unopposed and he accordingly proceeded to grant the order by default. It is trite that a request for default judgment is in the nature of an *ex parte* application therefore requiring an applicant to make full disclosure of all relevant factors. The respondent did not inform the Honourable Ranchod that he had notified the applicants that he is withdrawing the applications from the roll. The respondent accordingly misled the court.

[12] I am of the view that had the learned Ranchod J been made aware that a notice to oppose had been filed followed by a notice of withdrawal he would not have granted the order that he did on the 12 June 2013. His order was accordingly erroneously granted in the absence of the applicants and stands to be set aside in terms of Rule 42(1)(a).

[13] In the matter of *Topol and Others v L S Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) applicants there brought application for rescission of an order granted in their absence by Stafford J dismissing an application by them for leave to appeal. It appeared that the Registrar's written notice in terms of Rule 49(1)(d) had reached the office of the applicants' attorney timeously but had escaped his attention due to his ill-health at the time. The court found that the applicants had no knowledge of the fact that the application had been enrolled. It analysed the proceedings and concluded at page 648B that Stafford J had proceeded on the premise that notice had been sent to the parties and that the applicants despite having

knowledge of the hearing were in default. The court held that the fact that the premise proved to be wrong meant that Stafford J in granting the judgment had acted erroneously within the meaning of Rule 42(1)(a).

[14] Erasmus J in the matter of *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471E says the following:

“Rule 42(1)(a) it seems to me is a procedural step designated to correct expeditiously and obviously wrong judgments or orders. Once the applicant can point to an error in the proceedings he is without further ado entitled to rescission.”

[15] In the present matter the error lies in the act of withholding information from the judge thus channelling the court to believe in an untrue state of facts namely that the matter had been removed from the roll and that it was in fact being defended.

[16] I am satisfied that the applicants have made a case for rescission in terms of Rule 42 of the Rules of Court. The respondent's argument in opposing the application is far-fetched and legally untenable and requires no further consideration. I am also persuaded that in withholding the information from the court which was within his knowledge the respondent acted maliciously and his conduct deserves to be visited by a punitive of costs order.

[17] The order I make is as follows:

17.1 The application is granted.

17.2 The court order by the learned Judge Ranchod of the 12th June 2013 is hereby set aside.

17.3 The respondent is ordered to pay the applicants' taxed costs on an attorney and client scale.

M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPLICANT:	IN PERSON 21 DUNNEWELS COMPLEX 7 MAIDEN STREET ROBINDALE RANDBURG
RESPONDENT:	ADV G STEYN
INSTRUCTED BY:	BICCARI,BOLLO&MARIANO ATTORNEYS Tel: (011) 628-9300 Fax: (011)788-1736 Ref: M Hinz/rv/RD1873
DATE OF HEARING:	3 RD MARCH 2014
DATE OF JUDGMENT:	25 TH MARCH 2014