

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

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

30/9/2019  
DATE

[Signature]  
SIGNATURE

**CASE NO:7861/2018**

In the matter between:

**NT MAKHUBELE ENTERPRISES CC****1<sup>st</sup> Applicant****NATHANIEL TSAKANI MAKHUBELE****2<sup>nd</sup> Applicant**

and

**BUSINESS PARTNERS LIMITED****1<sup>st</sup> Respondent**

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## JUDGMENT

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### E DREYER AJ:

1. The Applicants seeks an order in terms of Rule 42(1)(a), alternatively the common law, for the rescission of the judgment and order granted by Cowen AJ on 16 January 2019.
2. On 16 January 2019 Cowen AJ handed down a written judgment ("the judgment") and made, *inter alia*, the following order ("the order"):
  - 2.1 The application for a postponement and / or temporary stay of proceedings is dismissed with costs.
  - 2.2 The application for the rescission of the order of Lamont J of 6 February 2018 ("the rescission application") is dismissed with costs.
3. The Applicants contend that the order was granted against them, in their absence, that is by default, when Cowen AJ:
  - 3.1 Found that the Applicants had not filed a Notice of Motion and Founding Affidavit in the postponement application and granted a costs order to the 1<sup>st</sup> Respondent, in its absence as it had not served and filed an Answering Affidavit; and

3.2 Decided the rescission application, based on the Answering Affidavit without considering the Founding Affidavit when the Applicants failed to address the Court.

4. The following appears from the judgment of Cowen AJ:

4.1 The rescission application came before her on the opposed roll on 19 November 2018 and at roll call the matter was allocated for hearing on 22 November 2018.

4.2 At roll call the Court was supplied with a Founding and Answering Affidavit in an application instituted by the Applicants on 13 November 2018 in terms of Rule 10 and 11 ("the Rule 10 and 11 application") seeking a consolidation and joint hearing of the rescission application and the interlocutory application. There was no Replying Affidavit from the Applicants.

4.3 The above application was not before Cowen AJ but the Founding Affidavit contained information relevant to the postponement application.

4.4 There was also a notice in terms of Rule 6(11) giving notice of intention to bring application 'at the rescission application on a date and time to be determined by the Registrar' for an order permitting the Applicants to file further affidavits in the rescission application ("the Rule 6(11) application"). There was however no affidavit supporting the relief.

4.5 At the hearing of the matter on 22 November 2018 the Second Applicant informed the Court that the Applicants sought a postponement alternatively a temporary stay of the rescission application. There was no tender for costs and also no formal application before the Court, no Notice of Motion and no affidavit to

substantiate the relief requested. The Second Applicant supplied Short Heads of Argument in support of the request for a postponement or stay.

- 4.6 The application for postponement was considered by Cowen AJ, *inter alia*, in light of the information that was placed before her and the submissions advanced by both parties.
  - 4.7 The rescission application was ripe for hearing as affidavits and Heads of Argument had been exchanged.
  - 4.8 The Second Applicant elected not to address the Court on the merits of the rescission application in oral argument, despite being afforded an opportunity to do so in the event that the request for a postponement or temporary stay was refused. The Court thus had regard to the written submissions of the Second Applicant, the affidavits exchanged between the parties and the limited relevant submissions made in the course of arguing the postponement application.
5. Attached to the Applicants' Supporting Affidavit marked as Annexure "NTM1" is email correspondence dated 21 November 2018 from the Second Applicant addressed to the Registrar of Cowen AJ as well as the attorney of record of the First Respondent. Attached to the email correspondence is a "POSTPONEMENT AND/OR STAY APPLICATION".
  6. As is evident from Annexure "NTM2" attached to the Applicants' Supporting Affidavit, the Registrar of Cowen AJ acknowledged receipt of the "POSTPONEMENT AND/OR STAY APPLICATION" on 21 November 2018 at 4:44 pm.

7. The "POSTPONEMENT AND/OR STAY APPLICATION" states, *inter alia*, as follows:

***"KINDLY TAKE FURTHER NOTICE THAT the affidavits of Dr Nathaniel Tsakani Makhubele in the Rules 6(11) and 10 and 11 applications under the above case number shall be used in support of such application."***

8. As set out in paragraph 4 above, it is evident from the judgment of Cowen AJ that:

8.1 The information relevant to the Applicants' postponement and stay application, as set out in the Founding Affidavit in the Rule 10 and 11 application, was considered by her.

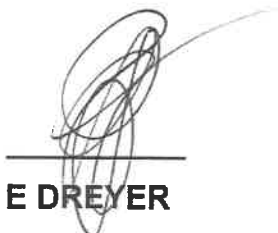
8.2 There was no affidavit in support of the relief sought in the Rule 6(11) application.

9. Rule 42(1)(a) provides that 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 an order of judgment erroneously sought or erroneously granted in the absence of any party affected thereby.
10. In order to obtain a rescission under Rule 42(1)(a) an Applicant must show that the prior order was 'erroneously sought or erroneously granted in the absence of any party affected thereby' (See *Duma v Absa Bank Ltd* 2018 (4) SA 463 (GP)).
11. In the present rescission application there does not seem to be any ground for the Applicants to succeed under Rule 42(1)(a).

12. Even if the "POSTPONEMENT AND/OR STAY APPLICATION" was not brought to the attention of Cowen AJ, as contended for by the Applicants, it is clear from the judgment of Cowen AJ that she considered the information relevant to the Applicants' postponement and stay application set out in the Founding Affidavit in the Rule 10 and 11 application, being the affidavit relied upon by the Applicants as per the "POSTPONEMENT AND/OR STAY APPLICATION".
13. It is also clear that in the rescission application affidavits and Heads of Argument had been exchanged between the parties and that Cowen AJ had regard to the written submissions of the Second Applicant, the affidavits exchanged between the parties and the limited relevant submissions made in the course of arguing the postponement application.
14. In the circumstances as no irregularity has been shown to have been committed, it has not been shown that the judgment and order granted by Cowen AJ had been erroneously sought and granted.
15. If the Applicants were of the view that Cowen AJ erred in any manner, the Applicants ought to have brought an application for leave to appeal, as contended for by the First Respondent, which the Applicants have failed to do.
16. The Applicants sought an order in the alternative in terms of the common law for the rescission of the judgment and order granted by Cowen AJ. In the present rescission application no grounds have been advanced by the Applicants for the rescission of the judgment and order granted by Cowen AJ under the common law.

17. I make the following order:

17.1 The application is dismissed with costs.



**E DREYER**

**ACTING JUDGE OF THE HIGH COURT**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

Appearance for Applicants: : Mr. NT Makhubele (Second  
Respondent in person)

Appearance for Respondents : Adv. M T Shepherd  
Instructed by : Strydom Britz Mohulatsi Inc.

Date of hearing : 27 August 2019

Date of Judgment : 30 September 2019