**REPUBLIC OF SOUTH AFRICA**

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

**CASE NO: A5048/2018**

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

24.10.2019
DATE

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SIGNATURE

In the matter between:

**ROUTIER, ROBERT JEAN** Appellant

And

**ROUTIER, SHARON ANN** Respondent

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**JUDGMENT**

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**LAMONT, J:**

[1] The respondent as applicant brought an application against the appellant as respondent seeking orders that the respondent settle in full the outstanding mortgage bond held over a property; the respondent pay the applicant a sum of money; the respondent pay the costs of the application on

an attorney and client scale. This application is referred to as the main application. The parties are referred to as they were referred to then.

[2] The respondent defended the main application and filed an answering affidavit. In due course the applicant filed a replying affidavit. The applicant then set the main application down for hearing on an opposed basis. The notice of set down was served upon the respondent's attorneys, who at that time were no longer in practice. The respondent was not aware of this fact and further was not aware that the notice of set down had been served. In consequence the respondent, who was not awarded of the date of hearing failed to appear at the hearing of the main application. The applicant sought judgment against the respondent in his absence. Judgment was granted as prayed by the applicant, save that the judge who granted the order directed that costs were to be on the party and party scale only.

[3] The respondent became aware that judgment had been granted against him and brought an application for rescission of the judgment. The respondent set out in the affidavit in support of the rescission application that he was not in wilful default as the service of the notice of set down had been effected on his attorneys of record at a time when they were no longer practising and he had not been informed of the notice of set down or the date of hearing. He set out that had he become aware of the notice of set down he would have appeared and prosecuted his defence at the hearing. The respondent further set out his defence to the applicant's claim in detail. His defence to the first claim was dependent upon an interpretation of the

settlement agreement. He stated that in terms of the agreement the applicant was not entitled to be paid in a lump sum. In respect of the second claim he set out that the claim had been paid in advance and hence there was no liability. The respondent in the affidavit seeking rescission of the judgment dealt more fully with their facts. The respondent's defences were however set out sufficiently in the answering affidavit to the main application to raise triable issues which represent a defence. The affidavit filed by the respondent in support of the rescission application set out both that the respondent was not in wilful default and that he had a *bona fide* and proper defence. These two elements constitute just cause generally, a requirement for a rescission application.

[4] At the time the rescission application was argued the applicant raised as a defence that the rescission application was brought under the common law and as evidence had been led at the hearing of the main application, such application could only succeed if there was fraud or *justus* error. The evidence which the submission contemplated had been led was the evidence contained within the affidavits forming the record in the main application.

[5] The judge who heard the rescission application concluded that the merits had been considered and determined. The judge held that on this basis, the order which was granted in the main application could not be held to have been granted by default. For this reason, the rescission application was dismissed with costs. That order is the subject of this appeal.

[6] A litigant commencing proceedings has a choice whether to proceed by way of application or action. If the litigant chooses to proceed by way of application, the litigant is required to set out in the affidavit not only the allegations required to establish the claim but also the facts on which he relies. The affidavit contains both the relevant allegations and the relevant facts. If the litigant chooses to proceed by way of action the litigant is required only to set out the allegations required to establish the claim. There is a material difference between the two forms of procedure insofar as the evidence to be produced is concerned. That difference arises in consequence of the choice of the litigant commencing proceedings.

[7] A defendant can seek a rescission of a judgment granted in proceedings in the following circumstances:-

1 If the litigant commencing proceedings instituted an action and the defendant failed to defend the action or having been barred failed to file a plea then on good cause being shown under Rule 31 the defendant could seek a rescission. Rule 31 applies only to actions,

2 if the litigant commenced proceedings either by way of action or application and judgment was granted erroneously the defendant is only required to establish the procedural error to be entitled to a rescission under Rule 42,

3 a defendant against whom judgment has been granted is entitled to seek a rescission of the judgment at common law,

4 a defendant could conceivably seek relief on the basis of the right of access to courts clause 34 of the Bill of Rights,

5 S173 of the Constitution, 1996 affords this Court the inherent power to protect and regulate its own process taking into account the interests of justice. A litigant could seek relief on the basis that a process which should exist does not.

[8] In the present matter which consisted of application proceedings, Rule

31 is of no application (as Rule 31 deals only with actions), Rule 42 is of no application as there was no procedural error. (There was proper service of the notice of set down in accordance with the rules).

[9] One of the respondent's courses of action was to seek a rescission of the judgment according to the common law. The common law was initially set out in *Childerley Estate Stores v Standard Bank of SA Ltd.* [1] *Childerley* was followed in *De Wet and Others v Western Bank Ltd*[2] where it was held that:

> "Before a judgment would be set aside under the common law, an applicant would have to establish a ground on which *restitutio in integrum* would be granted by our law, such as fraud, or *justus error* in certain circumstances"

A litigant who wishes to obtain the rescission of a judgment granted in motion court proceedings if he is limited to an application founded by the common law is required to establish if evidence has been produced on the merits of the dispute that there is fraud or *justus* error.[3]

[10] The requirements which were to be considered at common law were considered in *De Wet.* Where it was held:-

> "The first question which now requires consideration is whether, under the common law, the Court's power to grant the relief sought was indeed confined to the grounds specifically mentioned by De Villiers JP in the *Childerley* case. In my view, that is not the case..... Thus, under the common law, the Courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient case shown. This power was entrusted to the discretion of the Courts. Although no rigid limits were set as to the circumstances which constituted sufficient cause the Courts

[1] 1924 OPD 163
[2] 1977(4) SA 770 (T) at 776F-H
[3] *De Wet and Others v Western Bank Limited* 1979 (2) SA 1031 A at 1041, *Colyn v Tiger Food Industries Limited* 2003 (6) SA 1 (SCA) 4.

nevertheless laid down certain general principles, for themselves, to guide them in the exercise of their discretion. Broadly speaking, the exercise of the Court's discretionary power appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case. The *onus* of showing the existence of sufficient cause for relief was on the applicant in each case, and he had to satisfy the Court, *inter alia*, that there was some reasonably satisfactory explanation why the judgment was allowed to go by default. It follows from what I have said that the Court's discretion under the common law extended beyond, and was not limited to, the grounds provided for in Rules 31 and 42 (1), and those specifically mentioned in the *Childerley* case."[4]

[11] The Supreme Court of Appeal considered the issue again recently in *Freedom Stationery (Pty) Ltd and Other v Hassam and Others*,[5] it was held:-

"[16] As a general rule, a court has no power to set aside or alter its own final order, as opposed to an interim or interlocutory order. The reasons for this age-old rule are twofold. First, once a court has pronounced a final judgment, it becomes functus officio and its authority over the subject-matter has ceased. The second reason is the principle of finality of litigation expressed in the maxim *interest rei publicae ut sit finis litium* (it is in the public interest that litigation be brought to finality). See *Firestone South Africa (Pty) Ltd v Gentiçuro AG*1977 (4) SA 298 (A) at 306F – G and 309A; *Minister of Justice v Ntuli*1997 (3) SA 772 (CC) (1997 (2) SACR 19; 1997 (6) BCLR 677) paras 22 and 29; *Zondi v MEC, Traditional and Local Government Affairs, and Others*2006 (3) SA 1 (CC) (2006 (3) BCLR 423; [2005] ZACC 18) para 28. There are exceptions to this general rule. The requirements for relief under these exceptions depend on whether the judgment was given on the merits of the dispute between the parties after evidence had been led or whether the order was made in default of appearance of the party that seeks to have it rescinded. In respect of the first category the test is stringent. Such judgment can only be set aside on the ground of fraud or, in exceptional circumstances, on the grounds of *justus* error or the discovery of new documents. See *Childerley Estate Stores v Standard Bank of South Africa Ltd* 1924 OPD 163 at 168 and *De Wet and Others v Western Bank*

[4] At 1042
[5] 2019 (4) SA 469 (SCA)

*Ltd* 1979 (2) SA 1031 (A) at 1040E – 1041B. A default judgment, on the other hand, may be set aside in terms of Uniform Rule 31(2)*(b)*, Rule 42 or the common law. Only Rule 42(1)*(a)* or the common-law rules in respect of rescission of a default judgment could possibly be applicable to the s 252 order."

[12] *De Wet's* case in the SCA is authority that the common law is not limited to the grounds set out in *Childerley* and that the test for considerations of justice and fairness exists. Sufficient cause or good cause would be proper explanation why the applicant was not in wilful default and a defence. *Freedom Stationery* is authority that a judgment can been given on the merits of the dispute after evidence has been lead; further the judgment could only be set aside in the cause of fraud or exceptional circumstances. If the order was made in default of appearance then the rules set out above apply, namely, good cause must be shown. *Freedom Stationery* considers two sets of circumstances:-

1 where evidence was led a decision on the merits made and judgment given,
2 where the applicant for rescission was in default of appearance.

The circumstances set out by *Freedom Stationery* contemplates that there were appearances for the parties evidence led and a decision made as to the truth of the facts founding the finding in the judgment.

Once a litigant has chosen motion proceedings the form of the litigation compels the respondent to file affidavits containing both the facts and the allegations he wishes to place before the court.

[13] The applicant submit that as evidence was contained in the affidavits filed by the parties in the main application, evidence had been led and that the more stringent test was apposite, namely, the respondent was to establish the existence of fraud or *justus* error. The applicant submitted that the inference was to be drawn that evidence had been led from the fact that the order contained words indicating that the judge had read and considered the papers as also the fact that the costs order sought on the attorney client scale had been granted on the party and party scale only. In my view, this inference cannot be drawn. There are conflicting sets of facts in the affidavits and if evidence was led and considered there is no explanation how the factual disputes could be resolved. In addition there is the claim by the respondent that the settlement agreement had a particular meaning. There is no analysis as to how the court dealt with this issue. The fact that the court declined to grant the costs order sought could equally mean that on the allegations made by the applicant, the applicant had failed to set out sufficient facts to justify the punitive costs order sought.

[14] The words *"in which evidence has been led"* do not merely mean that the court was exposed to the evidence, they mean that the court has considered the evidence, has heard argument in respect thereof and after all the evidence the parties wished to adduce had been adduced, the court made a decision as to the truth of the evidence required to establish the allegations founding the applicant's case.[6] There is no indication as to whether the merits of the case were considered or whether the order of dismissal was made on

[6] *J M Moseneke and Another v Standard Bank of South Africa and Others* case number 65869/2014 a judgment handed down in the Gauteng Division, Pretoria by Kollapen J on 31st of May 2018 (paragraph 26.2). The words of Kollapen J are instructive "26.2.

account of the non-appearance of the applicants. In addition I would take the view that even if the affidavits were considered what did not happen on 30 May 2016 is that the court did not hear the case for the applicants and did not consider any arguments that would have been advanced in support of the case she brought. The right to have access to Courts encapsulated in section 34 of the Bill of Rights does not always entail a hearing and the right to be present and make submissions. However, in the context of opposed motions, the Rules as well as the Practice Directives that apply in this division consider the hearing as an integral and important part of the fulfilment of the right. Appearance in such cases provides the important opportunity to convince and persuade the Court of the facts and/or the law that a party seeks to place reliance on and is not a mere formality and I have doubts whether it would be permissible to conclude that a hearing where both parties' cases were properly considered took place in the absence of appearance...." The rules and Practice Directives applying in the division in which Kollapen J sits are similar to the rules which apply in this court.

[15] Hence my view is that it has not been established that evidence was led as contemplated by the authorities:-

1 here was only the set of facts in the affidavit,
2 the judge has not been shown to have considered the matter at any higher level than deciding the allegations made out in the case for the relief he granted,
3 no decision was made as to the truth of any facts,
4 there was no appearance and no argument from the respondent.

[16] Accordingly, in my view the respondent made out a case entitling the respondent to rescission of the judgment which was granted against him. It follows that the rescission application should have been granted. The application brought by the respondent in the main application was an adjunct to matrimonial proceedings. In addition the opposition by the applicant to the rescission application was reasonable. In the present circumstances an appropriate order for costs is that they should be in the cause of the main application.

[17] I would accordingly make the following order.

1 The appeal succeeds.

2. The costs of appeal shall be costs in the cause of the main application.

3. The order of the court *a quo* refusing the rescission application with costs is set aside in its entirety.

4 The application the respondent brought for the rescission of the judgment granted against him succeeds.

5 The order made in the main application is set aside in its entirety.

6 The costs of the rescission application shall be costs in the cause of the main application.

C. G. LAMONT
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

E.F. DIPPENAAR
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

L.I. VORSTER
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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| COUNSEL FOR THE RESPONDENT | Adv. D.L. Williams |
| RESPONDENT/S ATTORNEYS: | Craig Baillie Attorneys |
| DATE OF HEARING: | 09 October 2019 |
| DATE OF JUDGMENT: | 24 OCTOBER 2019 |

## SUMMARY OF JUDGMENT

**LAMONT, J:**

Practice – Orders and judgments – Application for rescission – court *a quo* finding that orders were made in application proceedings after merits were considered and refusing to rescind the orders on the basis that a litigant who wishes to obtain the rescission of a judgment granted in motion court proceedings is required to establish fraud or *justus* error, if evidence on the merits has been considered – Evidence has not been led (and merits considered) unless the court has considered the evidence, has heard argument in respect thereof and after all the evidence the parties wished to adduce had been adduced, the court made a decision as to the truth of the evidence required to establish the allegations founding the applicant's case.