

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 46212/2018

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

  
.....  
**SIGNATURE**

**14 September 2021**  
.....  
**DATE**

In the matter between:

**TSHOSA JOPA MORAKA**

Applicant

And

**INDUSTRIAL DEVELOPMENT CORPORATION OF  
SOUTH AFRICA**

First Respondent

**SHERIFF HALFWAY HOUSE**

Second Respondent

**NAME PLATE CENTER SIGNS (PTY) LTD**

Third Respondent

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**JUDGMENT**

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**MATOJANE J**

[1] The applicant has applied for an order rescinding or varying the "draft order" dated 25 February 2019 granted in favour of the first respondent in terms of "Rule 42 42(1)(b)(c)". The applicant further seeks relief in the form of "restraining" the sheriff from implementing the "draft order" issued under this case number. The applicant also seeks various declaratory orders that are irrelevant to the relief that he seeks.

[2] The applicant is the director of the third respondent and is not a party to these proceedings.

[3] The first respondent had sought and obtained an order perfecting its security held against Name Plate Center Signs (Pty) Ltd ("Name Plate") under a Notarial General Covering Bond in the urgent Court on 25 February 2019.

[4] The first respondent instructed the sheriff to execute the perfection order at 61 Kyalami-Glen Estate, Midrand address which is the chosen *domicilium* and business address of Name plate. The order could not be executed as it was the applicant's residential address. The applicant advised the first respondent as to the correct business address of the Name Plate and provided the first respondent with the keys to the premises.

[5] On 16 August 2019, the sheriff executed against Name Plate's movable assets at its business premises. The attached goods were sold on auction, and the proceeds were applied towards the partial discharge of the third respondent's debt to the first respondent.

[6] The applicant's complaint is that he and his family were being harassed by the first respondent's alleged attempt to execute against his personal property. He avers that despite advising the first respondent of the correct address of Name Plate, the first respondent has not varied the court order it obtained to reflect the correct business address of the third respondent. He alleges that he is placed under the risk of his property being attached without notice.

[7] The applicant for rescission is ill-conceived and misguided and bears no prospect of success as the applicant is not a party to the perfection order that he seeks

to have rescinded. Name Plate has not taken steps to have the perfection order set aside. The application falls to be dismissed on this ground alone.

### **Condonation of the late filing of this application**

[8] The Constitutional Court, in the matter of **eThekweni Municipality and Ingonyama Trust**,<sup>1</sup> said the following:

"As stated earlier, two factors assume importance in determining whether condonation should be granted in this case. They are the explanation furnished for the delay and prospects of success. In a proper case, these factors may tip the scale against the granting of condonation. In a case where the delay is not a short one, the explanation given must not only be satisfied but must also cover the entire period of the delay."

[9] The explanation proffered by the applicant for the late filing of the application for rescission is that since the order was granted on 25 February 2019, he informally tried to persuade the first respondent to amend the said court order. He alleges that he went to Court on 26 June 2019 to verify whether the first respondent had varied the court order so that it should reflect the correct address of the Name Plate. This was not done.

[10] On 23 July 2019, he brought an application for the rescission of the above judgment and was thereafter invited to a meeting with the first respondent where it was agreed that the first respondent would never serve legal documents meant for Name Plate at his residence. He alleges that the first respondent has continued to serve documents at his residence. He also alleges that there were intervening circumstances as a result of the COVID 19 pandemic.

[11] The applicant has failed to give a detailed and accurate account of the causes of the delay in bringing the application to enable the Court to understand the reasons and to assess his motives and conduct <sup>2</sup>. He fails to give the date, duration and extend

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<sup>1</sup> Case No. [2013] ZACC 7

<sup>2</sup> Uitenhage Transitional Local Council v SARS 2004(1)SA 292 (SCA) par 6

of any obstacle on which he relies<sup>3</sup>. There is no explanation whatsoever for the 22 months delay.

[12] He admits that he brought a similar application on 23 July 2019 and did not explain why he never pursued that application from 23 July 2019 until December 2020 when he brought the current application; the matter is *lis alibi pendens* and constitutes abuse.

[13] The applicant has not made out a good cause for condonation for the late filing of his application. In any event, he could not have the order set aside as he was not a party to the perfection order. The application for condonation falls to be dismissed on this ground alone.

### **Rescission of a judgment in terms of Rule 42**

[14] Rule 42<sup>4</sup> is confined by its wording and context to the rescission or variation of an ambiguous order or an order containing a patent error or omission (Rule 42(1)(b)); order resulting from a mistake common to the parties (Rule 42(1)(c)); or 'an order erroneously sought or erroneously granted in the absence of a party affected thereby' (Rule 42(1)(a)). In the present case, the application was, as far as the Rule is concerned, based on Rule 42(1)(c). The crisp question is whether the judgment contains a patent error or omission and that it was the result of the mistake common to the parties.

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<sup>3</sup> Van Wyk v Unitas Hospital 2008 (2) SA 472 (CC) at 477E-G

<sup>4</sup> Rule 42 of the Uniform Rules of Court provides 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 Judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
- (b) An order or Judgment in which there is ambiguity, or a patent error or omission;
- (c) An order or Judgment granted as a result of a mistake common to both parties.

[15] The applicant's reliance on Rule 42(1)(b) as the basis for rescission seems to be that the perfection order was served at his residential address, which was no longer a place of business of the third respondent at the time of service of the order. This reliance is misplaced as the 61 Kyalami-Glen Estate address is listed in the Notarial Covering Bond as the *domicilium citandi and executandi* of Name Plate. The first respondent was accordingly entitled to rely on this address.

[16] The applicant has failed to set out any grounds as to why he alleges that the order was granted as a result of a mistake common to the parties and has not pointed to any errors, ambiguity or the like justifying the order being set aside.

[17] His reliance on Rule 42(1)(c) is also misplaced. This Rule is of the application when a party affected by an order contends that order ought to be rescinded because it was granted as a result of a mistake common to the parties. The applicant, in his capacity, cannot argue on behalf of Name Plate that it was labouring under a mistake when the order was granted. He does not purport to act on behalf of Name Plate in this rescission application. It is not a mistake to have the order served at the chosen *domicilium* address.

[18] Rule 42(1)(a) is a procedural step designed to correct expeditiously an obviously wrong judgment or order. A judgment would be rescinded if the applicant can establish an error in the proceedings. There is nothing erroneous about the service of the order at the chosen *domicilium* address. This Rule does not assist the applicant.

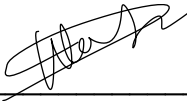
### **Costs**

[19] This fatally defective application for rescission of the order was pursued 22 months late in the face of a similar pending application. There is no explanation for the lengthy delay in bringing the application. The party affected by the order, Name Plate, did not take any steps to have the order rescinded. The order has already been executed, and some of the property of Name Plate have already been sold in execution.

[20] This application is an abuse of the court process and warrant a punitive costs order.

In the result I make the following order.

1. The application is dismissed
2. The applicant is to pay costs on attorney and client scale



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**K E MATOJANE**  
**JUDGE OF THE HIGH COURT,**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

### **Appearances**

Attorney for Applicant:	KD Magabane
Counsel for First Respondent:	Advocate S Freese
Attorney for First Respondent:	Mngadi Attorneys Inc.
Hearing date	03 August 2021
Date of judgment:	14 September 2021