

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 71244/2014


5/2/2016

In the matter between:

G W P BOTHA

A H VENTER

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1) RETURNED YES/NO.	FIRST APPLICANT
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	SECOND APPLICANT
(3) REVISED.	
5 Feb 2016 DATE	 SIGNATURE

ALGERDON BROKERS CC

RESPONDENT

JUDGMENT – LEAVE TO APPEAL

TLHAPI J

[1] The applicants seek leave to appeal the judgment of the 27 October 2015 where I refused an application to rescind an order granted by Tuchten J in the opposed motion court on 23 February 2015.

[2] The judgment was criticised on the following grounds:

1. That the order should have been rescinded because the proceedings before Tuchten J were incomplete in that, the order was granted in the absence of the

applicants.

2. That the proceedings were incomplete, despite the fact that the parties had filed all three sets of affidavits, the respondent having filed its heads of argument and the applicants having failed to file heads of argument, and in the circumstances Tuchten J having proceeded to hear only counsel for the respondent who was the only counsel present at the hearing;
3. That the order was susceptible to being revisited and rescinded and, that the order did not bring the matter to finality and was thus not appealable;
4. In not finding 'that paragraphs 1.1 and 2.1 of the order that was granted by Tuchten J were erroneously sought and granted despite the fact that they were at variance with the provisions of the agreements relied upon and in more particular clause 17.5.3 thereof in that the words "after termination of the agreement do not appear in any of the agreements;'
5. In not finding 'that paragraphs 2.1 and 2.2 of the order that was granted by Tuchten J was erroneously sought and granted because they were granted at variance with the provisions of the agreements relied upon and more particular Clause 18.1.1 and 18.1.2 thereof in that the wording of these paragraphs contained in the order do not correspondent with the said clauses.'

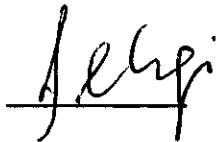
[3] Counsel for the applicants was engaged at length on the purpose of the founding, opposing and replying affidavits. He submitted that despite the fact that applicants had filed opposing papers, where there was no argument presented on their behalf, the proceedings were incomplete. He relied on paragraph 27 in *Pitelli v Everton Gardens Projects CC* (2010) (5) SA 171 (SCA). The facts in this case are distinguishable because Mr Pitelli as the court found for obvious reasons, was evading the proceedings and he had not filed any opposing papers relating to the judgment he sought to rescind. I am therefore still of the view

expressed in paragraph 8 and 9 of my judgement, however I am persuaded especially after having regard to the record of the proceedings before Tuchten J, that another court might find that the order granted by him was susceptible to rescission in that it was obtained by default.

[4] I shall not deal with grounds 4 and 5 in paragraph 2 above because these did not form the basis for the rescission application and as noted in the application, the applicants had not availed copies of the main application before Tuchten J for scrutiny during the application for rescission.

[5] In the result the following order is given.

'Leave to appeal to the full court of this division is granted.



TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	04 DECEMBER 2015
JUDGMENT RESERVED ON	:	04 DECEMBER 2015
ATTORNEYS FOR THE APPLICANTS	:	KRUGER & OKES ATT C/O VAN ZYL LE ROUC INC
ATTORNEYS FOR THE RESPONDENT	:	DE BEER JANSE VAN VUUREN INCORPORATED