

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 28465/2011

Reportable: No

Of interest to other Judges: No

Revised: No

In the matter between:-

MARTIN JAN SCHEFFER

FIRST APPLICANT

DINA MARIA GOBEY N.O.

SECOND APPLICANT

**as executrix of the late estate of
Edward Charles Gobey**

and

OFFICE INSTALLATIONS (SA) (PTY) LTD

FIRST RESPONDENT

**HERNANI FERNANDO VIEIRA DE
OLIVEIRA FERREIRA**

SECOND RESPONDENT

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the caselines electronic platform. The date for hand-down is deemed to be 14 October 2022.

JUDGMENT

MAZIBUKO AJ

1. This is a rescission application in which the applicants seek an order rescinding the

amended order made by Baqwa J on 1 December 2021 under the above-mentioned case number 28465/2011. The order for rescission is sought either in terms of rule 42(1)(a) alternatively Rule 42(1)(b) of the Uniform Rules of the High Court (the Rules) or the common law.

2. On 26 June 2020, Baqwa J delivered judgment and found in favour of the respondents. Leave to appeal and cross-appeal the judgment was granted on 4 August 2020. On 22 November 2021, a Rule 42(2) application was filed by the respondents seeking rectification and inclusion of the omitted amounts in the judgment. The defendants were granted leave to appeal and failed to commence with their appeal timeously. On 24 November 2021, the applicants filed their notice to oppose the application. On 2 December 2021, the applicant's attorneys received an email attaching the amended order.
3. The respondents in the answering affidavit stated that during the trial proceedings, they were legally represented. However, when they applied for rectification of the amounts, they were not. Their application was for rectifying the amounts awarded in respect of claim 4.
4. For an applicant to succeed in a rescission application under the common law, they must prove that there is "sufficient" or "good cause" to warrant rescission.
5. It is trite that the court has the power to rescind its orders or judgment in terms of rule 42 (1) (a) and (b), which provides as follows:

"Variation and rescission of orders

(1) 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 an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rule shall make application therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) The court shall not make any order rescinding or varying any order or judgment

unless satisfied that all parties whose interests may be affected have notice of the order proposed."

6. In *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*¹, the Constitutional Court explained the import of rule 42 as follows:

"[53] It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with a discretion to rescind its order. The precise wording of rule 42, after all, postulates that a court "may", not "must", rescind or vary its order – the rule is merely an "empowering section and does not compel the court" to set aside or rescind anything. This discretion must be exercised judicially."
7. Two requirements in terms of rule 42 (1) (a) of the Rules the applicant needs to satisfy. It must show the existence of both the requirements that the order or judgment was granted in their absence and that it was erroneously granted or sought. However, the court retains the discretion to grant or refuse the rescission to rescind an order regarding fairness and justice.
8. In *Tshabalala v Peer*² the court held that if the court finds that an order or judgment was erroneously granted in the absence of any of the affected parties, it should, without further enquiry, rescind or vary the order.
9. The requirement that the order was erroneously granted is generally satisfied when the applicant can show that at the time the order was made, there existed a fact that, had the court been aware of it, it would not have granted it. The respondents' rule 42(2) application was not uploaded on caselines, nor was the notice to oppose.
10. The respondents obtained the court order on 1 December 2021 in the following circumstances: (a) The notice of intention to oppose was filed on 24 November 2021; (b) amendment was prior to the dies for filing of the applicants' answering affidavit had lapsed, (c) the application had not been uploaded onto Caselines; (d) the application was never enrolled for a hearing, and the order did not correct a mere arithmetic

¹ (2021) ZACC 28, para 53

² 1979(4) SA 27 (T)

calculation or oversight; it dealt with an issue relating to the respondents' claim 4 raised in their cross-appeal.

11. In *Lodhi 2 Properties Investments CC v Bondev Developments*³, "*Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the sheriff's return of service wrongly indicates that the relevant document has been served as required by the rules whereas there has for some or other reason, not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If in these circumstances, judgment is granted in the absence of the party concerned, the judgment is granted erroneously*".
12. If there was an irregularity in the proceedings or if it was not legally competent for the court to make such orders or if there existed an issue of fact in which the judge was unaware and that which would have precluded the granting of the judgement and which would have induced the judge, if they had been aware of it, not to grant the order, a judgement or order is erroneously granted.
13. In my view, the court granted the order in error in the absence of the applicants as the application to rectify was properly opposed, and the amendments would, as they did, affect the applicants. The dies for filing the applicants' answering affidavit had not lapsed. The application was never enrolled for a hearing in the open court. The amendment or the order was made in chambers without the knowledge of the applicant, who was the interested party in the matter or the consequences thereof. The rectification of the amounts was already the subject matter in the cross-appeal. No facts suggest that these factors were brought to the attention of Baqwa J.

³ (Pty) Ltd) (128/06) 2007 (6) SA 87 SCA at para 24

14. Conversely, no mala fide could be found in respect of the respondent's conduct as they were not legally represented and seem to have received no proper advice when regard is had to the correspondence between themselves and the registrar's office. The registrar's office also allowed itself to correspond with one party when they were aware that the other nor their legal representatives were not copied in such correspondence.
15. In the result, I find that the applicants have met the requirements in terms of rule 42(1)(a), 42(1)(b) or at common law for having the judgment or order granted on 1 December 2021 rescinded and set aside.
16. In the circumstances, the following order is made:
1. The rescission application succeeds.
 2. The respondents are to pay the costs of this application on a party and party scale.



N. MAZIBUKO

Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

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Representation

For the applicant: Adv AJ Swanepoel

Instructed by: Jay Attorneys

For the respondent: In person

Hearing date: 21 July 2022

Delivery date: 14 October 2022