



IN THE HIGH COURT OF SOUTH AFRICA  
LIMPOPO DIVISION, POLOKWANE

CASE NO: 6437/2019

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

[REDACTED] 30/08/2023

In the matter between:

MINISTER OF MINERAL WATER AND SANITATION

1<sup>st</sup> APPLICANT

THE ACTING DEPUTY DIRECTOR: DEPARTMENT OF  
WATER AND SANITATION

2<sup>nd</sup> APPLICANT

ACTING CHIEF DIRECTOR: LIMPOPO REGION

3<sup>rd</sup> APPLICANT

and

LEON ERNST FOURIE

1<sup>st</sup> RESPONDENT

LYNDGRATH PROPERTIES 19 (PTY) LTD

2<sup>nd</sup> RESPONDENT

LOPIET ONTWIKKELINGS CC

3<sup>rd</sup> RESPONDENT

<b>JUDGMENT</b>
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**NAUDÈ-ODENDAAL J:**

- [1] The 1<sup>st</sup> to 3<sup>rd</sup> Applicants brought an application in terms whereof the Applicants applied for the rescission of the judgment and order granted against the Applicants on 15 April 2021. The application for rescission is brought in terms of the common law as per the founding affidavit of the Applicants.
- [2] The 1<sup>st</sup> to 3<sup>rd</sup> Respondents brought a counter-application in terms whereof the Respondents apply that the order granted on 15 April 2021 be amended by deleting order 5, that an order be granted to compel the 3<sup>rd</sup> Applicant to comply with the order granted on 15 April 2021 and costs of the application.
- [3] I will deal with the Applicants' rescission of judgment application first. The Applicants submitted that the order was granted in the absence of the

Applicants and without their participation in the proceedings. The Applicants submit that the order however states that the order was granted after hearing both counsel for the Applicant and the Respondent.

- [4] The Applicants submitted that it is not correct that the Counsel for the Applicants participated in the hearing prior to the order being granted. The Applicants were not represented during the hearing of the matter and for that reason the order was given in their absence.
- [5] The Applicants submitted in their founding affidavit that the Respondents, on 29 September 2019, instituted the application proceedings against the Applicants. The Respondents sought orders, *inter alia*, that they be declared to have properly completed the registration forms in terms of the provisions of the regulations requiring that water use be registered in respect of the properties identified in paragraphs 1.1 to 1.3 of the Notice of Motion in the main application.
- [6] The Applicants submit that the papers were served on the Applicants on the 3<sup>rd</sup> of October 2019. The Applicants then filed their answering affidavit on 3 December 2019. The Applicants also filed an application for condonation of the late filing of their answering affidavit.

- [7] Subsequent to the filing of the answering affidavit and having received the Respondent's replying affidavit, both the Applicants and the Respondents filed their heads of arguments as well as their practice notes. Thus, the only thing outstanding was an oral presentation of the matter by the respective counsel.
- [8] Following compliance with all pre-hearing requirements, the matter was set down for hearing on 15 April 2021. The notice of set down was issued on 23 September 2020 and served on 26 November 2020.
- [9] It was submitted by the Applicants that Miss Katlego Tepanyega, the State Attorney responsible for this matter, was unfortunately not made aware of the notice of set down and the date of hearing. According to the Applicants, Miss Tepanyega only became aware that the matter was heard on the 15<sup>th</sup> of April 2021 upon receipt of the order of Phatudi J on 11 May 2021 from the Respondents' legal representatives.
- [10] The Applicants submitted that they at all material times intended to oppose the main application and have indeed done so. The non-attendance at the hearing of the matter was only due to the fact that the State Attorney

handling the matter was not aware that the matter was set down for hearing on 15 April 2021.

[11] The Applicants further submitted that the Applicants' conduct throughout the main application and the factual background of the matter clearly demonstrate that the application for rescission is made in good faith and without intention to delay the Respondents' rights to enforce the order. The fact that the Applicants opposed the application and filed all papers so required, including the heads of arguments and practice note, is indicative of the Applicants' *bona fides* and intention at all times to defend the matter.

[12] In respect of the Applicants *bona fide* defence, it was submitted that the Applicants' defence has been set out in the answering affidavit and without regurgitating it, it is premised on the following:-

12.1 That the Respondents are legally precluded from seeking a declaratory in respect of a matter where a judicial review under PAJA is applicable;

12.2 That the applicable legislation affords the Respondents a right to appeal to the Water Tribunal against the decision of the responsible



authority, and that therefore the Respondents application is non-suited due to their failure to exhaust all internal remedies.

12.3 That the Respondents did not join a party, Labonte 5 (Pty) Ltd which is a company with direct and substantial interest in the matter before court and as such had to be joined.

12.5 That the Respondents are not entitled to be registered for water use under the interpretation of the empowering legislation.

[13] The Respondents in opposing the application for rescission of judgment submitted that the Respondents in the main application claim that each has an existing lawful water use as described in Section 32(1)(a) of the National Water Act, 36 of 1998. In terms of the regulations requiring that a water use be registered that was published in GNR 1352 of 12 November 1999 in terms of the National Water Act, an existing lawful water use should be registered with the Department of Water and Sanitation. The Department of Water and Sanitation conversely has a duty to register such an existing lawful water use on submission of an application form and to issue a registration certificate in terms of Regulation 7(1).

[14] It was submitted that the main application is for mandatory relief to direct the Applicants to register the Respondents' applications to have their

respective existing lawful water uses registered in terms of the regulations that was published in GNR 1352 of 12 November 1999, requiring that a water use be registered, and to issue a registration certificate in terms of Regulation 7(1) of the same regulations.

- [15] It was submitted by the Respondents that Section 1 of the Promotion of Administrative Justice Act, 3 of 2000 defines an administrative action as *“any decision taken or any failure to take a decision by an organ of state when...exercising a power or performing a public function in terms of any legislation.”* In order to be susceptible to review there must be a decision involved. The Respondents merely requires the registration of their existing lawful water use in terms of Regulations 3 – 7 of the National Water Act. The failure to issue a registration certificate is not reviewable and that the Respondents' only remedy was to bring the application.

- [16] It was further submitted by the Respondents that Section 148 of the National Water Act, does not provide for an appeal where the responsible authority fails to issue a registration certificate, nor does any other provision of the National Water Act affords such an appeal.

- [17] In respect of the alleged non-joinder of Labonte 5 (Pty) Ltd, it was submitted by the Respondents that the relief set out in the Notice of Motion in the main application does not have any bearing on it. Whether the Respondents are registered or not is immaterial to Labonte 5 (Pty) Ltd.
- [18] The Respondents further submitted that the Applicants have confused verification of existing lawful water use and the registration thereof. IN terms of the provisions of Section 35(1) of the National Water Act, the verification process starts when the responsible authority issues a written notice that requires from a specific person, who claims to be entitled to that water use, to apply for verification of that use. Such verification follows registration. The only manner in which the Minister will know that a person claims to be entitled to water use, is if that person registered his/her water use.
- [19] It was submitted that the Respondents are entitled to registration purely by claiming an existing lawful water use. Verification, however, is quite another matter.
- [20] The Respondents therefore submitted that it is denied that the Applicants provided a reasonable and justifiable explanation for the series of failures



by them and it is denied that the Applicants have illustrated that they have a reasonable prospect of success in the main application.

[21] In order for the Applicants to succeed with an application for rescission in terms of the common law, the Applicants must show sufficient cause, which means that:

21.1 There must be a reasonable and satisfactory explanation for the default;

21.2 That the application is made bona fide; and

21.3 The Applicant must show on the merits that it has a *bona fide* defence which *prima facie* has some prospects of success.

[22] However, before I enter into the realm of the requirements for a rescission of judgment application in terms of the common law, I deem it appropriate in the present matter to first deal with the issue of whether there was indeed a default judgment granted.

[23] In **Rainbow Farms (Pty) Ltd v Crockery Gladstone Farm (HCA15/2017)** [2017] ZALMPPHC 35 (7 November 2017) at paragraphs 10 to 12

**Mokgoba JP (Kganyago J and Sikhwari AJ concurring)** held as follows:-

*"[10] The Court a quo decided that the judgment was not a judgment taken on default of appearance by the Appellant. It did so on the basis that the Appellant's Counsel was present in Court when the Order was made. The Court a quo erred in this regard. This matter was an application and the presence or absence of a party can only be determined by whether that party has submitted affidavits or not. The presence of the actual party and / or Counsel in Court is irrelevant to that issue. In the absence of any affidavits (bearing in mind that there is no option available for the party to testify at such a hearing) it is logical to conclude that that party is in default of appearance when the Order was made notwithstanding that Counsel may have been in Court.*

*[11] In my view where opposing papers have not been filed there is a "default" even if the Respondent in the matter or his legal representative is present in Court. See: **Morris v Autoquip (Pty) Ltd 1985 (4) SA 398 (WLD); First National Bank of SA Ltd v Myburgh and Another 2002 (4) SA 176 (CPD).***

*[12] The question of what is meant by "default" was considered in **Katritsis v De Macedo 1966 (1) SA 613 (A)**. In this matter the Appellate Division (as it then was) held that "default" which then as is the case now is not defined in the Rules or the Act, meant a default in relation to filing the necessary documents required by the Rules in opposition to the claim. In casu the judgment was granted in the absence of an opposing affidavit by the Appellant and was therefore a "default judgment" even if it was not a default in the sense of the absence of the party.*

*[13] ...'*

[24] In the present case, the Applicants were only in default in the sense that legal representation failed to appear on their behalf and advance oral argument at the hearing of the matter. It is common cause that an

answering affidavit was filed in the main application, as well as heads of argument and a practice note on behalf of the Applicants. Having regard to what was stated in *Rainbow Farms (Pty) Ltd v Crockery Gladstone Farm supra*, it therefore cannot be found that the judgment and order by Phatudi J on 15 April 2021 constitutes a default judgment. In the result, in my view, there is no need to proceed to deal with the requirements for rescission of judgment in terms of the common law in the present matter. The application for rescission of judgment therefore stands to be dismissed.

[25] I now turn to deal with the counter-application by the Respondents. The judgment and order of 15 April 2021 reads as follows:-

*"1. It is declared that the applicants have properly completed the registration forms in terms of the provisions of the regulations requiring that a Water use be registered that was published in GNR 1352 of 12 November 1999 read with Section 26(1)(c) of the National Water Act 1998 (Act 36 of 1998). In respect of:*

*1.1 Portion 7 of the Farm Wonderboomhoek 550, Registration Division LQ, Limpopo Province,*

*1.2 Portion 23 of the Farm Wonderboomhoek 550, Registration Division LQ, Limpopo Province,*

*1.3 Portion 6 of the Farm Schaapplaats 524, Registration Division LQ,  
Limpopo Province.*

- 2. The third respondent is ordered to take all the necessary steps in order to register the applicants' water use in terms of the provisions of the regulations requiring that a Water use be registered that was published in GNR 1352 of 12 November 1999 read with section 26(1)(c) of the National Water Act 1998 (Act 36 of 1998) in respect of:*

*2.1 Portion 7 of the Farm Wonderboomhoek 550, Registration Division  
LQ, Limpopo Province,*

*2.2 Portion 23 of the Farm Wonderboomhoek 550, Registration  
Division LQ, Limpopo Province,*

*2.3 Portion 6 of the Farm Schaapplaats 524, Registration Division LQ,  
Limpopo Province.*

- 3. The third respondent is ordered to issue registration certificates to the applicants in terms of regulation 7(1) of the provisions of the regulations requiring that a Water use be registered that was published in GNR 1352 of 12 November 1999 read with section 26(1)(c) of the National Water Act 1998 (Act 36 of 1998) in respect of:*

*3.1 Portion 7 of the Farm Wonderboomhoek 550, Registration Division  
LQ, Limpopo Province,*



*3.2 Portion 23 of the Farm Wonderboomhoek 550, Registration Division LQ, Limpopo Province,*

*3.3 Portion 6 of the Farm Schaapplaats 524, Registration Division LQ, Limpopo Province.*

4. *The Respondents are ordered to pay the costs of the application.*

5. *No order as to costs."*

[26] It is clear from a reading of the order in the main application, granted on 15 April 2021, that paragraph 5 thereof is in direct conflict with paragraph 4 thereof.

[27] It was submitted by the Respondents that they never asked for an order in terms of paragraph 5 of the order under case number 6437/2018, nor was such an order sought in the Notice of Motion in the main application.

[28] In terms of **Rule 42(1)(b) of the Uniform Rules of Court**, a court may in addition to any other powers that it may have, *mero motu* or on application of any party vary an order or judgment in which there is an ambiguity or patent error to the extent of the ambiguity or error.



[29] It is clear that the inclusion of paragraph 5 in the order that was granted on 15 April 2021, creates an ambiguity in the order and is the result of a patent error as it was not prayed for in the notice of motion. The notice of motion in the main application in prayer 5 thereof states as follows:-

*"The respondents are ordered to pay the cost of the application."*

In the result the counter-application in respect of prayer 1 of the Notice of Counter Application stands to succeed.

[30] In respect of prayer 2 of the Notice of Counter Application in terms whereof the Respondents apply that an order be granted to compel the 3<sup>rd</sup> Applicant to comply with the order granted on 15 April 2021, I am of the view that this prayer is applied for pre-maturely. The application for rescission of judgment is only finalized in this judgment. It follows automatically that if the 3<sup>rd</sup> Applicant fails to comply with the order of 15 April 2021, the Respondents have other remedies available to them such as contempt of court proceedings. In the result, prayer 2 of the counter-application stands to fail.

[31] The general rule is that costs should follow the event. In the present matter there is no reason to deviate from the general rule, and in the result, the application for rescission of judgment stands to be dismissed

with costs. The Respondents were only partially successful in their counter-application in that only prayer 1 of the counter-application is granted. It can therefore be said that the Applicants, in the refusal of prayer 2, were also partially successful, in the result, in respect of the counter-application, I deem it fit that each party be ordered to pay his/her/its own costs.

[32] In the circumstances the following order is made:-

1. The application for rescission of judgment is dismissed with costs.
2. The 1<sup>st</sup> to 3<sup>rd</sup> Applicants are ordered to pay the costs of the 1<sup>st</sup> to 3<sup>rd</sup> Respondents in the rescission of judgment application, jointly and severally, the one to pay, the other to be absolved.
3. The order granted on 15 April 2021 is amended by deleting order (paragraph or prayer) 5 thereof.
4. Each party to pay his/her/its own costs in respect of the counter-application.



M. NAUDÉ-ODENDAAL

JUDGE OF  
THE HIGH COURT,  
POLOKWANE

DATE OF HEARING: 22 MAY 2023

DELIVERY OF JUDGMENT: 30 AUGUST 2023

APPEARANCES:

FOR THE APPLICANTS: Adv. H. Mpshe

INSTRUCTED BY: The State Attorney,  
Polokwane

FOR THE FIRST TO

THIRD RESPONDENTS: Adv. J. Saunders

INSTRUCTED BY: Jaco Roos Attorneys Inc.  
C/O De Bruin Oberholzer Attorneys  
Polokwane