IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

CASE NUMBER: 1626/2020

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

05.10.2021
DATE **SIGNATURE**

In the rescission application between:-

SIMON DUNCAN NKOSI **First Applicant**

THOBELA AMOSI NKOSI **Second Applicant**

MANDLAMA MAVUSO **Third Applicant**

MOSES NDLOVU **Fourth Applicant**

TIMOTHY FANIE SHABANGU **Fifth Applicant**

ESAAU SAM NKOSI **Sixth Applicant**

THE MEMBERS OF THE FORMER ENDLOVINI TAKS TEAM THAT ACTED AS THE STEERING COMMITTEE FOR THE APPLICANTS **Seventh Applicant**

THE MEMBERS OF THE FARM HERMANSBURG 450 GT LANDGROEP (INCLUDING ALL PERSONS WHO ACT FOR OR THROUGH THE LANDGROEP) **Eighth Applicant**

and

ENDLOVINI COMMUNAL PROPERTY ASSOCIATION **First Respondent**

THE STATION COMMANDER: SAPS MBOMBELA **Second Respondent**

In re:

In the main application between:-

ENDLOVINI COMMUNAL PROPERTY ASSOCIATION **Applicant**

and

SIMON DUNCAN NKOSI **First Respondent**

THOBELA AMOSI NKOSI **Second Respondent**

MANDLAMA MAVUSO **Third Respondent**

MOSES NDLOVU **Fourth Respondent**

TIMOTHY FANIE SHABANGU **Fifth Respondent**

ESAAU SAM NKOSI **Sixth Respondent**

THE MEMBERS OF THE FORMER ENDLOVINI TAKS TEAM THAT ACTED AS THE STEERING COMMITTEE FOR THE APPLICANTS **Seventh Respondent**

THE MEMBERS OF THE FARM HERMANSBURG 450 GT LANDGROEP (INCLUDING ALL PERSONS WHO ACT FOR OR THROUGH THE LANDGROEP) **Eighth Respondent**

THE STATION COMMANDER: SAPS MBOMBELA **Ninth Respondent**

JUDGMENT

GREYLING-COETZER AJ

INTRODUCTION

[1] This is an application wherein the applicants (respondents in the main action, and herein after referred to as "*the applicants*") seek a rescission of the order granted on 10 March 2021. In aforesaid order the rule *nisi* issued on 18 August 2020 by Mashile J, extended on 19 November 2020 by Musa AJ, and further extended on 4 March 2021 to 10 March 2021, was confirmed. This order stated that it was granted as the applicants herein failed to file their opposing papers in the main application.

BACKGROUND

[2] The applicants allege that pursuant to the rule *nisi* being extended by Mashile J, Musa AJ further extended the rule *nisi* to 4 March 2021 in order to give the applicants an opportunity to file their answering affidavit. On 4 March 2021 the answering affidavit was served on the respondents' legal representative,

however the answering affidavit was not filed at court. On 4 March 2021 the applicants were advised that the matter was stood down from 4 March 2021 until 10 March 2021, pending the delivery of the court order dated 18 August 2020 and the transcribed record of the previous proceedings of the matter.

[3] On 8 March 2021 the applicants' answering affidavit was filed at court.

[4] On 9 March 2021 the respondents' legal representative made the transcription of the hearing of 18 August 2020 available to the Registrar and further enquired from the Registrar as to whether the applicants and the applicants' legal representative remained excused for 10 March 2021.

[5] The applicants' legal representative addressed a similar e-mail to the Registrar, enquiring as to appearances of legal representatives and whether there was a facility for virtual appearances. This e-mail was sent shortly after 08h00 on 10 March 2021. Without replying to either of the aforementioned emails, the Registrar sent the order of 10 March 2020 to the parties, which read as follows:-

> "1. *The respondents failed to file opposing papers.*
>
> *2. The rule nisi issued on 18 March 2020 by Mashile J and extended on 19 November 2020 by Musa AJ to 4 March 2021 and further extended on 4 March 2021 to 10 March 2021 is hereby confirmed.*
>
> *3. The respondents to pay the cost of this application jointly and severally the one paying the other to be absolved*."

[6] It is on this basis that the applicants launched the current application submitting that the order was erroneously granted in their absence, after the court found that the applicants' answering affidavit was not filed.

[7] The facts leading up to this rescission application are largely common cause between the parties. In opposition to the rescission application the respondents allege that the applicants have been dilatory in filing their

answering affidavit, notwithstanding being granted various opportunities to do so. According to the respondents on 18 November 2020 Moosa AJ "*threw the applicants a life line*" and granted them an indulgence to file their answering papers. It bears mention that during this period the applicants changed attorneys of record. The respondents admit that the answering affidavit was served on them as alleged by the applicants, but contend that said answering affidavit was not properly commissioned and therefore does not constitute an affidavit, nor was it accompanied by a substantive application for condonation for the late filing thereof.

[8] It is further contended on behalf of the respondents that as the applicants failed to file a properly commissioned affidavit and condonation application, the court cannot *"..'see' those papers just as it cannot 'see' an unrobed counsel in court session*".

[9] *Ex facie* the applicants' answering affidavit, and in respect of the commissioning thereof, each page contains an initial and the last page contains a signature by the deponent as well as the Commissioner of Oath's certificate. What has not been completed was the date and place where the deponent signed and took the declaration.

[10] The commissioning of affidavits are governed by the Regulations under GNR. 1258 of 21 July 1972 made in terms of Section 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963. In terms of Regulation 4 a Commissioner of Oath shall certify that the deponent has acknowledge that he or she knows and understands the content of the declaration and shall state the manner, place and date of taking the declaration. The Commissioner of Oath shall further sign the declaration and print his or her full name and business address below his or her signature, and state his or her designation and the area for which he or she holds his or her appointment, or the office held by him or her, if he or she holds his or her appointment *ex officio*.

[11] Against aforementioned, the applicants' answering affidavit falls short of the place and date of taking the declaration.

[12] That being said, a court has a discretion whether to have regard to the affidavit, notwithstanding the non-compliance with the commissioning. In the matter of **Dawood v Mahomed**[1] it was explained that in deciding whether the non-compliance in respect of the commissioning of an affidavit is of such a nature that the court should refuse to entertain the affidavit, one has to have regard to the nature and purpose of the requirements which have not been complied with. Said reasons for the requirements, more particularly the business address to be indicated, facilitate the task of anyone who might thereafter wish to locate the said Commissioner for any purpose connected to the affidavit and its execution.

[13] An affidavit falling short of the regulations are therefore not automatically of no consequence. The court to whom should an affidavit is submitted will be faced with the decision of entertaining same or not.

[14] Further, from the answering affidavit it appears that although a substantive application for condonation in the form of a notice of motion and founding affidavit had not been filed, the answering affidavit (at paragraphs 139 to 156 thereof) deals with the issue of condonation. Herein various facts are set out in ostensible support for condoning the late filing of the answering affidavit.

[15] It is therefore not technically correct as submitted by the respondents that no condonation application has been made. It has become practice to deal with the issue of condonation in the answering affidavit itself instead of filing a separate substantive application for condonation for the late filing of a document. During argument the court was not referred to any authority contradicting or challenging the correctness of the inclusion of condonation within an affidavit.

[16] As held in **Kgomo and Another v Standard Bank of South Africa**[2] with reference to **Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills**

---

1 1979 (2) SA 361 (D) at 367C to F

2 2016 (2) SA 184 (GP)

(Cape)[3] **and Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd**,[4] the following principles govern rescissions under Rule 42(1)(a):-

(a) The rule must be understood against its common law background.

(b) The basic principle at common law is that once a judgment has been granted, the judge becomes *functus officio*, but subject to certain exceptions of which Rule 42(1)(a) is one.

(c) The rule caters for a mistake in the proceedings.

(d) The mistake may either be one which appears on the record of proceedings, or one which subsequently becomes apparent from the information made available in an application for a rescission of judgment.

(e) A judgment cannot be said to have been granted erroneously in light of a subsequent disclosed defence, which was not known or raised at the time of the default judgment.

(f) The error may arise either in the process of seeking the judgment on the part of the applicant for default judgment, or in the process of granting the default judgment on the part of the court.

(g) The applicant for a rescission is not required to show, over and above the error, that there is good cause for the rescission, as contemplated in Rule 31(2)(b).

[17] Therefore the only thing which is necessary to be shown by the applicants is that the prior order was erroneously sought or erroneously granted in the absence of a party affected thereby. Once the court holds that an order or judgment was erroneously sought or granted, it should without further enquiry

---

3 2003 (6) SA 1 (SCA)
4 2007 (6) SA 87 (SCA)

rescind or vary the order, and it is not necessary for a party to show good cause for the sub-rule to apply.[5]

[18] In deciding whether a judgment was erroneously granted, a court is not confined to the record of proceedings.[6] An order or judgment is erroneously granted if there was an irregularity in the proceedings, or if it was not legally competent for the court to have made such an order.[7]

[19] It is trite that an application in terms of Rule 42 needs to be launched within a reasonable time. For a judgment or order to be erroneously sought and granted, there needs to exist, at the time of its issue, an unknown fact which would have precluded the granting of the judgment, and which would have induced, if aware of it, a basis not to grant the judgment.[8]

[20] From a plain reading of the order granted on 10 March 2021 it appears that the court dealt with the matter in the manner that it did, as no answering affidavit was filed by the applicants. This was then also the reason for the first paragraph of the order.

[21] The argument raised by respondents that the court may very well have been aware of the answering affidavit, but did not "*see it*" due to the fact that it was not accompanied by a condonation application and was non-compliant in respect of the requirements of the commissioning thereof, does not hold water when compared to the plain wording of the order sought to be rescinded.

[22] Being alive to the fact that a judgment cannot be said to have been granted erroneously in light of a subsequent disclosed defence, which was not known or raised at the time of the default judgment, the matter at hand is distinguishable on the fact that the court clearly was unaware of the answering

---

5 **Rossitter v Nedbank Ltd** (Unreported) SCA case number 96/2014 (dated 1 December 2015) at par [16]

6 **Lodhi** *(supra)* at 93C to H

7 **National Pride Trading 452 (Pty) Ltd v Media 24 Ltd** 2010 (6) SA 587 (ECP) at 593F to 594I and **Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others** 1996 (4) SA 411 (C) at 417G to H

8 **Occupiers, Berea v De Wet N.O. and Another** 2017 (5) SA 346 (CC) at 366E to 367A

affidavit being filed on 8 March 2021. In the event that the court had regard to the answering affidavit, but considered same not to be filed on the grounds argued for by the respondents to any other ground for that matter, same would have been have been reflected in the order.

[23] The circumstances of the matter is exacerbated by the fact that the matter was dealt with without appearances from the parties' legal representatives and without oral argument. The court, only having regard to that which was filed in the court file, considered the matter on the papers alone. It follows that had the court been aware of the answering affidavit having been filed, the court would not have granted the order or in the present form. Even if I am wrong in this respect, I am of the view that had the parties appeared, and it was during said appearance brought to the court's attention that the answering affidavit was served on 4 March 2021 and filed in court on 8 March 2021, the court would, at the very least, not have granted paragraph 1 of the order.

[24] In the circumstances the default judgment stands to be rescinded.

[25] Cost is ultimately in the discretion of the court. The general rule is that cost follows the event, and that the successful party should be awarded his or her costs.

[26] In the matter at hand I am of the view that it would not be just to award costs to the applicants. Having regard to the circumstances and the necessity of this rescission application, it is clear that the applicants, although in my view entitled to the order, did not act as diligently as one would have expected of a party who professes to be serious about opposing the rule *nisi* which was granted. Had the applicants filed the answering affidavit prior to the hearing of 4 March 2021 as it was supposed to, alternatively ensured that it was brought to the attention of the court, this application could have been avoided. Equally so the application could have been avoided if the respondents approached the issue differently and having found that the defences raised were meritless they similarly are not entitled to costs.

[27] Consequentially the following order is made:-

1. The order dated 10 March 2021 is hereby rescinded and set aside.

2. The rule nisi granted and extended to 10 March 2021 is hereby extended to 3 March 2022;

3. The parties are ordered to co-operate with one another, complete a Form B and file same with the registrar to secure the hearing date per 3 above.

4. Each party to pay its own costs.

GREVLING-COETZER AJ

DATE OF HEARING:	31 August 2021
DATE OF JUDGMENT:	5 October 2021
FOR THE APPLICANTS:	Adv Khumalo Instructed by Dlamini Legal Inc Attorneys E-mail: nduduzi@dlaminilegal.co.za Ref: Lit/21/Endlovini c/o T Mabunda Attorneys Ref: N0002/TM/2021
FOR THE RESPONDENTS:	Adv Janse van Vuuren Instructed by Richard Spoor Inc Attorneys E-mail: george@rsinc.co.za Ref: Spoor/Kahn/Endlovini CPA c/o Cochrane Attorneys Ref: RSI/Kahn