REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT, PRETORIA

16/5/14

CASE NO: 3489/07 and
CASE NO: 8456/07

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

16 May 2014
~~13 FEBRUARY 2014~~

KE MATOJANE

In the matter between:

BLUE CELL (PTY) LTD (IN LIQUIDATION)	APPLICANT
and	
BLUE FINANCIAL SERVICES LIMITED	1ST RESPONDENT
BLUE EMPLOYEE BENEFITS (PTY) LTD	2ND RESPONDENT
VAN NIEKERK, DAVE	3RD RESPONDENT
SMIT, WESSEL	4TH RESPONDENT
VAN DER WESTHUIZEN, RENIER	5TH RESPONDENT
MOSTERT, WAYNE ANTON	6TH RESPONDENT

MATOJANE, J

[1] The first and second respondents ("the respondents") apply for leave to appeal against the judgment and order granted against them on the 13 February 2004, in terms of which judgment and order: The costs order made on 8 May 2007 under case number 3489/07 and case number 8456/07 was set aside, and substituted with an order directing the first respondent, jointly and severally, with the second to fifth respondents, to pay the costs of the application for specific performance and the liquidation on a scale as between attorney and client.

[2] This court in the earlier application liquidated applicant at the instance of the respondents and refused applicant's application seeking a statement of account and payment of its revenue from the respondents. Applicant was mulcted in costs. It is common cause that the court was misled and defrauded into liquidating the applicant and refusing the order for specific performance. The costs order is the only portion still alive. Unless the costs order is reconsidered, It would be manifestly inequitable and not in the interest of justice to implement the costs order given against the applicant as a result of fraud and dishonesty.

[3] The respondents contends that while a judgment can be rescinded under common law, the requirements necessary to be fulfilled in this regard are those set out in **Childerley Estate Stores v Standard Bank of SA Ltd** 1924 OPD 163. They submit that this court has no inherent jurisdiction to rescind its orders outside of this authority.

[4] The common law power of this court to rescind its own final judgments was discussed in **De Wet and Others v Western Bank Ltd** 1979(2) SA. Trengove AJA as he then was stated at 1040 D that the court's power to rescind its own judgments and orders, in cases where the merits of the dispute between the parties have not been gone into, is not confined to cases of fraud or the exceptional cases of Justus error which are referred to in the Childerley case, but may be exercised on wider grounds than those, at 1041 C-E he said :

> *"The Courts of Holland, as I have mentioned, appear to have had a relatively wide discretion in regard to the rescission of default judgments, and a distinction seems to have been drawn between the rescission of default judgments, which had been granted without going into the merits of the dispute between the parties, and the rescission of final and definitive judgments, whether by default or not, after evidence had been adduced on the merits of the dispute. (Cf Athanassiou v Schultz 1956(4) SA 357 (W) at 360G and Verkouteren v Savage 1918 AD 143 at 144). In the former instance the Court enjoyed relatively wide powers of rescission, whereas in the latter event the Court was, generally speaking, regarded as being functus officio, and judgments could only be set aside on the limited grounds mentioned in the Childerley case. (Cf Voet 2.11.9 and Loenius Decisien en Observatien cas 109)."*

[5] In **Firestone South Africa (Pty) Ltd v Genticuro AG** 1977(4) SA 298 (A) at 306H - 308A four exceptions to the rule that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it is set out. The exceptions are clearly set out in the headnote and I quote them for convenience:

> *"Once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased. There are,*

however, a few exceptions to that rule. Thus, provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following cases: (1) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, that the court overlooked or inadvertently omitted to grant. (2) The court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter 'the sense and substance' of the judgment or order. (3) The court may correct a clerical, arithmetical, or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance. (4) Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order.

The above list is not exhaustive: the question whether the court has an inherent general discretionary power to correct any other error in its own judgment or order in appropriate circumstances, especially as to costs, raised but not decided. On the assumption that the court has a discretionary power this should be sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded - interest reipublicae ut sit finis litium."

[6] The court held that the list of exceptions to the *functus officio* rule was not exhaustive. Given the circumstances in that case the court was prepared to assume in the applicant's favour that the court does retain a general discretion to correct, or supplement, its judgment or order in appropriate cases other than those listed in the judgment, but warned that "*the assumed discretionary power is obviously one that should be very sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded – interest reipublicae ut sit finis litium*".

[7] The constitutional court in **Zondi v MEC, Traditional and Local Government Affairs and others** 2006(3) SA 1 CC at par 34 after a reference to **West Rand Estates Ltd v New Zealand Insurance Co. Ltd** 1926 AD 173 at 178 held that the common law general rule that an order once made is unalterable was departed from when it was in the interest of justice to do so and where there was a need to adapt the common law to changing circumstances and to meet modern exigencies. The court reaffirmed the inherent power of a court to regulate its own process and the principle that when justice required it a court had the power to amend its own order.

[8] In the instant case, justice and necessity requires that the earlier court order be amended or substituted as the court was misled and defrauded in granting it. As it was correctly argued by counsel for the applicant in his heads of argument and in court, costs is an ancillary issue and does not warrant a rehearing of substantive issues under the circumstances where subsequent events relating thereto exposes an injustice. Consequently, in my judgment, the application for leave to appeal must fail as there is no reasonable prospect that another court will come to a different conclusion than this court.

[9] After entering judgment against the defendants on the 13 February 2004 it was brought to my attention that the attorney and own client costs orders I awarded in favour of the applicant in respect of the two applications ("the 2007 applications") and the variation application itself were erroneously granted jointly and severally against first to fifth respondent. The cost orders ought to have been granted jointly and severally against first to fourth respondent as the application against the fifth respondent was settled and withdrawn by notice of

withdrawal. The orders also inadvertently omitted to expressly include the applicant's costs consequent upon employment of two counsel and also past reserved costs orders as was specifically dealt with and ordered by Bertelsmann J in his party and party costs orders in the 2007 applications.

[10] A letter by applicant's attorneys was addressed to the respondent's attorney requesting them to confirm and agree that the attorney and own client costs orders in favour of the applicant would include the costs consequent upon the employment of two counsel and the past reserved cost orders granted in the 2007 applications. The respondent's attorneys refused to agree to the request and insisted that the punitive costs orders in favour of the applicant stand as they are. A formal application was brought and for convenience, the application was heard together with the application for leave to appeal.

[11] I should point out that it is apparent from my order of the 13 February 2004 that I inadvertently omitted to expressly make provision for the costs consequent upon employment of two counsels as ordered by Bertelsmann J in the 2007 applications, as well as the reserved costs in the past.

[12] The then Appellate Division in **West Rand Estate** case, supra, was called upon to consider whether it had the power to amend its order. The court in giving judgment for an amount due under an insurance policy overlooked the fact that *mora* interest had been claimed and made no order in that regard. In an application made to the court that such interest be granted, the court in amending its order stated that it was doing justice between the same parties as this is a plain matter of necessity and justice.

[13] I agree that it was open for the applicant who is aggrieved by the order to be heard on an appropriate order as to costs and that the court has the inherent power to supplement its costs order so as to provide for past reserved costs orders not expressly dealt with therein.

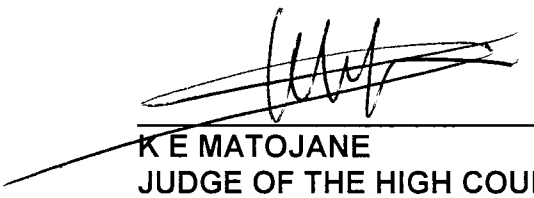
[14] In the result

a. The application for leave to appeal is dismissed with costs, including the costs of two counsel.

b. The order for costs I made on the 13 February 2014 is accordingly clarified and altered to read as follows:

1. The two cost orders made in the two 2007 applications are set aside and substituted with an order that the first to fourth respondents jointly and severally pay the costs in respect of the two applications on a scale as between attorney and his own client, which costs are to include, the costs consequent upon the employment of two counsel. The defendants are also ordered to pay those costs that were reserved.

2. The costs of the setting aside / variation application are to be paid by the first to the fourth respondents jointly and severally on a scale as between attorney and his own client, which costs are to include, the costs consequent upon the employment of two counsel.



K E MATOJANE
JUDGE OF THE HIGH COURT