

29/5/17

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



Case Number: 96247/15

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED

5/6/2017

DATE

SIGNATURE

In the matter between:

RIGNEY: CECILIA SANDRA

Applicant

and

BMW FINANCIAL SERVICES

Respondent

Coram: HUGHES J

REASONS FOR DISMISSING RESCISSION APPLICATION

HUGHES J

[1] This rescission application was before me on the opposed motion court roll on 29 May 2017.

[2] From the outset of these proceedings, I must highlight, that the respondent opposed the rescission application initiated by the applicant.

[3] In doing so, the respondent raised, in my view, two pertinent points *in limine* and in addition, took the applicant to task as regards the basis upon which the rescission application is sought.

[4] The first point *in limine* raised by the respondent is the applicant's failure to comply with the Uniform Rules of this Court, in application proceedings, specifically so, Rule 6(5) (a) which reads:

"Every application other than one brought ex parte must be brought on notice of motion as near as may be in accordance with form 2 (a) of the first schedule and true copies of the notice and all annexures thereto, must be served upon every party to whom notice thereof is to be given."

[5] The respondent submitted that, the application before this court is defective as it is not set out in the format of Form 2(a), as is required by Rule 6(5) (a) set out above. In addition, it was pointed out that the costs orders sought by the respondent are conflicting, to which I concur. Further, that the grounds for the application, that being that the judgement was fraudulent, are only incorporated in the prayer portion for the relief sought.

[6] I glean from the prayers sought in the application, the applicant no longer seek a rescission of the judgment but rather a review and setting aside of the judgement. This is contrary to application for rescission launched and set out in the notice of the application.

[7] In short, the relief sought in the application notice is at variance with that relief reflected at the end of the applicant's so called founding affidavit. The founding affidavit does not conform to that which constitutes an affidavit. It is likewise with the supporting affidavits of both Cedric Rigney and that of Eldrid Maheppy. With regards to the latter's supporting affidavit, it is noted, that he deposed to the supporting affidavit prior to the founding affidavit being deposed to. How is that possible? In

addition, the supporting affidavits do not abide by the prescripts of Regulation 4 of the Justice of the Peace and Commissioners Oaths Act 16 of 1963. Regulation 4 reads as follows:

“(1) below the deponent’s signature or mark the commissioner of oath shall certify that the deponent has acknowledged that he knows and understand the contents of the declaration and he shall state the manner, place and date of taking the declaration.

(2) The commissioner of oath shall-

- a) Sign the declaration and print his full name and business address below his signature: and*
- b) State his designation and the area for which he holds his appointment or the office held by him if holds his appointment ex officio”*

None of the peremptory requisites set out above have been adhered to in respect of the founding affidavit and the supporting affidavits of both Cedrick Rigney and Eldrid Maheppy.

[8] Lastly, the application is brought in terms of Rule 31 (5) (d) which states as follows:

“Any party dissatisfied with a judgement granted or direction given by registrar may, within 20 days after such party acquired knowledge of such judgement or direction, set the matter down for reconsideration by the court.”

[9] The respondent correctly points out in its heads of argument, that nowhere in the application of the applicant does she state the basis upon which the rescission application is sought.

[10] I concur with the respondent, that this application does not set out whether the rescission is based on either the Common Law, Rule 31 (2) (b) or Rule 42 (1), but for setting out the rule for a reconsideration, which is in conflict with the rescission

sought in the founding affidavit. The reconsideration and the rescission are both, in further conflict with the prayers for a review sought in the founding affidavit.

[11] These papers are just in royal mess. On the points *in limine* raised above the application falls to be dismissed.

[12] In the prevailing circumstances, the respondent seek costs on an attorney and client scale. They make out a case that the applicant has not taken this court into its confidence and has either not been candid with the court or has bent the truth on numerous occasions.

[13] It is trite, that only in extra-ordinary circumstances and if special considerations arise out of the conduct of the parties or the circumstances that gave rise to this application, may a punitive costs order be granted. This would ensure that the party seeking such an order is not put out of pocket and is thus not to be granted lightly.

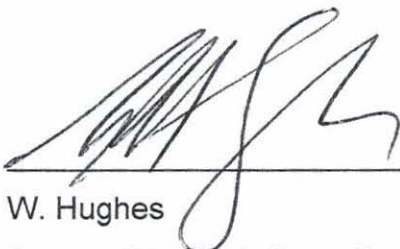
[14] The special circumstances above include but are not limited to, where a party acts dishonestly, fraudulently, in a vexatious manner, recklessly, maliciously and had frivolous motives or committed a grave misconduct in the conduct of the case itself. See **Herbstein and Van Winsen** *The Civil Practice of the High Courts of South Africa* (5 Ed) at pages 971 to 973.

[15] In the context of the preceding paragraph it is evident to me, that at the least, I find that this application was instituted by the applicant in a in a reckless manner. The respondent, in my view, is thus entitled to the punitive costs order sought on an attorney and client basis. This is besides the fact that the contract entered into by the applicant makes provision for costs to be granted on that specific scale.

[16] Consequently I make the following order;

[16.1] The application for rescission is dismissed with costs.

[16.2] The scale of the aforesaid costs is ordered to be on an attorney and client scale.



W. Hughes
Judge of the High Court Gauteng,
Pretoria