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

CASE NO.: 49281/2019

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED

In the matter between:

SELLO ELLY MOGODIRI	1st Applicant
BAHLALEFI PROJECTS (Pty) Ltd	2nd Applicant

And

EXCLUSIVE LOG CABINS CC	1st Respondent
THE SHERIF (BRITS)	2nd Respondent

JUDGEMENT

NQUMSE AJ

INTRODUCTION

[1] This is an application to rescind and to set aside the orders which were granted by this court under the case numbers and on the dates hereunder.

[1.1] the order under case number 49281/2019 dated March 2011 and 28 November 2012;

[1.2] the order dismissing an application for rescission dated 14 February 2014;

[1.3] the setting aside of a warrant of execution and the urgent stay of the sale in execution of the applicant's member's interest in the second applicant and

[1.4] the cost order which were granted in the abovementioned matters rescinded and set aside.

THE PARTIES

[2] The first applicant is Sello Elly Mogodiri in personal capacity whilst the second applicant is a private company registered and incorporated in terms of the laws of the Republic of South Africa. The second applicant is joined in this application owing to its interest in the attachment of the first applicant's member's interest/shares in the second applicant.

[3] The first respondent is Exclusive Log Cabins CC, trading as Exclusive Build, a close corporation duly registered in terms of the laws of the Republic of South Africa.

[4] The second respondent is the sheriff for the district of Brits with its main place of business situated at 62 Ludorf Street, Brits North West Province. The second respondent is cited in so far as he may have an interest in the application, otherwise no relief is sought against it, save in the event of apposition to the application.

[5] For sake of convenience, I shall refer to the first applicant as the "applicant" and the first respondent as the "respondent".

[6] The facts and chronology of events underlying this application albeit dating back a number of years and characterized by a bitter strife between the applicant and the first respondent can be summarized as follows.

[7] During August 2008 the second respondent had acquired property, which it registered in its name on 5 June 2009. After the applicant receiving advice on a builder who was allowed to build on the estate where the property was situated, he made contact with Mr Van Rensburg of the first respondent who indicated that he was already in possession of plans for the property which had been drafted for someone else.

[8] Subsequently, on 9 January 2009 the applicant entered into a written agreement (the agreement) with the respondent. According to the agreement the applicant was required to pay to the respondent an amount of R356 250. 00 as a payment towards the building works inclusive of the plans that were required for the design of the structure.

[9] Due to the failure by the applicant to pay the aforesaid amount, it resulted in the respondent during August 2009 to cancel the agreement and claimed from the applicant damages in the amount of R1.4 million which allegedly arose from the loss of profit by the respondent. Following the cancellation of the agreement summons was issued around 13 August 2009.

[10] On 26 January 2010 the applicant filed its plea to the summons which was followed by a trial date for 2 February 2011. The applicant's attorney a Mr Lourens in Brits appointed a Mr de Beer of Gerhard de Beer attorneys who were in Pretoria as their correspondence in order to appear on behalf of Mr Lourens whenever that need may arise. On 28 November 2012 Makgoba J, gave judgement against the applicant for a amount of R601 486. 56 and costs were awarded against the applicant on a scale of between attorney and client.

[11] According to the applicant, it was only in April 2013 when the sheriff attempted to execute a writ against his assets did he become aware of the court orders. He made telephonic enquiries from his attorney Mr Lourens who did not give him a clear explanation, who only promised that he was going to revert back to him. He received a call from the second respondent informing him of his intention to attach his property in execution of a warrant issued in respect of costs in the amount

of R70 000. Since then he made telephonic calls to Mr Lourens which were unanswered and he left messages that were never responded to.

[12] On 24 May 2013 the applicant consulted with Rangwako attorneys and instructed them to investigate the matter and to take up the issue with the respondent and his erstwhile attorney. Mr Rangwako informed him that the court file could not be traced. He further informed him that he did not have all the documents pertaining to the case except the letter of cancellation of the contract from the respondent's attorneys as well as the building contract. When Mr Rangwako contacted Mr de Beer, he was provided with the copy of the summons, plea and a notice of withdrawal as a correspondent attorney.

[13] Mr Rangwako was further provided by the second respondent with copies of the court orders together with the writs in respect of the judgement amount and the writ for costs. The applicant further contends that Mr Rangwako was informed by Mr Lourens by means of a letter that the applicant had terminated his services and had instructed de Beer to defend him in the matter. He denies that allegation by Mr Lourens. He also found disturbing is the withdrawal of de Beer as correspondent without his knowledge. The letter of Mr Rangwako to Mr Lourens and the reply thereto were both attached to the founding affidavit as annexures "A9" and "A10".

[14] The applicant denies that the order against him was granted by agreement between the parties. According to the applicant he was never made aware that the matter was on trial. Even Mr Lourens denies having been involved in the negotiations in a settlement agreement on the matter. The applicant further referred to a statement by Mr Lourens wherein he denies that he was involved in the pre-trial meeting on 25 January 2011, which was held at Circle Chambers in Pretoria. To this effect he annexed the copy of the statement as annexure "A12". Since he still awaited the trial date for his matter, it came as a huge surprise to hear of the judgements against him.

[15] The applicant further avers that in 2013 he brought an application to rescind the court's order, but only learned that it was dismissed in 2016, since he did not contact Mr Rangwako regularly to enquire about his matter. After 4 April 2016, the

sheriff attached his interest in the close corporation. He tried to contact Mr Rangwako to no avail and he resorted to appoint his current attorneys who instructed counsel in the matter. In the meantime he learnt that Mr Rangwako had withdrawn as his attorney of record on 08 October 2013, something he was not aware of. Correspondence to this effect is attached as Annexure “A13”. A notice of set down for the hearing of the application for rescission was filed on 6 November 2013 by the respondent and the matter was set down for hearing on 14 February 2013. According to the applicant, the notice was delivered to Mr Rangwako but he never received it.

[16] It is further contended by the applicant that the judgement against him should not have been granted since he was not the contracting party and the property was owned by a Close Corporation. Furthermore, the respondent was not entitled to any remuneration in terms of the contract since the property was not registered with the National Home Builders Registration Council (NHBRC). The applicant contended that the application for rescission was not properly set down as neither himself nor his previous attorney were made aware of the hearing of the matter.

[17] According to the applicant he has a *bona fide* defence because the respondent is not entitled to claim any costs in respect of damages since the property was not registered in terms of the Housing Consumers Protection Measures Act, Act 95 of 1998. The applicant further contends that the contract did not comply with the provisions of section 13 (1) and 13 (2) as well as sections 14 (1) and 14 (2) of the Act. He also contends that the contract did not take effect until the conditions which are contained in paragraph 12 of the Act had been complied with. He also contends that according to the aforesaid legislation the respondent cannot claim any such amount from him but from the employer which in this case is the close corporation. Since the respondent was not legally entitled to start work on the property, no costs and losses could have been incurred.

[18] In his opposition on behalf of the first respondent Johan Hendrick Janse Van Rensburg sought indulgence for the late filing of its opposing affidavit. In support of its condonation application the respondent stated that is in almost ten years since the start of the matter it is for the first time to seek indulgence from the court. The

following circumstances are a reasons for the delay in the filing of the opposing affidavit.

[19] During 1976 whilst an employee of the Nuclear Energy Corporation of South Africa (NECSA), he inhaled enriched uranium powder which was discovered during 2009 when he visited his cardiologist; a scan of his lungs indicated that the enriched uranium was gradually breaking down his lungs capacity and affected his ability to sustain physical involvement in the business. As a result it had an undeniable impact on his income and also made it difficult for him to fund this litigation.

[20] His situation is compounded in the dishonest manner in which the applicant litigates the matter. By way of example, the applicant waited until the last day which was 25 August 2016, to launch an urgent application to stop an auction of his masserati and a Bentley vehicle that were to be auctioned on, 26 August 2016. Even though the applicant was ordered to pay the wasted costs for the execution, such costs are yet to be paid. Since the costs of the main application were referred to be argued in the application for the rescission, he had to pay the costs of his advocate and attorney who were involved in opposing the urgent application. He also had to pay a further deposit in order to have the opposing papers drafted for filing in opposition to the second application for rescission.

[21] He also contended that, even though it was not financially possible to finance the ongoing litigation. When he was advised that the applicant had managed to enroll this matter in the High Court within a few days notice, he had to borrow money to urgently instruct the attorneys to draft the papers which he is now in a position to file. He further averred that he had to file voluminous papers which dealt with the long history of frustration and delays of the matter. That he had to do within a short time since the applicant had, despite the common knowledge that it takes approximately two to three month to obtain a date for hearing on the unopposed motion roll, managed to set down the matter down in less than 5 days. He concludes his application by contending that the granting of the condonation will not cause any distraction, harm or prejudice towards the applicant and it will be in the interest of justice to include the opposing affidavit in the final determination of the matter.

[22] In opposing the condonation application, the main issue that was taken by the applicant is the lack of a supporting affidavit from the first respondent's medical doctor to sustain the allegations he made regarding his ill health.

[23] After hearing the application for condonation, I found that the explanation is plausible and adequate. Further, no prejudice will be suffered by the applicant. Therefore it is in the interest of justice that condonation be granted.

[24] I shall now refer to those facts by the respondent which are at variance, or not mentioned or clearly set out in the applicants' papers. He stated as follows.

[25] According to Van Rensburg, the first applicant seem to hide from this court the reasons for the existence of the orders that were granted against him. He stated that the applicant brought this application under dubious circumstances and that his application which is launched on the same facts as the previous application and dismissed with costs cannot succeed. According to him the orders granted in March 2011 and 28 November 2012 relate to the orders where the applicant was found to be liable for payment of the capital amount, interest as well as costs. Whilst the order of 14 November 2014 relates to the unsuccessful application to rescind the two former orders. He contends that the applicant knew about the orders against him since April 2013. He referred to his answering affidavit which was filed in response to the earlier rescission application were he stated.

> [26.1] The summons in the main action was duly served on Mr Mogodiri (applicant) personally on 8 October 2009;
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> [26.2] Mr Mogidiri failed to file his plea timeously and it was necessary to serve him with a notice of bar on his attorneys of record;
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> [26.3] The plea was received and after close of pleadings, the first respondent applied for a trial date. During February 2010, he was served with a notice of set down for 2 February 2011. He failed to file his discovery affidavit and it was necessary for the first respondent to file an application to compel discovery which was eventually filed two months later;

[26.4] Shortly before the commencement of the trial it was agreed at a pre-trial conference with the defendant's attorney of record Mr Lourens, that the parties will separate the quantum and merits. The agreement was confirmed in a letter.

[26.5] A day before the commencement of the trial on 2 February 2011, Mr Gerhard de Beer, indicated that he held instructions from Mr Mogidiri to apply for a postponement of the matter. The reason advanced for the postponement was that Mogidiri was not available to adduce evidence during trial. The postponement was granted with an order for the applicant to pay the costs. Despite those costs having been taxed on 5 July 2012, he has not yet paid them.

[26.6] A new trial date was obtained and the matter was set down for 5 April 2011. After the filing of the notice of set down on his attorney, his attorney withdrew as an attorney of record, 8 months later. The notice of set down was served on 5 April 2011, whilst the attorney withdrew on February 2012.

[26.7] On 20 March 2012 the Honourable Judge Van Der Merwe granted an order annexed as annexure "J1". On 13 October 2012, the first respondent taxed the bill of costs with regards to the court order obtained under "J1". The allocator is annexed to the opposing papers of the previous application as "J4". On 28 November 2012 the order with regard to the capital, interest and costs was duly granted by Makgoba J, a copy of the order is annexed as "J2".

[26.8] Approximately one and a half months before the trial on 28 November 2012, the first respondent's attorney Mr Gert Van Der Merwe, received a telephone call from Mr Lourens. Discussions of the telephone call were:

[26.8.1] Mr Lourens confirmed that he received the notice of set down for 28 November 2012.

[26.8.2] Mr Lourens informed Mr Van Der Merwe that he was awaiting for instructions from Mr Mogidiri but that he was slow and reluctant to give instructions. Mr Lourens further indicated that he would in all likelihood have to withdraw as attorney of record because of the fact that Mr Mogidiri did not pay him.

[26.8.3] Then Mr Van Der Merwe informed Mr Lourens that he was obliged to serve the notice of set down on him as he was still his attorney of record. It was only the correspondent attorney, Mr Gerhard de Beer who withdrew.

[26.9] Notwithstanding the fact that Mr Lourens was fully aware of the trial date and did not withdraw as attorney of record, there was no appearance on behalf of Mr Mogidiri on 28 November 2012.

[26.10] At roll call, the honourable Judge Van Der Merwe indicated that it would be necessary for the first respondent to present evidence with regards to the quantum of its claim. The trial was allocated to Judge Makgoba. The plaintiff (the first respondent) called its expert witness who gave evidence. After hearing of the expert evidence, Judge Makgoba granted the order as per, “J2”. Pursuant to the aforesaid the first respondent duly taxed its bill of costs. However, the costs were never paid.

[27] Mr Van Ransburg contends that it is patently untrue and dishonest for the applicant to allege that he got word of the orders during the latter part of April 2013. He further contends that even if it can be assumed that he got the news of the orders in April 2013, the question remains whether he acted as expeditiously as possible and within a reasonable time.

[28] He further contends that whilst the applicant launched an application to rescind and set aside the orders granted on 28 November 2012, he never applied for

rescission of the order obtained on 20 March 2012 or the costs order as a result of the postponement of 2 February 2011. It is further contended that the first applicant's affidavit in support of his previous rescission application was vague and embarrassing where it refers to something which had not been done between himself and, his attorney, Mr Lourens and de Beer. According to van Rensburg, when the applicant appointed Rangwako, he knew that it would severely affect his position if he again allows an attorney to cause an order to be granted in his absence as he alleged with regards to Mr Lourens and Mr de Beer.

[29] The failure by applicant to deal with his bona fide defense in his previous application for rescission caused an opposing affidavit to be served on his, Rangwako attorneys on 30 July 2013. A copy thereof is annexed as "J4", (it is requested by the first respondent that the contents thereof be `incorporated herein as if specifically repeated as it will play a pivotal role in the determination of this application). Again the applicant failed to furnish his attorney with an instruction and failed to file a replying affidavit, a practice note, heads of argument on even index the papers despite having been invited to do so. This led, so it was contended, to the withdrawal of Rangwako attorney on 8 October 2013. A copy of the notice of withdrawal is annexed as "S2"and the service affidavit by a candidate attorney at the office of the respondent is annexed as "J5".

[30] On 14 February 2014 the application for rescission (of only one of the orders) was dismissed with costs on an attorney and client scale before Justice Prinsloo. A copy of the order is attached as annexure "J6". Despite that being the fourth costs order granted against the applicant and despite it being taxed it has not been paid. Van Rensburg further stated that despite the knowledge gained by the applicant of the orders, he failed to take any steps. He disputes that there were numerous letters exchanged between Mr Mogidiri's representatives and those of the first respondent. The numerous efforts by the applicant to frustrate and delay execution led to an application by the respondent for applicant's sequestration. However, upon the applicant's disclosure of his wealth, he instructed his attorney not to continue with sequestration but rather with the sale in execution. As a result of the attachment of his assets, the applicant launched an urgent application to stop the auction.

[31] An opposing affidavit was served on 6 August 2016 which is attached as annexure “J10” and which the court is requested to incorporate its contents herein as if repeated in order for the court to consider the ill-conceived conduct of the applicant in the launching of the urgent application together with his latest version of the application to rescind the previous orders. The execution was suspended pending the finalization of the fresh application for rescission which was served on 22 August 2016.

[32] In prayer 4 of the notice of motion of the second rescission application, the applicant prays that the order dismissing the first application for rescission and the related costs in respect of the aforesaid order be rescinded and set aside (the order of 14 February 2014). In support of this prayer it appears to be as a result that the applicant could not get hold of Mr Rangwako, his attorney. The respondent’s contention is that no reasonable explanation is given by the applicant on why he never took steps to keep abreast or to ensure that the application is ventilated. There was a heavy onus on him to pursue the application and to ensure that its heard without delay. Instead, so it was contended he hired an attorney after the other, only to give them a bad name afterwards. Respondent contends that there is no clear or acceptable explanation for the failure by the applicant to pursue his previous application for rescission and the fact that his application is launched out of time with no condonation application, he has not acted as is expected for a litigant applying for an indulgence.

[33] Furthermore, the respondent contends that the application is totally flawed. The respondent reiterates that an agreement was reached between the respondent and the applicant (Mr Mogidiri) and he is incorrect to allege that the contract can at any stage be cancelled without any costs involved. The respondent further contends that provisions of the agreement were complied with. This is evident in the drawings, plans and approvals from relevant authorities including the Home Owners Association. All those documents were discovered.

[34] The respondent further avers that it is not reasonable to accept the version of the applicant on the papers without any supporting documents by the so-called incompetent attorneys who became completely hopeless as alleged by the applicant.

Furthermore, nowhere in his papers does the applicant indicate the steps he took against his attorneys or to even lay charges against them with the Law Society.

[35] Dealing with the letters of 30 May 2013 (annexure ÄG" to the founding papers) from Mr Rangwako to Mr Lourens and the reply thereto. The respondent stated that a close reading of the replying letter of Mr Lourens to the letter that was directed to him by Rangwako on 30 May 2011, it shows that he was replying to another or different letter than the one appended as Annexure Ä9" to the founding papers. According to the respondent it is clear that Mr Lourens was acting on behalf of the applicant and Mr de Beer as his correspondent. However, so it is contended, that in an attempt to curb costs Mr Mogididri instructed de Beer directly and hence de Beer was able to withdraw as attorney of record not Mr Lourens. What the applicant was expected to do was to obtain a letter or at least an affidavit from Mr de Beer wherein he deals with these issues. Neither does the applicant explain how Mr de Beer obtained instructions to argue a postponement on his behalf.

[36] It was further contended that the applicant did not make out a case for the relief sougth nor did he play open cards with the court to explain the delay and complete lack of motivation of his own case. Instead he failed to explain how he brought an application for rescission in 2013 and then waited until August 2016 to hear from the sheriff that his application was dismissed. The applicant further failed to show to the court the dates on which he called Mr Rangwako.

[37] On 21 June 2016 the applicant had another set of attorneys, |Mohoko attorneys who also directed a letter to the respondent's attorneys with the following "*We confirm that we act for Sello Mogodiri (our client). We want to inform you that we recently received instructions to rescind judgement obtained against our client under the abovementioned case number of the Pretoria High Court. We will soon serve your offices with the necessary notices.*" On the 21 June 2016 the respondent's attorneys responded through a letter annexed as "J13" which stated the following "*Your client's application was dismissed with costs on an attorney and client scale. The relevance of this information is that you are not aware of the fact that your client has employed every possible effort to delay the inevitable. He has threatened with efforts to apply for rescission since we obtained judgement against him and he has*

failed with each and every effort." The first respondent therefore rejects the allegations that the applicant learnt about the demise of his application for rescission only in August 2016. According to the respondent he knew about it in June 2016 when it was communicated to his third set of attorneys Mahoko attorneys. His attempts to hide it from the court and what he stated under oath amounts to dishonesty on his part. Furthermore, nowhere does he deal with the appointment of Mahoko attorneys and why they refused to act on his behalf and take the matter further.

[38] Regarding the defence of the applicant the respondent contends that in his plea which was filed in the action proceedings, never made reference to the defences he now raises in the application for rescission. Whilst the respondent concedes that the property was not enrolled and registered with NHBRC, it rejects the reliance on Section 14 of the Act as a defence since it contends that it had complied therewith. It is further contended that the legislation does not take away the right of a contracting party to claim damages. With regard to the allegation that the agreement was not entered into by Mr Mogidiri in his personal name, the first respondent referred to the first page of the agreement which mentions Mr Mogidiri and his Identity number as a party to the agreement. Furthermore, he is the sole owner of the membership in the Close Corporation. The applicant, on his own version stated that he only transferred the property on to the name of the Close Corperatation during or about June 2009, after the agreement was concluded.

[39] It is further contended that this is far from what he pleaded in the main action wherein he said the agreement is not binding because it was signed whilst he was married in community of property and "therefore his wife had to consent". In paragraph 3 of the particulars of claim the respondent (plaintiff in the main action) averred that on or about 9 January 2009 and at Pretoria the plaintiff and the defendant entered into a written binding agreement. In his plea, Mogidiri admitted the aforementioned paragraph without any reliance at the later defense of a wrong identity. In reply to the third defense which relates to the suspensive conditions as alleged by the applicant, the respondent refers to the approved building plans and further reiterates the discrepancy between the filed plea and the founding papers in the application. In the plea Mr Mogidiri admits signing the agreement but in his

founding papers he avers that it is the Close Corporation that is responsible for the payment of the contract sum not him in his personal capacity.

[40] The respondent begs the court to dismiss the application with costs as between attorney and client. That the urgent application was launched only to frustrate the inevitable. It is also the respondent's prayer that the costs of the urgent application be paid by the first and second applicant jointly and severally on a scale as between attorney and own client.

[41] In its replying affidavit the applicant draw the court's attention to references made by the respondent to annexures with no motivation as to which part of the annexure is applicable or their relevance. This according to the applicant has caused it difficulty to answer to the opposing affidavit. Therefore, so he contended, the court should disregard the reference to annexures. The applicant denies that he entered into an agreement with the respondent. He concedes that it was signed by and on behalf of the second applicant. The applicant's reply to the fact that he is the defendant in the in the summons is that he was married in community of property at the time and had informed his erstwhile attorney, Mr Lourens as such. He further maintains that Mr Lourens had been struck off the roll of attorneys for his failure to submit the auditor's report for the period ending 28 February 2013. As a result of which he was suspended from practice on 28 September 2014.

[42] He conceded that after the plea was filed I January 2010 the matter was enrolled for hearing which he could not attend due to his attorney who did not inform him on time of the trial date. As a result an application for the postponement of the matter was sought and granted with costs against him. According to information he had received the postponement was argued by Mr De Beer.

[43] He stated that he assumed that Mr De Beer withdrew as correspondent owing to non-payment of fees by Mr Lourens. He further alleges that subsequent to February 2011 he could not get hold of Mr Lourens and he never returned his calls. He was not aware that the matter was later set down for hearing at the beginning of 2012 nor was he aware that his attorney attended a pre-trial conference. He further challenges the incorrectness of the judgment of R601 468.56 granted against him as

invalid and contrary to the law since the agreement entered into with the respondent to build was never registered with the NHBRC.

[44] He also stated that as a result of being a permanent resident of Mafikeng in the North West Province he could not make contact with his erstwhile attorney, Mr Rangwako despite his telephonic attempts to get hold of him. He was however assured that the matter was under control. He did not lay any complaint with the Law Society against with Mr Rangwako since he bore no grudges nor did he want to make life difficult for him.

[45] He assumes that the decision against him is as a result of the non-appearance of his attorneys on 10 February 2014 for an application he was not aware of. Neither did anyone inform him that the matter was on the roll for hearing on 10 February 2014. Nor did he receive any explanation as to what happened. The application he made on 22 August 2016 is as a result of the dismissal of his previous rescission application of 2014. The urgent application to stay the sale was necessitated by the reason of the refusal to stay the proceedings by the respondent's attorneys.

[46] He denies being a responsible party for the delays in the matter save one instance where a cost order was granted against him and he had paid the said costs. That is evident from the letter of the sheriff. He reiterates that he cannot explain why his attorney did not do what was expected from him and why they never appeared on his behalf.

[47] He also contended that the cost order occasioned by the urgent application was tendered by the applicant and not ordered as alleged by the respondent. That amount for costs was paid in full to the sheriff. In response to the speedy enrolment of the matter, he contends that according to the practise directives, all that is required is that the opposing party should be given five days' notice for the set down of the matter. He further denied that the papers were voluminous.

According to the applicant the application for rescission was brought as expeditiously as possible and the explanation that the application was brought within a reasonable time was accepted by Thlapi J.

[48] The applicant further denies that the current application is based on the same facts as the previous application. Furthermore, the respondent did not in his answering affidavit mention that the court should not entertain the application on the grounds that an order based on the same facts and between the same parties had already been granted. The defence of res *judicata* has therefore not been raised.

[49] Whilst admitting that summons was served personally on him, the applicant contends that after he had consulted with his attorney, Mr Laurens he was informed that the matter was set down for February 2011 and was not made aware that the discovery was late. He also contends that the alleged application to compel discovery is not provided to the court. He was also not aware that the quantum and merits were separated as alleged by the respondents. He also laments the fact that the annexure referred to in this regard had not been identified in the opposing papers and consequently, reference to such documentation should be struck from the respondent's affidavit since a litigant cannot be expected to trawl through annexures looking for a passage from a document referred to in general terms.

[50] Applicant further contends that he was not aware that a new trial date was obtained nor the service thereof upon his then attorney. He conceeds that the order granted on 20 March 2012 was in respect of merits and it could have been as a result of the earlier separation of quantum and merits. However, he was not aware of the trial date nor of the order against him until much later. It is also contended that no mention is made when the notice for the taxation of bill of costs was given as it is not clearly set out in annexure "J1". He also alleges that the notice of set down for the hearing of the matter on 28 November 2012 never came to his attention. He further contends that the service could not have been effected by registered post to Mr Lourens. Such a service, so he contended, is invalid.

[51] He also contends that Mr Van Der Merwe did not depose to an affidavit and even if he did, he would not be able to obtain the evidence of Mr Lourens. Further,

the letter Mr Rangwako received from Mr Lourens is incorrect where Mr Lourens stated that he withdrew as attorney whereas it is Mr De Beer who withdrew. He also contends that Mr Van Der Merwe does not say that he made Mr Lourens aware that the judgment was obtained on its merits.

[52] He also stated that the rescission application is against the order of March 2012 not 2011 as referred to incorrectly in the notice of motion. An amendment to this effect would be sought since it is clear from the affidavits that the order referred to is that of March 2012. Regarding Mr Rangwako, he contends that whilst he had instructed him to deal with the matter, he instead referred it to his junior whose details he cannot remember. The applicant further contends that the reference to previous affidavits without reference to a specific paragraph and the conclusion to be drawn by the court should he disallowed since it amounts to a trial by ambush. He further stated that he was not aware of the withdrawal of Mr Rangwako. He could not attend his offices and was led to believe that the matter was being dealt with by a junior attorney who could not assist him.

[53] In paragraph 63 of the replying affidavit the applicant states that he never received the notice of set down at the given address since he was residing temporarily in Mafikeng due to business he was conducting there. It is to be noted that this is contrary to what is stated in paragraph 11.2 wherein he stated that he was residing permanently in Mafikeng. He also contended that he is not to be blamed for the incompetency of Mr Rangwako who failed to pursue his matter. Further, he has not fired any of his erstwhile attorneys he relied on their advice since he is a law abiding person and was not in their control. When he opposed successfully the sequestration application and the subsequent discharge of the provisional sequestration order, he was left with the impression that the matter no longer needed attention and that the respondent was not going ahead with the matter.

[54] He however, concedes that the only orders that sought to be rescinded is that of March 2012 and November 2012. He further reiterated that the document (agreement) was signed in haste on behalf of the second applicant to book a spot and even if that accounts to a valid and binding agreement the first respondent is not

entitled to any compensation as he did not enter into a contract. He denies that the building plans were drawn for him or as per his instructions.

[55] The applicant further contends that since the first respondent was not present in court to know what exactly happened it is denied that the plea was considered when judgment was granted.

[56] In paragraph 86 of the replying affidavit, he denies that the court dealt with the merits of the matter. Instead, as he contended, the matter was dismissed due to lack of appearance. Furthermore, the respondent has failed to place the transcript of proceedings before this court to confirm its allegation.

[57] He further contends that it is difficult to obtain documentation from an attorney who has been struck from the roll. As the files of that attorney have been handed over to the Law Society. He also requests the court to disregard the reference by the first respondent to letters in his paragraphs 86 to 88 of his answering affidavit since, same was not made available to court nor was it pointed out which paragraphs are relevant. He further contends that he had never met with Mr De Beer. He gave instructions to Mr Lourens who in turn instructed Mr De Beer as his correspondent. He further contended that he did not find it necessary to mention the appointment of Mahoko Attorneys who were not able to assist him. The period between 21 June 2016 to 22 August 2016 was taken up by telephonic conversation between Mahoko Attorneys and counsel that who was not available during July 2016 due to court recess and he needed time to obtain documents.

[58] He contends that defences can never be belated. The defences he raised in his founding affidavit should have been raised in the plea to the summons, however, they are valid and had not been considered when the court granted the orders. He also contends that the first respondent should have been aware of those defences but failed to bring them to the attention of the court. Where there is a conflict between the definition of "*employer*" and his name in the contract the first respondent failed to seek a rectification of the contract. He further alleges that the first respondent was aware that the building work could only start once the property has been transferred into the name of the second applicant. It is further contended that

according to advice he has been given, a joint estate is represented by both the husband and wife.

[59] According to the applicant there is no difference between the defences raised in the plea and those raised in the finding affidavit to the application and in any event the defences are not frivolous without merit, nor are they vague and embarrassing. He also denies that the urgent application of 25 August 2016 was brought solely to frustrate and delay the matter. As a result he denies that it should bear the costs of that application but instead costs should be awarded against the first respondent on a punitive scale.

DISCUSSION

[60] In its heads of argument the applicant submitted that it relies on both the common law and Rule 42 as its basis for the rescission.

[61] It is trite that an applicant for rescission under common law must show good cause for her default. It entails that the applicant must:-

1. present a reasonable and acceptable explanation for his default and
2. satisfy the court that on the merits she has a bona fide or substantial defence that prima facie carries some prospect of success.[1] The commonality in the legal principles applicable in Rule 31 (2) (b) makes the principles enunciated in ***Colyn v Tiger Food Industries t/a Meadow Feed Mills*** (***Cape***)[2] relevant wherein the requirements were stated to be;

    (a) giving a reasonable explanation of the default;

    (b) showing that the application is made bona fide; and

    (c) showing that there is a bona fide defence to the plaintiff's claim which prima facie has some prospect of success. In addition the application must be brought within 20 days after the defendant has

[1] Chetty v Law Society, Transvaal 1985 (2) 756 (A) at 765 B-D
[2] Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at 9F

obtained knowledge of the judgment. Therefore the applicant bears the onus to show good cause or sufficient cause why the order against her should be set aside.[3]

[62] The terms "*sufficient cause*" and "*good cause*" have been held to mean the same thing. The only difference is that Rule 31 (2) (b) refers to "good cause" whereas under common law reference is made to "sufficient cause". In ***Chetty***,[4] Miller JA explained the requirements of sufficient cause thus:

> "*the term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered (see* ***Cairns Executors v Gaarn 1912 AD 181 at 186*** per Innes JA*). But it is clear that in principle and in the long standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:*
>
> *i. that the party seeking relief must present a reasonable and acceptable explanation for his default; and*
>
> *ii. that on the merits such part has a bona fide defence which prima facie, carries some prospect of success....*
>
> *It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect on the merits will fail in an application for rescission for a default judgment against him, no matter how reasonable and convincing the explanation for his default. And ordered judicial process would be if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.*"

[3] Sulber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352 H – 353 A
[4] Supra fin 1

[63] Regarding the bona fide defence, it is sufficient if the applicant makes out a prime facie defence in the sense of setting out averments which, if established at the trial, would entitle her to the relief asked for. The applicant need not deal fully with the merits of the case but is required to produce evidence that the probabilities are actually in her favour[5]

[64] In terms of Rule 42 a judgment may be rescinded on the basis that the judgment was erroneously sought or erroneously granted in the absence of any party affected thereby. The requirements under Rule 42 which have been extracted from ***Colyn***[6] and ***Lodhi 2 Properties investments CC and Another v Bondev Developments (Pty) Ltd***[7] by Dodson J and restated in ***Kgomo and Another v Standard Bank of South Africa and Others***[8] have been crystalized as the following:

(1) the rule must be understood against its common law background;

(2) the basic principle of 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;

(3) the rule caters for mistakes in the proceedings;

(4) 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 rescission of judgment;

(5) a judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of default judgment;

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[5] Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at 476-7
[6] fin
[7] 2007 (6) SA 87 (SCA)
[8] 2016 (2) SA 184 (GP)

(6) the error may arise in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court; and

(7) the applicant for rescission is not required to show, over and above the error, that these is good cause for the rescission.

[65] An order under Rule 42 would have been erroneously granted if there existed at the time of its issue a fact which the judge was not aware of and had the judge been aware thereof, would have induced the court not to grant the order sought[9]. In ***Lodhi***[10] the Supreme Court of Appeal qualified the type of facts of which the court was unaware that would be relevant to a rescission under Rule 42 (1) (a) to be facts that would demonstrate whether the plaintiff was procedurally entitled to the order. An order to which a party was procedurally entitled to cannot be considered to have been granted erroneously by reason of facts of which the court was unaware of at the time.[11]

[66] I shall now evaluate the facts before me against the principles of the common law and those under Rule 42 in order to ascertain if the applicant has met the requirements needed to persuade the court to rescind the impugned orders. In carrying out that the exercise. It is appropriate to consider each order separately. Since the order of 2 February 2011 is not attacked and no rescission thereof is sought no consideration therefor will be made except only to the extent it becomes relevant in the evaluation of the entire factual matrix.

[67] It is common cause that pursuant the postponement of the matter which was at the instance of applicant on 2 February 2011, the matter was set down for 20 March 2012. It has to be noted that when the notice of set down for 20 March 2012 was served, it was served on the applicant's attorney, Mr Lourens who was still on record for the applicant. Owing to the default if the applicant on 20 March 2012 an

[9] Nyingwa v Moolman 1993 (2) SA 508 (TK) and Stander and Another v ABSA Bank 1997 (4) 873 (E).
[10] Fin
[11] Lodhi supra at para 25

order against him was obtained on the merits by default and the matter was postponed to 28 November 2012 for determination of quantum.

[68] The notice of set down for hearing on 20 March 2012 was annexed as "EB1" to the first respondent's answering affidavit. It was served on the offices of Mr Lourens on 5 April 2011. Mr Lourens did not take issue with the signature appearing on the return of service as not being that of his employees. I am therefore unable to find that the service is not proper. Under such circumstances, it is my view that the service should be regarded as proper service.

[69] This brings me to another point which relates to the duties of an attorney who ceases to act as the attorney of record. Rule 16 of the Uniform Rules provides as follows:

> *'(1) if an attorney acts on behalf of any party in any proceedings, such attorney shall notify all other parties of this fact and shall supply an address where documents in the proceedings may be served.*
> *(2)(a)……..*
> *(3) ……..*
> *(4)(a) where an attorney acting in any proceedings for a party ceases so to act, such attorney shall forthwith deliver notice thereof to such party, the registrar and all other parties: provided that notice to the party for whom such attorney acted may be given by facsimile or electronic mail in accordance with the provisions of Rule 4A…..*[12]

[70] In ***Sayed NO v Road Accident Fund***[13] Mahon J, commented in the rule as follows:

> "**the *above-quoted provisions make it plain that an attorney, when acting for a litigant, is required to place himself on record in accordance with the rule. Axiomatically, where that attorney ceases to***

[12]

[13] 2021 (3) SA 538 (GP)

act in the matter, he is similarly duty – bound to deliver a notice of withdrawal as attorney of record."[14]

[71] The provisions of the rule above find application in the circumstances of this matter, since there was no formal withdrawal of Mr Lourens as an attorney of record. Therefore, he remains for all intends and purposes an attorney of record for the applicant.

[72] In ***Colyn***[15] the court stated "while the courts are slow to penalise a litigant for his attorney's inept conduct of litigation, there comes a point when these is no alternative but to make the client bear the consequences of his attorneys (**Saloojee and Another NNO v Minister of Community Development**). Even if one takes a benign view, the inadequacy of the explanation may well justify the refusal of rescission on the account unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a bona fide defence which has not merely some prospect, but a good prospect of success (***Melana v Santam Insurance Co. Ltd)***.[16]

[73] I have serious reservations in the explanation of the applicant, that shortly after the postponement of the matter in February 2011, he was never able to get hold of his attorney, Mr Lourens. This is more so, when there has been no confirmatory affidavit deposed to by the secretary who he alleges to have been assisting him whenever he called and when he went to the offices of Mr Lourens, and to whom he left messages. Neither does he indicate who is the person who assured him that the matter is receiving attention and that he will be informed as soon as anything was happening therein. I am therefore not convinced that the applicant has put a satisfactory explanation for his default on 20 March 2011.

[74] I turn to consider the defences raised by the applicant. Most importantly as they appear in his plea to the summons. According to the plea, paragraph 3 thereof is couched in the following terms. '*The defendant admits the contents of this paragraph however, the contract is not a binding contract, due to the fact that the*

[14] Opcit para [12]
[15] Para 12
[16] Citations omitted

defendant is married in community of property and therefore his wife had to consent to the agreement, which she did not do.' A mere reading of the averment above is that whilst the applicant admits the existence of the contact he disputes its binding effect due to his marriage requirements.

[75] In paragraph 5 the plea is in the following terms. '*The defendant denies the contents of this paragraph and put the plaintiff to the proof there off (sic). According to paragraph 10.3 of the said agreement, the 'Employer' as mentioned in the interpretation clause 1, shall be held responsible for the contract sum. According to the interpretation clause 1, the employer is "**Batlhalefi Projects**" and not the defendant, therefore the defendant is not responsible for the contract sum'* (sic).

[76] In paragraph 6 of the plea it is framed in the following terms. '*The defendant denies the contents of this paragraph and put the plaintiff to the proof thereof, due to the fact that the defendant was not in breach of the agreement, due to the fact that conditions or obligations as mentioned in paragraph 6 of the said agreement was not fulfilled, due to the non-approval of various bodies including statutory provisions, which include the following:*

> *6.1. The property was only registered in the name of Batlhelifi Projects CC seven months after signature of this agreement and therefore neither the defendant nor Batlhelefi CC were more legally entitled to start work on the said property as mentioned in the said agreement. This was communicated verbally to the plaintiff*' (sic).

[77] The agreement referred to above was annexed to the applicant's founding affidavit as "A2". In its first page it denotes the following "**Building Agreement** entered into between **Mogodiri SE identity number: [....]** [hereinafter also referred to as the "*the Employer*"] and Exclusive Log Cabins CC t/a Exclusive Build registration number 2000/006788/23, herein duly represented by: JH Janse V. Rensburg [hereinafter referred to as "*the Contractor*"]. The mere reading of the above suggests that the contract was entered into between the applicant and the first respondent. Whilst the employer is defined as meaning BATLHALEFI PROJECTS in clause 1.10, it does not detract from the fact that according to the agreement the

applicant is also referred to as the '*employer*'. Furthermore, Batlhalefi Projects could not have been competent to enter into a contract before its existence.

[78] Another difficulty is to understand the applicant's defence which relates to the type of marriage he has with his wife. I do not find the relevance of this defence if the applicant contends that the agreement was not entered into by him in his personal capacity but an agreement between the Close Corporation and the first respondent. What I also find curious is that the applicant raises a defence of non-joinder, which relates to the Close Corporation which is not cited in the summons, nevertheless proceeds and file a plea and does not take issue of this apparent lack by way of special plea. Better still, since the fact of misjoinder was apparent on the face of the pleadings, the objection may have been raised by way of exception.[17] Furthermore, the allegation that no work could have been performed due to no approval by the Homeowners Association is controverted by the plan which shows the stamp of approval by the Homeowners Association annexed as J11"

[79] Pursuant 2 February 2011, the matter was again heard on 20 March 2011 and again on 28 November 2012. With regard to the hearing of March 2011 a notice of set down was served on the applicants of Lourens Attorneys on 5 April 2011. Regarding the notice of set down for hearing on 28 November, proof thereof was indicated and annexed as "EB". It therefore follows that the attorney of the applicant was made aware of the dates of the hearings of the matter. It is on these bases that the orders were granted against the applicant.

[80] I now turn the examine the conduct of the applicant briefly in order to find if his explanation is satisfactory for the indulgence he seeks.

[81] The applicant's first rescission application pursuant the order of March 2011 was launched on 23 July 2013, a period of two and a half years later. The only explanation given by the applicant for this delay is to blame his attorney. After the launching of the rescission application the first respondent served its answering affidavit. Failure by the applicant to file its heads of argument led to the first

[17] Rule 22 of the Uniform Rules

respondent enrolling the matter for hearing on 10 February 2014. The rescission application was dismissed in the absence of the applicant. The first respondent's attempts to execute led to the sheriff's attempted auction of the applicant's two luxury vehicles to be stopped by an order of stay of proceedings.

[82] It is noteworthy that the applicant appears to gain knowledge of the matter each time the sheriff is involved to execute a writ. What is borne out in the applicant's conduct is that even though he has been aware of the litigation against him which culminated in the hearing of 2 February 2011, he has not acted diligently nor showed any interest in attending to the matter seriously. His attitude of lack lustre in the litigation is again borne out in what happened after the dismissal of the first application on 10 February 2014. The second application for rescission was filed on 22 August 2016, more than a year later. Once again the explanation given is to blame his attorneys for not doing their work. What is to be borne on mind is none of the attorneys of the applicant has been reported for their "*unprofessional*" conduct and the alleged hardship they have caused him to suffer. Instead he gave dubious and ambiguous explanations regarding both Mr Lourens and Mr Rangwako on how they have left his matter to juniors. Similar to Mr Lourens, he gave an explanation that Mr Rangwako passed on his matter to a junior whose details he cannot recall. No explanation is given why he has not attended to the offices of Rangwako to obtain an affidavit from the said junior.

[83] Furthermore, the applicant deliberately choses to be non-committal in his replies. By way of example, in paragraph 46 of his replying affidavit he stated that the application was set down after the attorneys withdrew. He is not clear as to which attorney had withdrawn since in the same affidavit, he disputes that Mr Lourens ever withdrew as his attorney of record. Another example is the averments in paragraph 62 of the replying affidavit which I choose to quote in full and where he states as follows:

> "*It is ordered correct that I could not get hold of Mr Rangwako. I was unaware of his withdrawal in the matter and it can hardly be better explained that I tried to get hold of a person and I could not. I telephoned on numerous occasions but I could not attend at the office. I was unable to talk to Mr*

Rangwako personally. I was led to believe that the matter was being dealt with by a junior who could not assist" (sic).

[84] The above quoted averment confirms my view that the applicant has been vague and not transparent with the court. According to the paragraph quoted above no mention is made as to when did he make the telephonic calls. No mention is made of who he spoke to on the numerous times of his telephone calls. No details are provided of the person who led him to believe that the matter is being attended. No explanation is given why he could not attend the offices of Rangwako. The conduct of the applicant in my view is far from being consistent with an applicant who seeks an indulgence from the court to set aside an order that has been obtained by default.

[85] I now turn to deal with the order of 10 February 2014 dismissing the rescission application. Similar to the other instances the applicant contends that he never received the notice of set down of the hearing on 10 February 2014. The affidavit of Suandri Brandt is very relevant in this regard and for sake of completeness I shall reproduce the relevant portions thereof as follows:

85.1. "paragraph *8, on 28 August 2013 our offices wrote a letter to the applicant's attorneys of record, a copy thereof appended hereto as Annexure "S1" from which I quote the following "Our client filed his answering affidavit on 30 July 2013 and almost a month has now passed and we have not yet received your client's replying affidavit nor any heads of argument. We will now proceed to file our client's practice note and heads of argument to have the matter enrolled on the opposed motion role. (sic) A notice of set down will be served on your offices in due course*".

85.2. *In paragraph 10, the following is stated: On 8 October the applicant's attorneys served a notice of withdrawal as attorneys of record as is evident from Annexure "S2" appended hereto.*

85.3. Paragraph 11 states: Relevant to Annexure "S2" is the fact that the applicant's previous attorneys only indicated the address of the respondent as 83 Kosmosridge, Hartebeespoort Dam. No further information was given.

85.4. Paragraph 12 states: a date of the hearing of the matter on the opposed motion roll was obtained (being 10 February 2014) and a notice of set down was duly drafted. Our messenger attempted to serve the notice of set down in the applicant's previous attorneys of record on or about 6 November 2013 (when the notice of set down was filed) but the applicant's previous attorneys of record refused to accept a copy of the notice of set down.

85.5. Paragraph 13 states: In response to the aforesaid a further letter was forwarded to the applicant's previous attorney of record, a copy thereof appended hereto as Annexure "S3" to which the Honourable Court is kindly referred and from which I quote the following "we are of the humble view that the aforesaid notice is defective in that it does not reflect an address of the applicant's where we will be able to serve any papers with a measure of accuracy. In light of the aforesaid we humbly request you to ensure that you furnish us with all the contact details of the applicant as to ensure effective service of the notice of set down. Kindly note that a copy of this letter will also be appended to our papers and handed to the presiding judge when the matter is heard as to ensure that the court takes cognizance of our attempts to inform the applicant of the date on which the matter will be heard.

*85.6. Paragraph 14 states: Our offices did not receive any response from the applicant's erstwhile attorneys and on 7 January 2014 a further letter was forwarded to the applicant's previous attorneys, a copy thereof is appended hereto as Annexure "S4" from which I quote the following: "**Kindly find appended hereto a copy of the notice of set down which your offices refused to take when we attempted to serve it on you, we will draft a short supplementary affidavit dealing with our attempts to serve the notice of set down on your client"**.*

85.7. *Paragraph 15 states: Annexure "S4" follows an attempt by the respondent to send the notice of set down to the applicant via pre-paid registered post. The Honourable Court will note that the notice was sent on 18 December 2013, a copy of the registered post slip confirming same is appended hereto as Annexure "S5".*

*85.8. Paragraph 16 states: In accordance with the prediction of our offices the registered post letter was returned by the post office with the following endorsement on it "**undelivered unknown address**". A copy of the envelope confirming these facts is appended hereto as Annexure "S6".*

85.9. Paragraph 17 states: I then received instructions from my principal to, again, attempt to serve the notice of set down on the applicant's previous attorneys of record. On 8 January 2014 our messenger attended the offices of the applicant's previous attorneys to serve the notice of set down. Their offices were still closed and a copy of the notice of set down was left under the door at 10h25 in the morning. A copy of the notice with the said endorsement on is appended hereto as Annexure "S7".

85.10. Paragraph 18 states: It is in my view, obvious that the applicant is only frustrating the process of execution under the order granted by this Honourable Court on 28 November 2012.

[86] The above quoted affidavit was placed before the judge on 10 February 2014 when he granted the order dismissing the application for rescission. It follows that all the papers containing the information relevant to the matter including the attempts by respondents to serve the notice of set down were considered by the judge. It is therefore my view that the judgment of 10 February 2014 was not erroneously granted.

[87] In ***Banson and Another v Standard Bank of SA (Pty) Ltd and others***[18] Weiner J, dealt with an application to rescind the dismissal of the rescission

[18] Case No. 17143/2011 (unreported judgment of the Gauteng Local Division,

application by Mia AJ. In that matter applicants had contended that the dismissal was erroneously granted since the applicants had been in court but had waited in the wrong court. After referring to various authorities the learned judge framed the issue to be decided as whether or not the judgment was granted by default and therefore capable of being rescinded. In answering the issue before him be said the following:

> *"…the analogous situation in my view, is that which presents itself in a summary judgment application. In such an application, the defence has to put up an affidavit before the court to oppose the application for summary judgment.*

[88] In paragraph 11 he stated "*In my view, that is the situation in the present case. The Banson's in this case had filed an application for rescission. Standard Bank filed its answer on 14 September 2012 and, therefore the Banson's were entitled to file a reply thereto by the end of September 2012. They did not do so. They took the point that the fourth respondent only filed its answer late on 21 January 2013 and it would have been entitled to reply thereto within the requisite days. However, the matter was only set down by Standard Bank for 13 February 2013 by which time, the period for filing the replying affidavit would have lapsed*. In paragraph 12 he continued and said "*Accordingly all the papers that had been filed were before the court and the court made its judgment upon the record before it. On the papers before it, it was entitled to grant the judgment which it did and, therefore, the judgment was not erroneously granted nor was it a default judgment because the Banson's had filed an affidavit and the court was obliged to have regard thereto*."

[89] In *casu*, the applicant had filed its rescission application which was dismissed on 10 February 2014. All the necessary papers were before the court and were considered by the judge in refusing the application. It is therefore my view that the judgment of 10 February 2014 was not erroneously granted and is therefore not rescindable. If the applicant is of the view that the court erred in dismissing its application for rescission the applicant has the remedy to apply for leave to appeal and the remedy for a subsequent appeal.

[90] In light of all the reasons above I come to the conclusion that the applicant has failed to establish the requirements he has to meet under both the common law or rule 42, to entitle him to the rescission of the various orders sought in the notice of motion.

[91] Finally, on the issue of costs, I had been invited to order costs against the applicant on a punitive scale, regard being had to his conduct in the litigation of the matter over the period of not less than five years. In determining whether the behavior of a litigant is deserving of censure in the form of costs awarded against such litigant, the court will have regard to the conduct of such litigant. Costs are ordinarily ordered on the party and party scale, the court will in the exercise of its discretion and in exceptional circumstances award costs on a punitive scale.[19] In ***Nel v Waterberg Landbouwerkers Kooperatiewe Vereniging***[20] the court found that the explanation for awarding attorney and client's costs which are not authorized by the statute, was with special considerations arising either from the circumstances which give rise to the action or conduct of the losing party. The award is made in a particular case when the court deems it just to ensure that the successful party is not out of pocket in respect of the expenses caused to him or her by the litigation.

[92] The lackadaisical attitude adopted by the applicant in litigating this matter and his patent negligence in attending to same diligently, resulting in a protracted litigation, is in my view deserving of a punitive cost order which shows the disapproval by this court of his behavior.

ORDER

[93] Accordingly, the following order will issue:

1. The application for the rescission of the orders of this court dated 20 March 2011 and 28 November 2012 and the cost orders granted under case number 49281/2009 and the order dismissing an application for rescission and related cost order dated 14 February 2014 is dismissed with costs.

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[19] [2013] 4 ALL SA 346 (GNP) at para [34] and [35]
[20] 1946 AD 5997 at 608

2. Costs to include the reserved costs of 26 August 2016.

3. The applicant is ordered to pay the costs ordered above on the scale as between attorney and client.

M NQUMSE AJ
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the Appellants	:
Instructed by	: Zisiwe Attorneys
For the Respondent	: Adv H Wessels
Instructed by	: Van Der Merwe & Associates
Heard on	: 14 February 2022
Judgement handed down on	: 13 June 2022