

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 34183/2020

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **NO**

Date: 23 September 2024

Signature:

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY
Applicant

And

MARI HAYWOOD N.O Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] This is an application for rescission of an order which was granted by Her Ladyship Leso AJ on 12 October 2020. The application is accompanied by an application for condonation of the delay in instituting the rescission application. Both applications are opposed by the respondents.

[2] The order by Leso AJ was granted unopposed. In terms of the court order, it was declared that the applicant ("the City"):

2.1 was not obligated to make payment of the full amount reflected in the clearance certificate which had been issued by the applicant in terms of Section 118 of the Local Government: Municipal Systems Act, 32 of 2000 (the MSA) to the applicant; and

2.2 that payment by the respondent of the nett proceeds generated by the sale of the immovable property known as Erf 3[...], Rosslyn Ext [...], owned by Wise Design Africa (Pty) Ltd (*in liquidation*), (to which the clearance certificate relates) constitutes full and final payment by the applicant in respect of the City's claim as contemplated in section 118 of the Local Government: Municipal Systems Act, 32 of 2000, read with section 89(5) of the Insolvency Act 24 of 1936 (the Insolvency Act).

[3] The above order was granted unopposed.

[4] The applicant herein seeks the following order:

4.1 Rescinding and setting aside the whole of the default judgment granted by the Honourable Acting Judge Leso on 12 October 2020, under the above case number.

4.2 Stay of execution and/or suspension of the default judgment granted on 12 February 2020 by the Honourable Acting Judge Leso pending the finalization of the rescission application and/or the main application.

4.3 That the Respondent be ordered to pay the cost of the application on a scale between attorney and client.

4.4 That the late filing of this application be and is hereby condoned and the time for filing of this be and is hereby extended to the date on which the application was filed.

B. BACKGROUND

[5] The applicant admits that it became aware of the Court Order in October 2020, after having received the Court Order on 27 October 2020.¹

[6] The applicant, however, only launched its application for rescission more than two years later, in December 2022.² The applicant states the following as to how it dealt with the Court Order upon receipt of it:

6.1 *"Upon been (sic) made aware of such an order of the High Court, I then requested the team to investigate the matter";³*

6.2 *"...hence immediately upon receiving the Court orders, the internal Memorandums were drafted to the office of the Municipal Manager on the Court orders granted and the matter was attended to, which resulted in communication been (sic) made to the Respondent's attorneys".⁴*

6.3 *"On or during August 2021, numerous consultations took place between our attorneys on record and client department and*

¹ Founding affidavit in rescission application.

² Notice of motion in rescission application.

³ Founding affidavit para 8.1.

⁴ Ibid para 8.2.

based on the Court Order of 12 October 2020, an approach to the matter was developed..."⁵

[7] Mr Vorster submits on behalf of the respondent that the above extracts from the founding affidavit are the sum total of the explanation for the delay in the launching of the rescission application, and it is submitted that they fall far short of what is required of a party seeking to rescind a judgment. On the City's own version — it knew of the Court Order in October 2020, and despite allegedly "acting immediately", only developed "an approach" to the matter in August 2021, and thereafter only launched a rescission application 16 months later (in December 2022). No proper explanation for this inordinate delay is provided in the City's application.

[8] Mr Springfield submitted on behalf of the applicant that:

8.1 The Municipality is entitled to impose property rate on all properties within its jurisdiction and the respondent in the present matter is no exception.

8.2 The respondent will not suffer any prejudice at all should the default judgment be rescinded.

8.3 The Municipality's constitutional right to access the Court and to have a meaningful participation in the legal proceedings instituted against it by the respondent had been violated by the respondent's attorneys in approaching the court as the matter was unopposed.

⁵ Founding affidavit para 38.1.

8.4 The Municipality is entitled to be heard as per the principle of *audi alteram partem* rule.

Requirements for condonation

[9] It is trite that an applicant must file an affidavit satisfactorily explaining the delay, which requires the applicant to furnish an explanation of such party's default sufficiently full to enable the Court to understand how it really came about, and to assess such party's conduct and motives.⁶

[10] A full, reasonable explanation, which covers the entire period of delay, must be given. In the case of a long delay, the party in default must satisfy the Court that the relief sought should be granted.⁷

[11] Questions of prejudice do not arise unless the applicant establishes good cause.⁸

[12] Mr Vorster submitted that the applicant's so-called explanations are unsatisfactory and do not cover any part of the inordinate delay and should result in the dismissal of the rescission application.

C. RESCISION OF JUDGMENTS

[13] There are three ways in which a judgment can be rescinded:

13.1 under common law; or

13.2 under Rule 31(2)(b); or

⁶ Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 353A; Scholtz v Merryweather 2014 (6) SA 90 (WCC) at 93 [13].

⁷ Standard General Insurance Co Ltd v Eversafe (Pty) Ltd 2000 (3) SA 87 (W) at 93G.

⁸ Standard General Insurance Co Ltd (*Supra*) at 95E-F.

13.3 under Rule 42(1) of the Uniform Rules (the rules).

[14] The applicant seems to rely on all three of the above grounds in an attempt to rescind the judgment.⁹

Rescission under common law

[15] For a rescission in terms of the common law, sufficient cause must be shown, which means that: (a) there must be a reasonable explanation for the default; (b) the applicant must show that the application was made *bona fide* and (c) the applicant must show that he has a *bona fide* defence, which *prima facie* has some prospects of success.¹⁰

[16] This was confirmed by the Constitutional Court in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and Others*.¹¹

Rescission in terms of Rule 32(2)(b)

[17] In order to successfully rely on this subrule, the applicant must show:

⁹ Founding affidavit paras 9 – 14.

¹⁰ *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042.

¹¹ 2021 (11) BCLR 1263 (CC) at para 71.

- (a) the judgment must be one granted by default before a Court or the Registrar;
- (b) it must have been due to the failure to enter an appearance to defend or a plea;
- (c) show sufficient/good cause for the rescission;
- (d) an absence of wilfulness;
- (e) that there is a reasonable explanation for the default;
- (f) that the application is bona fide and not made with the intention to delay the plaintiff's claim;
- (g) that he has a bona fide defence to the plaintiff's claim.

[18] As regards Rule 32(2)(b), the applicant has inter *alia* failed to meet the above cited requirement. The respondent also failed to bring this application within the twenty-day period prescribed by the Rule or seek condonation in this regard.

Rescission in terms of Rule 42(1)(a)

[19] Rule 42(1)(a) reads as follows:

"The Court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary: (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby".

[20] In *De Wet v Western Bank*¹² the erstwhile Appellate Division held that Rule 42 enables the Court, in addition to any powers it has, to grant relief to an applicant under the circumstances set out in the Rule and that the word "may" indicates that the Court has been vested with a discretion and that this should only be exercised in favour of an applicant if good or sufficient cause in the action were shown. (Emphasis added).

¹² Supra at p. 728.

[21] The respondent's reliance on Rule 42(1)(b) is ill-fated and misplaced. As can be seen from the *Zuma* case¹³ referenced above, Justice Khampepe stated: "...Our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a). And, it certainly cannot have the effect of turning the order granted in absentia, into one erroneously granted..."¹⁴

[22] The respondent has also not presented any coherent *bona fide* defence before the court, thereby failing to meet the requirements for a rescission of the court order.

[23] In *Chetty v Law Society, Transvaal*,¹⁵ Millar AJ (as he then was) held that:

"It is not sufficient if only one of these two requirements (i.e. reasonable explanation or bona fide defence is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated 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."

[24] No reasonable explanation has been given to justify the granting of a rescission of a judgment granted more than 3 years ago. The application cannot succeed.

¹³ Paragraph [16] above.

¹⁴ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and Others* at para 61.

¹⁵ 1985 (2) SA 756 (A) at 764J.

[25] As regards the issue of costs, the general rule is that costs follow the result. I see no reason to depart from therefrom. Accordingly, the following order is made:

(a) The application for rescission is dismissed.

(b) The applicant, the City of Tshwane, is ordered to pay the costs of the application on a scale as between party and party.

J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 31 July 2024

Date of Judgment: 23 September 2024

On behalf of the Plaintiff: Adv. P. Springveldt

Duly instructed by: JL Raphiri Attorneys Incorporated, Pretoria

e-mail: info@raphiriattorneys.co.za

On behalf of the Respondent: Adv J. Vorster

Duly instructed by: Magda Kets Incorporated, Pretoria

e-mail: magda@magdakets.co.za

admin6@magdakets.co.za

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 23 September 2024.