

**IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG DIVISION, PRETORIA**

**CASE NO: 2024/136926**

(1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES: YES / NO  
(3) REVIEWED: YES/NO

**14 April 2025**

In the application by

**JOYCELYN BAPOO ISMAIL**

1st Applicant

**EBRAHIM BAPOO ISMAIL**

2<sup>nd</sup> Applicant

**And**

**GIOVANNI GRANT DAVIS**

Respondent

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**JUDGMENT**

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**Raubenheimer AJ:**

**Order**

[1] In this matter I make the following order:

1. The application is dismissed with costs on scale B.
2. This judgement is to be referred to the Legal Practice Council and the Registrar of this Court for an investigation of the status of Malatji Attorneys as well as the conduct of Adv Molopyane.

[2] The reasons for the order follow below.

### **Introduction**

[3] The respondent is the registered owner of a property located at [...] D[...] Street, E[...], Gauteng which he bought at a sale in execution on 31 May 2024 and of which ownership was transferred to him on 12 July 2024.

[4] The sale in execution resulted from the non-payment of a loan for which the immovable property was offered as security by the previous owners, the Applicants.

[5] The applicants has been in unlawful occupation of the property since registration in favour of the respondent and there is an eviction application pending in the Protea Magistrates Court for the eviction of the applicants.

[6] On 8 October 2024, the applicants launched an application for the rescission of the default judgment and the consequent sale in execution in respect of the property bought by the respondent at the sale in execution which application is still pending.

[7] The applicants issued an urgent application on 4 November 2024 for the stay of the eviction application pending the outcome of the 8 October 2024 rescission application. The order staying the eviction was granted on 4 December in the absence of the respondent.

[8] The respondent applied for a reconsideration of the 4 December 2024 order on 7 February 2025. The application was enrolled on the urgent roll of 18 February 2025. The application was granted on a punitive scale on 18 February

2025 with the effect that the applicant's application for a stay of the eviction application was dismissed.

[9] The applicants brought an urgent application for the rescission of the order granted on 18 February 2025 on the following basis:

*That an order erroneously granted by Default on the 19 February 2025 by His Lordship Judge NYATI in the above matter be rescinded and/or set aside*

[10] The reconsideration application was opposed by the applicants and a full set of papers were exchanged and placed before the court.

[11] The basis for the reconsideration application was that the order was granted without the respondents being notified of the application and that the proof of service placed before the court was false as it did not originate from the Sheriff who purportedly issued the return. The particular Sheriff deposed to an affidavit in support of the reconsideration application wherein he denies that the return originated from his office or that the particular case numbers were registered in his office. The Notice of Motion and the Founding Affidavit bears different case numbers and was served and uploaded onto CaseLines on different days.

[12] The respondent contended that he only became aware of the court order on the day he attended at the Protea Magistrates Court on 15 December 2024 when the eviction application was to be heard.

[13] The applicants contend that on the day of the reconsideration hearing there was a power outage at the Pretoria High Court and consequently the court was "not functional" and "nobody could be allowed to go inside".

[14] They further aver that the court was closed and they were never advised when the court was to resume and how and were consequently not aware that the court proceeded online, hence they were absent when their matter was heard.

[15] The respondents points out that the reconsideration order was granted on the same day that it was on the roll namely 18 February 2025 and that the matter did not proceed on a different date than the date for which it was enrolled on.

[16] In their answering affidavit in the rescission application the respondents challenged the applicant's attorneys to provide proof of their Legal Practice Council membership. This challenge was based on a search that was conducted on the Legal Practice Council website during which the particulars of the attorneys were not located on the said website.

[17] The respondents contend that the matter is not properly before court as the applicants are not represented by a duly admitted firm of attorneys.

[18] The basis for the contention that the court erred in granting the reconsideration application is not dealt with in the rescission application.

[19] The matter requires the following aspects to be addressed:

- 19.1 The basis for the rescission application;
- 19.2 Was the order granted by default;
- 19.3 Did the Court grant the order erroneously;

[20] The contention that the reconsideration order was granted by default is based solely on the non-appearance of counsel for the applicants when the matter was heard in virtual court.

[21] The presiding judge in the reconsideration application indicated on the court order that not only did he hear counsel but have also read the papers filed in the application and considered the matter before granting the court order.

[22] The application for rescission of the reconsidered judgment by Nyati J did not include the annexures referred to in the Founding Affidavit and was not provided despite requests thereto to the respondents by the time the Answering

Affidavit had to be served and filed. The respondents were consequently not properly served with the application.

[23] The respondents furthermore contend that the application for rescission lacks urgency and has no merit.

[24] The applicants does not deal with the aspect of urgency in the founding affidavit. In the light of the fairly long and extended period of time that the parties have been embroiled in litigation the application does not meet the urgency threshold.

[25] In respect of the merits counsel for the applicant conceded in court that the only basis for the rescission presented in the papers of the applicant as well as argued in court was fact that the counsel of the applicant was not present in court when the presiding judge heard the matter.

### **The requirements for rescission**

[26] For a successful rescission application, the applicant firstly have to show that the court committed an error in the granting of the order.

[27] The error relied on by the applicant is that the court erred in the process of granting the order.<sup>1</sup>

[28] For an order to be granted erroneously there must have existed at the time when it was granted facts of which the court was not aware which would have precluded the court of granting the order had it been aware of the fact(s)<sup>2</sup> or an irregularity occurred in the proceedings<sup>3</sup> or if it were not legally competent for

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<sup>1</sup> Kgomo v Standard Bank of South Africa 2016 (2) SA 184 (GP). Colyn v Tiger Food Industries t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA). Lodhi2 Properties Investments CC v Bondev Dvelopments (Pty) Ltd 2007 (6) SA 87 (SCA)

<sup>2</sup> Occupiers Berea v De Wet NO 2017 (5) SA 346 (CC)

<sup>3</sup> National Pride Trading 452 (Pty) Ltd v Media 24 Ltd 2010 (6) SA 587 (ECP)

the court to have made such an order.<sup>4</sup>

[29] The applicant then has to show good or sufficient cause for the order to be rescinded.<sup>5</sup>

[30] Sufficient cause entails that the applicant has to:<sup>6</sup>

- 30.1 Provide a reasonable explanation for his absence;
- 30.2 Bring the application in good faith;
- 30.3 Indicate that on the merits of the matter he has a *bona fide* defence;
- 30.4 Show that the defence has some prospects of success.<sup>7</sup>

### **Discussion**

[31] The applicant provides no explanation for his absence in court on the day of the hearing except for mentioning in his Founding Affidavit that he attended court and was informed of the power outage. He submits that neither his counsel nor his attorney of record were informed as to the manner in which the matters would be dealt with and neither did they conduct any enquiries in this regard.

[32] The respondent explains in his answering affidavit that his counsel was likewise present at court and was informed that court will proceed online and was provided with the link for the online court procedure.

[33] The applicants were served with the application, entered an appearance to oppose, filed an Answering affidavit and was served with a Replying affidavit.

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<sup>4</sup> Leopard Line Haul (Pty) Ltd t/a Elite Line v New Clicks South Africa (Pty) Ltd (39276/2019) [2021] ZAGPJHC 89 (16 July 2021)

<sup>5</sup> Colyn v Tiger Food Industries t/a Meadow Feed Mills (Cape) (n 1 above). Zuma v Secretary of the Judicial Commission of Enquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State 2021 (11) BCLR 1263 (CC)

<sup>6</sup> Zuma v Secretary of the Judicial Commission (n 1 above). Sehuba v City of Johannesburg Metropolitan Municipality (42396/2020)[2021] ZAGPJHC 535 (13 October 2021)

<sup>7</sup> Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd 2011 (3) SA 477 (KZP)

They were furthermore present at court on the day of the hearing and did not familiarise themselves with the manner that the court would proceed, despite directives being issued in this regard and posted on CaseLines.

[34] When relying on Rule 42(1)(a) the applicant must show that the order sought to be rescinded was granted in their absence and that it was erroneously granted or sought. When the applicant succeeds in these two requirements the court has a discretion which to be exercised judicially and influenced by considerations of fairness and justice.<sup>8</sup>

[35] In general terms a judgement/order is erroneously granted if there existed at the time of its issue, a fact which the court was not aware of, which would have precluded the granting of the judgement/order and which would have induced the court, if aware of it, not to grant such a judgement/order.<sup>9</sup>

[36] For a party to be absent such party must be absent in fact as well as in law.<sup>10</sup>

[37] When all the formalities to secure the presence of a party at the hearing of a matter have been fulfilled and the party is absent at the hearing such party is not regarded as being absent in law.<sup>11</sup>

[38] Absence when the court made the order does not entail actual presence but deals with ensuring that the proper procedure is followed so that a party can be present and not be precluded from participating in the proceedings.<sup>12</sup>

[39] When the matter proceeded it proceeded virtually in terms of the Revised

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<sup>8</sup> Zuma (n 7 above).

<sup>9</sup> Daniel v President of the Republic of South Africa and another 2013 (11) BCLR 1241 (CC)

<sup>10</sup> Halstead v MEC for Public Transport and Road Infrastructure of the Gauteng Department (Leave to Appeal) 2023 JDR 4381 (GJ)

<sup>11</sup> 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 2021 (11) BCLR 1263.

<sup>12</sup> Zuma (n 12 above)

Consolidated Practice Directive 1 of 2024. The respondent stated in his answering affidavit that directives were issued by the presiding judge and the link for the virtual hearing were sent to the respective attorneys. This was not disputed by the applicants in their replying affidavit.

[40] It is at this point that the registration of the applicant's attorneys with the Legal Practice Council (LPC) becomes significant. The challenge to provide proof of the registration of their attorney with the LPC was not met with any such proof neither was this aspect dealt with in the replying affidavit.

[41] The respondent points out that the e-mail address registered on Court Online is not the e-mail address of the applicants' attorney of record and is also not the e-mail address his attorneys used to communicate with the attorneys of record. This aspect is likewise not dealt with in the replying affidavit.

[42] The proper procedure was followed to ensure the presence of the parties at court on the day of the hearing. It was the responsibility of the applicant's attorney to ascertain how the court will proceed. This the attorney did not do. It was furthermore the responsibility of the attorney to ensure that the correct contact details appear on Court Online so that the necessary notifications and links for virtual hearings could be forwarded to them.

[43] The applicants has not provided a proper explanation for their non-appearance. The applicants furthermore placed no evidence before the court that the order was granted erroneously.

[44] I now turn to the next requirement namely whether the applicants have shown good cause why the order should be rescinded.

[45] The merits are dealt with scantily in the founding affidavit and contains little substance.

[46] The applicants does not deal with the *bona fides* of the defence neither do they deal with the prospects of success at all. This much was conceded by



counsel for the applicants in open court.

[47] The high water mark of the applicant's case is that should the reconsideration order not be rescinded they would lose their property without being heard.

[48] This does not amount to a defence as the application for the cancellation of the sale in execution is still pending and the application for eviction is likewise still pending. All that the reconsideration application did was to set aside the order suspending the eviction application granted on 4 December 2024.

[49] Both the mentioned applications are still alive and the applicants have full opportunity to have their day in court in these applications.

#### **The status of the applicant's attorneys of record**

[50] Apart from the challenge by the respondent in his answering affidavit to provide proof of their registration with the Legal Practice Council I was alerted to a judgement by Retief J in the matter of *Ramatlapa and Another v SB Guarantee Company (RF) (Pty) Ltd*<sup>13</sup> where the same firm of attorneys "Malatji attorneys" also acted as the attorneys of record and could also not provide proof of their registration with the Legal Practice Council.

[51] The judgment was referred to the Legal Practice Council and the Chief/Deputy Chief Registrar of the Gauteng Division for investigation and appropriate action.

[52] During the hearing, counsel for the applicant was requested to provide his written brief from Malatji attorneys. After the court stood down for him to obtain the brief he presented a brief from Samalenge Attorneys who indicated that they are the applicant's attorneys. This despite the fact that the attorneys of record throughout the litigation has been Malatji Attorneys. No Notice of Withdrawal for

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<sup>13</sup> (61088/2020)[2024] ZAGPPHC 853 (28 August 2024)

Malatji attorneys was filed and no Notice of Appointment of Samalenge attorneys was filed.

[53] Advocate Molopyane could offer no explanation for the above mentioned state of affairs.

### **Conclusion**

[54] For the reasons stated above I make the order in paragraph 1.

**E Raubenheimer**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION**  
**PRETORIA**

### ***Electronically submitted***

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be

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|-----------------------------|---------------------|
| COUNSEL FOR THE APPLICANT:  | Adv Molopyane       |
| INSTRUCTED BY:              | Samalenge Attorneys |
| COUNSEL FOR THE RESPONDENT: | Adv Van der Linde   |
| INSTRUCTED BY:              | A Le Roux Attorneys |

DATE OF ARGUMENT: 06 March 2025

DATE OF JUDGMENT: 14 April 2025