IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NO: 992/16

Reportable	**Yes**

In the matter between:

GOBO GCORA CONSTRUCTION & PROJECT **1ST Applicant**

MANAGEMENT CC

SIPHO GCORA **2ND Applicant**

KHUSELWA GOBO-GCORA **3RD Applicant**

And

NELSON MANDELA BAY MUNICIPALITY **Respondent**

THE PUBLIC PROTECTOR OF THE REPUBLIC **Interested Party**

OF SOUTH AFRICA

And **Case No: 1414/2016**

NELSON MANDELA BAY MUNICIPALITY **Applicant**

And

THE PUBLIC PROTECTOR OF THE REPUBLIC **1ST Respondent**

OF SOUTH AFRICA

GOBO GCORA CONSTRUCTION & PROJECT **2ND Respondent**

MANAGEMENT CC

THE MEMBER OF THE EXECUTIVE COUNCIL **5TH Respondent**

FOR HUMAN SETTLEMENTS, EASTERN CAPE

PROVINCIAL GOVERNMENT

W K CONSTRUCTION SA (PTY) LTD **6TH Respondent**

W K PIPELINES (PTY) LTD **7TH Respondent**

JUDGMENT

VAN ZYL DJP:

1) This judgment deals with two applications for the rescission and setting aside of three judgments of this Court. The two applications were heard simultaneously and may conveniently be dealt with in one judgment.

2) The judgments which are the subject matter of the rescission applications were granted in two separate but interrelated cases under case numbers 992/2016 and 1414/2016 (collectively referred to as the **"main application(s)"** and individually as **"the application to compel"** and "**the application for review"** respectively). At the heart of the main applications lies a report of the Public Protector and a directive made by her that the Nelson Mandela Bay Municipality (the Metro) must take specified

remedial action, inter alia, in favour of a close corporation called Gobo-Gcora Construction and Project Management CC (the close corporation).

3) In the first of the two main applications (case number 992/2016), the close corporation and its members sought to compel the Metro to comply with, and to implement the directive of the Public Protector. The Metro responded by launching an application (under case number 1414/2016) for a review of the decision of the Public Protector. The review application brought forth two applications under the same case number. In the first application the close corporation and its members, in terms of court rule 30/30A, asked that the review application be set aside, alternatively, be struck out. The matter came before Plasket J who dismissed the application with costs.

4) That was followed by a second application before Eksteen J under the same case number for a declaratory order that the judgment of Plasket J be declared null and void and of no force and effect. Eksteen J similarly dismissed the application. The main applications ultimately served before Pickering J who upheld the review application and set the remedial action ordered in favour of the close corporation aside. The result of that order was that the application of the close corporation to compel compliance with the remedial action directed the Public Protector was also dismissed.

5) The background to the Public Protector's report and the litigation that flowed therefrom was comprehensively dealt with by Pickering J in his judgment. I accordingly do not intend to deal therewith in much detail in this judgment. What

follows is a summary of what is relevant in the context of the issues raised in the rescission applications.

6) The report and the directive issued by the public protector arose from tenders awarded by the Metro to two companies for the installation of services and the construction of houses in Uitenhage. The two companies, namely **"W K"** Construction SA (Pty) Ltd and W K Pipelines (Pty) Ltd (collectively called W K) in turn appointed the close corporation as a subcontractor to construct the houses for the project. The relationship between W K and the close corporation was created and regulated by a contract entered into by them. The Metro was not a party to that agreement.

7) In the course of time various disputes developed between the close corporation and W K about the non-payment of remuneration for work performed. The close corporation unsuccessfully attempted to recover monies from W K and the Metro that it alleged were owing to it. In December 2013 the estates of the two members of the close corporation Mr Sipho Gcora and Mrs Khuselwa Gobo-Gcora, were sequestrated, and the close corporation was placed under provisional liquidation in February 2016. The latter order was later discharged in July 2016.

8) The close corporation sought the assistance of the public protector who conducted an investigation. The declared focus of the investigation was **"whether or not the municipality was responsible for any improper conduct or maladministration."** The main findings of the public protector were *inter alia* that the tender for the building of the houses was irregularly awarded, and that the project was improperly and insufficiently funded, with the result that the close corporation **"who is a small business person, suffered enormous prejudice in that it was left out of**

pocket after using its own money to fill the gap arising from the municipality's funding shortfall after the latter wrongly used for internal purposes, the grant meant for the top structure construction."

9) In her report the public protector found that the prejudice suffered by the close corporation was **"exacerbated by the fact that it has taken five years for the municipality to accept it's wrongdoing and agree to remedy the injustice suffered by the complainant."** This finding was based on a letter which the acting municipal manager of the Metro wrote to the public protector in December 2015 wherein he said that the Metro intended to **"address the oral administration,"** and to **"remedy the prejudice suffered by the complainant"**.

10) The Metro did not act on its declared intention in the letter. In the proceedings that followed, the acting municipal manager explained this by saying that he commenced his duties some two weeks before he wrote the letter, and at a time when he was not fully informed of the matter. It was only after he had met with officials from the Human Settlement Directorate in the Metro for purposes of discussing the implementation of the remedial action ordered by the public protector, that it became apparent that the public protector's report required further investigation, and that its lawfulness may have to be challenged in legal proceedings. According to the acting municipal manager his letter dated 14 December 2015 did not, and could not constitute a waiver of the Metro's right and entitlement to launch the proposed proceedings to review the public protector's report.

11) In March 2016 the close corporation and its two members in their personal and representative capacities launched an application under case number 992/2016

wherein they sought to compel the Metro to comply with the remedial action ordered by the public protector. The application was heard by Smith J in April 2016, who made the following order by agreement:

> "1. That the application brought by applicants under case number 992/2016 is postponed sine die.
> 2. That the aforesaid application is to be heard simultaneously with the application for review to be brought by the Nelson Mandela Bay Municipality (the respondent in this application).
> 3. That the Nelson Mandela Bay Municipality is directed to institute its proposed application to review and set aside the remedial action contained in the report of the Public Protector date 29 January 2016 by no later than the end of April 2016.
> 4. That the Nelson Mandela Bay Municipality is directed to serve such application upon the applicants in this application, the liquidators of the first applicant and the Public Protector.
> 5. That the Nelson Mandela Bay Municipality is directed to comply with its obligations to promote co-operative governance and intergovernmental relations as enshrined in section 41 of the Constitution, in pursuing the review referred to more fully above.
> 6. That the costs occasioned in the application thus far be reserved."

12) Two weeks later the Metro launched its review application under case number 1414/2016 as envisaged in paragraph 2 of the agreed order. The respondents were the public protector, the three joint liquidators of the close corporation, the MEC of the Department of Human Settlements of the Eastern Cape Government, and the two

companies to whom the tenders were awarded. Subsequently, and following the discharge of the order placing the corporation under provisional liquidation, the close corporation was substituted for the three liquidators.

13) In response to the review application, the close corporation, Mr Gcora and Mrs Gobo-Gcora launched a separate application under the same case number as the review application in which they sought the following relief in terms of Court Rule 30/30 A:

> "1. The review application under case number 1414/2016 be set aside.
>
> 2. Alternatively the review application be struck out.
>
> 3. Declaring that the applicant under case 1414/2016 is in contempt of the order dated 12 April 2016 and under case number 992/2016.
>
> 4. That the applicant under case number 1414/2016 is acting in violation of s 41 of the Constitution by approaching the above honourable court without raising the issues it wants the above honourable court to hear, with the public protector first.
>
> 5. That the Nelson Mandela Bay Municipality be ordered to comply with the remedial action of the public protector in 'costs of deviation' as it opted to waste all the time if had to engage the public protector.
>
> 6. That the Nelson Mandela Bay Municipality is in contempt of the public protector."

14) As stated, this application was heard by Plasket J who dismissed it with costs. He found that Mr Gcora and Mrs Gobo-Gcora had no standing to represent the close corporation or to be parties in their personal capacities. This finding was based on the provisions of sections 20 (1) (a) and 23 of the Insolvency Act 24 of 1936. The learned judge found that the effect of their sequestration was that they were divested of their estates, including their members interest in the close corporation, and that their capacity to institute legal proceedings in their own names was limited by section 23. Plasket J further found that Mr Gcora and Mrs Gobo-Gcora attempt to represent the close corporation in the proceedings before him constituted a breach of, and was in contempt of an order made by Chetty J in Sholto-Douglas N O and Others v Gobo-Gcora Construction and Project Management CC and Others [2014] Jol 31988 (ECP), that they be interdicted from:

> "1.1 authorising the initiation, pursuit or defence of any legal proceedings of any nature by the first respondent [the close corporation];
>
> 1.2 directly an/or indirectly participating in the management of the business of the first respondent in contravention of section 47 (1) (b) (i) of the Close Corporation Act 69 of 1984."

15) In his judgment Eksteen J pointed to a similar order that was made by Roberson J in the matter of Gobo-Gcora Construction and project Management CC and Others v Cape Building and Truss Supplies and Another (unreported case number 2699/2011, ECP, dated 8 September 2016). The orders were granted on the

application of litigants in civil cases wherein Mr Gcora and Mrs Gobo-Gcora purported to litigate on behalf of the close corporation whilst they were unrehabilitated insolvents.

16) Plasket J then proceeded to deal with the merits of the application which was founded on the contention that the Metro had failed to comply with the order of Smith J, thereby rendering the review application an irregular proceeding. The submission was twofold, firstly, that the review application was not instituted before the end of April 2016 as directed, and secondly, that the Metro failed to comply with its obligations in terms of section 41 of the Constitution as contemplated in paragraph 5 of the order of Smith J.

17) Section 41 is concerned with intergovernmental relations and disputes. Section 41 (3) provides:

> "An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute."

Plasket J found no merit in the objections raised. The application papers were issued by the Registrar before the end of April 2016, and he held that the fact that it was only served on the respondents thereafter did not render it an irregular proceeding for want of compliance with Smith J's order, as no time was prescribed in paragraph 4 for the service of the papers.

18) With regard to the second objection raised, Plasket J's finding was in essence that it was not possible for the Metro, in fact and in law, to comply with the directive in paragraph 5 of Smith J's order. The reason was that when the Metro wrote to the public protector to request a meeting with her, she responded through her attorneys's that she was *functus officio*, that she cannot change her decision, and that in the circumstances no purpose would be served by having a meeting as requested by the Metro. The public protector further stated in her letter, correctly according to Plasket J, that section 41 of the Constitution could not find application, in that chapter 9 institutions, of which the public protector is one, were not organs of state as envisaged in section 41. Further, that section 2 (2) (e) of the Inter-Governmental Relations Framework Act 13 of 2005, which gives effect to section 41, provided expressly that it does not apply to chapter 9 institutions.

19) Plasket J, as a consequence dismissed the application with costs. The unsuccessful applicants then brought an application before Eksteen J, again under the same case number, for a declaratory order that the judgment of Plasket J was null and void and of no force and effect. It was argued that the orders of judges Chetty and Plasket and their findings with regard to the *locus standi* of Mr Gcora and Mrs Gobo-Gcora to act in their personal capacities, or in a representative capacity on behalf of the close corporation, were interlocutory in nature, and as a result capable of reconsideration. Eksteen J rejected this argument finding that the orders were correctly granted, that they were final in nature and therefore not capable of variation, and that what the applicants were in effect asking for was that the judgment be declared void because they considered it to have been incorrectly decided. This meant, according to Eksteen J, that the appropriate remedy available to them was to lodge an appeal.

20) That is what they did. They applied for leave to appeal which Eksteen J refused. Not satisfied with this outcome, the applicants then unsuccessfully sought special leave to appeal the judgments, first from the Supreme Court of Appeal, and thereafter from the Constitutional Court. They also subsequently sought leave to appeal the earlier judgment of Plasket J which application was similarly dismissed.

21) That then brings me to the judgment of Pickering J. In accordance with the agreement of the parties and the order of Smith J, the learned judge was asked to decide both the application to compel compliance with the public protector's directive for remedial action, and the Metro's application to review and set that directive aside. The two applications were heard simultaneously and dealt with in one judgment. In the application to compel, the close corporation and its two members were the first, second and third applicants respectively. The Metro was the respondent and the public protector was cited as an **"interested party"**. The parties in the review application were the entities referred to in paragraph [12] above.

22) For the obvious reason that if the review application was to succeed the application to compel would fall away, the focus of the hearing before Pickering J was the lawfulness or otherwise of the public protector's report. In that context the learned judge considered and dealt with two aspects of the report, namely the lawfulness of her directive that the Metro must compensate the close corporation, and her finding that the award of the tender to W K was unlawful. At the hearing of the matter the public protector conceded that her directive that the close corporation must be compensated by the Metro could not stand. Pickering J found that the concession was correctly made. The reason for that finding was that there existed no contractual nexus between the Metro and the close corporation, and that the approach reflected in

the remedial action would force the Metro to pay money to the close corporation, a sub-contractor, in circumstances where the fault, if any, for the sub-contractor not receiving payment lay with the principal contractor and not the Metro.

23) The public protector was accordingly found to have acted *ultra vires* her powers in section 181(2) of the Constitution, which in turn meant that the remedial action relating to the close corporation had to be set aside. In respect of the lawfulness of the award of the tenders to W K, Pickering J confirmed the remedial action ordered by the public protector and her finding that the award was unlawful. The basis of the finding was that because W K carried on the business of a homebuilder as envisaged in section 10 of the Housing Consumers Protection Measures Act 95 of 1998 it had to be registered as a home builder in terms of the Act. Its failure to do so accordingly meant that W K acted in breach of section 10 (7) of that Act when it contracted with the close corporation for the construction for the houses in compliance with its obligations in terms of tender contract awarded to it by Metro. Section 10 (7) reads as follows:

> **"A home builder registered in terms of subsection 6(b) shall be obliged, for purposes of the physical construction of homes, to appoint a home builder in terms of subsection 6(a)."**

See (Hubbard v Cool Ideas 1186 CC [2013] JOL 30478 (SCA) and Cool Ideas 1186 CC v Hubbard and Another [2014] JOL 31868 (CC).

As before, the applicants sought leave to appeal the judgment of Pickering J. When he refused leave they proceeded to seek special leave from the Supreme Court of Appeal. That application was also dismissed whereafter they filed an application for

leave to appeal to the Constitutional Court. That application appears to have been abandoned as the applicants instead chose to launch the present application to rescind the judgment of Pickering J.

24) Can the judgments be rescinded? The power of a court to set aside its own orders is very limited. The general principle is that once a court has duly pronounced a final judgment or order the matter is *res judicata,* and it has itself no authority to correct, alter or supplement it. (Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa 5th ed vol 1 at page 926 and the authorities referred to). The reason is that it is *functus officio*, that is, **"its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased"** (Firestone South Africa (Pty) Ltd v Gentiruco 1977 (4) SA 298 (A) at 306 F-G). The Constitutional Court explained the rationale for this principle as follows in Zondi v MEC Traditional and Local Government Affairs 2006 (3) SA 1 (CC) at para [28]:

> "Under common law the general rule is that a Judge has no authority to amend his or her own final order. The rationale for this principle is twofold. In the first place a Judge who has given a final order is *functus officio.* Once a Judge has fully exercised his or her jurisdiction, his or her authority over the subject matter ceases. The other equally important consideration is the public interest in bringing litigation to finality. The parties must be assured that once an order of Court has been made, it is final and they can arrange their affairs in accordance with that order."

25) There are certain exceptions to the general principle. A court may in certain circumscribed circumstances set aside its own judgment. This may in appropriate cases be achieved by invoking the court's common law powers, or the rules of court. (Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA). A judgment entered by default may be set aside in terms of the common law and rule 31 (2) (b) where the party in default can show sufficient cause (De Wet and Others v Western Bank Ltd). A second exception to the general rule that a judgment may not be changed after its pronouncement, is when the order granted, through some mistake, does not express the true intention of the court, or where the order is ambiguous, as the court inadvertently omitted to include some ancillary relief. In terms of the common law the court has the inherent power in such circumstances to correct its own judgment. (Estate Garlick v Commissioner of Inland Revenue 1934 AD 499 and Firestone South Africa (Pty) Ltd v Gentiruco 1977 (4) SA 298).

26) In defended cases where judgment has been granted after evidence had been adduced on the merits of the dispute, and both parties have been heard, the test is more stringent and the judgement is capable of rescission on very limited grounds. (Childerly Estate Stores & Standard Bank of SA Ltd 1924 OPD 163; De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 (A), and more recently, Moraitis Investments v Montic Dairy 2017 (5) SA 508 (SCA)). A judgment induced by fraud can be set aside at the instance of the innocent party, and on the ground, in what has been described as **"relatively rare and exceptional"** cases where the court gave the judgment in error, if the error is found to be just (*justus*). As stated in the Childerly judgment, (at 168) this ground is not of general application, and most of the cases under the common law falling in this category are nowadays obsolete and inapplicable.

27) Rule 42 of the rules of court also provides for the rescission and variation of an order or judgment. In terms of rule 42 the High Court may, in addition to any other powers it may have, *mero moto* or upon application of any party affected, rescind or vary an order or judgment **"erroneously sought or erroneously granted in the absence of any party affected thereby"**. (rule 42 (1) (a)); or, **"in which there is an ambiguity or patent error or omission"** (rule 42 (1) (b)), or was **"granted as a result of a mistake common to the parties."** (rule 42 (1) (c)). The purpose of the rule is **"to correct expeditiously an obviously wrong judgment or order."** (Bakoven Ltd v GJ Howes (Pty) Ltd 1992 (2) SA 466 (E) at 471 E-F).

28) It is on the provisions of rule 42, that the applicants in the present matter chose to base their applications for rescission. I shall assume in favour of the applicants that they are **"affected"** parties as envisaged in the rule (United Watch & Diamond Co v Disa Hotels 1972 (4) SA 409 (C) at 414 F) and their applications for rescission were launched timeously (First National Bank of SA Ltd v Van Rensburg 1994 (1) SA 677 (T) at 681 D – E). At the hearing of the matter Mr Gcora, who appeared in person on behalf of the applicants, conceded, quite correctly in my view, that rule 42 (1) (a) could not find application by reason of the fact that none of the judgments were granted in the absence of the applicants as contemplated therein. In all three of the judgments, the orders were made on a contested basis after the matters were set down for hearing and the parties have filed their affidavits in support or in opposition to the relief claimed. The orders were accordingly based on the evidence placed before the court by the parties by way of affidavit, and granted after argument had been advanced by them.

29) The applicants instead chose to place reliance upon paragraphs (b) and (c) of rule 42 (1). Mr Gcora's submission was in essence that the orders in the three judgments were erroneously and mistakenly granted in the sense that the court in each instance made a mistake on a matter of law appearing from the record of the proceedings. In support of this contention the applicants formulated several grounds in the affidavits filed in support of the applications, supported by submissions contained in extensive heads of argument and other material that Mr Gcora placed before me at the hearing of the matter. In his very able and comprehensive address he expanded on those submissions. I do not intend to burden this judgment by verbatim, reciting the grounds relied upon in the material placed before me. It is not necessary to do so. What follows is therefore nothing more than a summary of the main grounds raised, and is not intended to be exhaustive.

30) In respect of the judgments of judges Plasket and Eksteen the submissions were that:

(a) the finding of Pickering J, and concession to that effect made by the Metro that Mr Gcora and Mrs Gobo-Gcora should be joined as respondents in the review application meant that the finding by Plasket J that they lacked *locus standi* in the rule 30/30A application, was wrong.

(b) the order of Smith J was a valid and binding order that had to be complied with until set aside. There accordingly existed no legal basis for ignoring or condoning non-compliance with the order as the judgment of Plasket J purported to do.

31) The errors said to exist in the judgment of Pickering J were *inter alia* that:

(a) despite the learned judge stating in his reasons for the judgment that Mr Gcora and Mrs Gobo-Gcora were to be joined as respondents in the review application, he failed to give effect thereto in the order that he ultimately made, and the relief granted therein. This meant that they were never joined as parties despite the fact that they possessed the necessary standing.

(b) the public protector herself considered the standing of the close corporation at the time of her investigation of the complaint and decided that she had the authority to do so.

(c) the finding that the public protector acted *ultra vires* her powers when she directed that the Metro must compensate the close corporation was erroneously made:

(i) without reference to the Public Protector's Act 23 of 1994 which Act was intended to, and gave effect to the provisions in section 182 (1) of the Constitution for the regulation of the powers of the office of the public protector.

(ii) the public protector's report envisaged further investigations to be conducted which meant that the report was not final, thereby rendering the review application premature.

(iii) the unreported judgment relied upon by Pickering J in paragraph [30] of his judgment was not a final judgment as it was subject to an appeal that was pending. It could accordingly not provide authority for the finding that the public protector lacked the authority to order remedial action in favour of the close corporation.

(iv) the fact that there was an absence of a contractual relationship between the Metro and the close corporation had no relevance to the authority of the public protector to direct the Metro to pay compensation. The reasoning was that the maladministration investigated by the public protector, and found by her to have existed, prejudicially affected the close corporation. Further, that the public protector was a public functionary who performed her functions in terms of legislation outside the sphere of the private law. The lack of a contractual nexus was therefore irrelevant to the performance by her of her functions.

(d) The judgment was further said to be erroneous in that:

(i) the finding that remedial action ordered in favour of the close corporation was severable from the rest of the public protector's report was wrong in that the finding that there was maladministration could only be given effect to by upholding the report as a whole.

(ii) the judgment failed give effect to the provisions of the Housing Consumers Protection Act 95 of 1998.

(iii) the effect of the judgment was that there was a failure to grant appropriate relief in the face of a finding of the existence of maladministration, and the improper performance of an administrative function.

(iv) the Metro was bound by its undertaking to comply with the remedial action, which undertaking stood until set aside.

(v) the findings do not account for certain concessions made by the Metro;

(vi) findings were made based on the incorrect belief that certain facts existed, such as the existence of a valid contract between the Metro and W K, and also that the Metro was entitled to ignore the public protector's remedial action without it first approaching a court for appropriate relief. The latter ground was based on the proposition that the Metro could not simply ignore the public

protector's report, and that the launching of the review application did not relieve it from complying with it.

(vii) the Metro, in pursuing legal proceedings to review the decision of the public protector acted in breach of its obligation as a public functionary to prevent and act upon maladministration, and further to act in accordance with its duty towards its rate payers.

32) The question of what constitutes an error or a mistake for purposes of rule 42 must be approached against the background of the principle that a judgment is, in the interests of certainty, final and that the court does not have the general authority to correct, alter, or supplement its own judgment. Rule 42 has been introduced to cater for a mistake, and is for the most part a restatement of the common law. It does not, according to Jones AJA in Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) (at para [6]), purport to amend or extend the common law which provides the proper context for its interpretation. Further, and in view of the fact that it is a rule of court, its ambit is entirely procedural.

33) An error as envisaged in rule 42 (1) (b) has been held to be confined to a **"patent error or omission"** which has the result that the judgment or order does not reflect the intention of the judicial officer pronouncing it. (First Consolidated Leasing Corporation Ltd v McMullin 1975 (3) SA 606 (T) at 608, Seatle v Protea Assurance Co Ltd 1984 (2) SA 537 (C) at 541, and Herbstein v Van Winsen 5th Ed Vol 1 at page 934). This is consistent with the common law powers of a court to clarify or correct its judgment so as to give effect to its true intention. (Firestone South Africa (Pty) Ltd v Gentiruco).

34) The ambiguous language or the patent error or omission in the order must be attributable to the court itself, and relief will only be granted where the terms of the judgment do not reflect the true intention of the court (First National Bank of South Africa Ltd v Jurgens and Others 1993 (1) SA 245 (W) at 246 F-G). In Seatle v Protea Assurance Co Ltd 1984 (2) SA 537 (C) at 541 C-D the court emphasized, quite correctly, that it is irrelevant whether the reasoning of the court was sound or unsound. The rule is not aimed at correcting a judgment that is wrong because the court arrived at a wrong decision on the facts or the law. Accordingly, if the order reflects a considered decision of the presiding officer, and the intention was to make the order as it is formulated in the judgment, a rescission thereof in terms of rule 42 (1) (b) is not possible on the basis that the reasoning and the findings which underlie the order were unsound or wrong. The appropriate remedy in such an instance is to appeal the judgment.

35) On a reading of the three judgments it is evident that they reflect the intention of the court, and were made upon a consideration of the evidentiary material placed before it. What the applicants contended were errors or mistakes in the judgments are nothing more than errors or mistakes in the reasoning of the court, or put differently, that the court made the orders based on incorrect findings of fact and/or law. This type of error is not what rule 42 (1) (b) envisages to be an ambiguity, patent error or omission in the order. What the applicants are seeking is a correction of what they considered to be a wrong decision on the merits, and the errors or mistakes the court is said to have committed, are in effect nothing more than an attempt at an appeal in the guise of a rescission application. A civil appeal is an appeal in the strict sense, that is, a rehearing of the matter on the merits, but limited to the evidence or material

on which the decision was given, and the only question is whether the decision was right or wrong (National Union of Textile Workers v Textile Workers' Industrial Union (SA); 1988 1 SA 925 (A) at 937 E – F).

36) The only aspect that requires consideration in the context of rule 42 (1) (b) is the issue relating to the *locus standi* of the applicants. The proposition was that the finding of Pickering J that Mr Gcora and Ms Gobo-Gcora should be joined as parties to the review application had two consequences. The first was that it meant that the finding of Plasket J that they lacked the necessary standing in the rule 30/30A application was wrong, and the order was consequently granted in error, and thereby, by necessary implication, also the judgment of Eksteen J. The second consequence was that the failure of Pickering J to follow through on his finding that Mr Gcora and Mrs Gobo-Gcora must be joined as respondents by failing to include an order to that effect in the relief which he granted at the conclusion of the judgment, was on error as envisaged in the rule 42 (1) (b) that provides a basis for the setting aside of the judgment.

37) The submission has no merit. It is apparent from a reading of the judgment of Plasket J that the lack of *locus standi* was not the only reason why he dismissed the application. Further, the submission not only wrongly conflate the issues arising in the rule 30/30A and the review applications with regard to the standing of Mr Gcora and Ms Gobo-Gcora, it also does not give effect to the intention of the learned judge as expressed in his judgment. It conflates the issues regarding standing raised in the two applications because Plasket J was asked to determine the *locus standi* of Mr Gcora and Mrs Gobo-Gcora as applicants in the context of (a), proceedings to set aside the review application in which application were neither parties, nor did they ask to be

joined as parties thereto, and (b), their status as unrehabilitated insolvents who have been divested of their members interest in the close corporation.

38) In paragraph [29] of the judgment Pickering J dealt with the joinder of Mr Gcora and Mrs Gobo-Gcora in the following manner:

> "In the broader interest of justice I considered it appropriate that he and Mrs. Gobo-Gcora be joined as respondent in case no 1414/2016, despite their failure to have applied for such joinder at an earlier stage of the proceedings; that regard therefore be had to the affidavits filed by them prior to their joinder; and that Mr. Gcora be permitted to address me on the various applications filed by him, Mrs. Gobo-Gcora and the CC as well as on the merits of the review application."

On a reading of this paragraph it is clear that the issue of joinder was not determined with reference to the status of Mr Gcora and Ms Gobo-Gcora as unrehabilitated insolvents, and/or that they had a direct and substantial interest in any orders that the court might make in the review application. The decision was rather made in the exercise of the court's discretionary power in terms of the common law to allow someone to be joined as a party on the basis of convenience, or as Pickering J put it, in **"the broader interest of justice."** (Herbstein v Van Winsen at page 209).

39) What is further evident from a reading of paragraph [29] and the remainder of Pickering J's judgment is that it was the expressed intention of the learned judge to join Mr Gcora and Mrs Gobo-Gcora as respondents, and that the hearing of the matter proceeded on that basis with the two of them fully participating in the proceedings as

parties thereto. In interpreting a judgment, the intention of the court must be ascertained primarily from the language of the judgment or order, as construed according to the usual well known rules relating to documents. Importantly, **"As in the case of any document, the judgment or order and the court's reasons for giving it must be read as a whole to ascertain its intention."** (Van Rensburg NNO v Naidoo NNO 2011 (4) SA 149 (SCA) at para [42] and Administrator Cape and Another v Ntslwaqela and Others 1990 (1) SA 755 (A) at 715 F – H).

40) If there was any error in the judgment of Pickering J, then it was that the relief granted by the learned judge in his order did not give effect to, or reflect his expressed intention, not only in his reasons, but also in his subsequent conduct to allow Mr Gcora and Mrs Gobo-Gcora to participate in the hearing of the matter. The result of this is that the order may be corrected so as to reflect the intention of Pickering J as envisaged by rule 42 (1) (b), as opposed to rescind the whole of the judgment as the applicants are asking me to do. The granting of an order in terms of rule 42 is discretionary, (Tshvihase Royal Council V Tshivhase; Tshivhase v Tshivhase 1992 (4) SA 852 (A) at 826 J to 863 A), and I do not find it necessary to make any correction to the order of Pickering J, as there can be no doubt that Mr Gcora and Mrs Gobo-Gcora were as a fact joined as parties to the review application, and no purposes will be served by such an order.

41) That leaves rule 42 (1) (c). It contemplates a common mistake by the parties. A common mistake occurs when the parties are *ad idem,* that is, they are of one mind and share the same mistake. There must further be a causative link between the mistake and the granting of the order. This requires that the mistake must **"relate to and be based on something relevant to the question to be decided by the court**

at that time." (Tshivhase Royal Council v Tshivhase: Tshivhase v Tshivhase at 863 A – D).

42) Rule 42 (1) (c) clearly cannot find application to the facts of the present matter. It was not the applicant's case that the judgments were granted as a result of a mistake common to the parties. As stated, the grounds relied upon for the relief claimed are that the judgments were wrong because of mistakes in the court's reasoning and its findings on the facts and the law.

43) The applicants have all but exhausted their remedy to appeal the three judgments, and rule 42 cannot in the circumstances provide them with a further remedy. Accordingly, and for the aforegoing reasons, both the applications for rescission are dismissed with costs.

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D VAN ZYL
DEPUTY JUDGE PRESIDENT

Counsel for the Applicants: Mr Gcora (In person)

Counsel for the Respondents: Adv. Buchanan SC

Instructed by: Gray Moodliar Inc

Date Heard: 14 February 2019

Judgment Delivered: 16 April 2019