

**IN THE HIGH  
FREE STATE**



**H AFRICA  
BLOEMFONTEIN**

Portable:	YES/NO
Of interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: **5049/2014**

In the matter between:

**VAUGH VICTOR**

First Applicant

**MARIA MAGRIETHA CATHARINA VICTOR**

Second applicant

and

**WONDERHOEK FARMS (PTY) LTD**

First Respondent

**DONOVAN MAJIEDT N.O.**

Second Respondent

**KARIN FORTEIN N.O.**

Third Respondent

**JERRY SEKELE KOKO N.O.**

Fourth Respondent

**FIRSTRAND BANK LIMITED**

Fifth Respondent

**THE MASTER OF THE HIGH COURT, BLOEMFONTEIN**

Sixth Respondent

**MARYNA SYMES N.O.**

Seventh Respondent

**ANTON OTTLY NOORDMAN N.O.**

Eight Respondent

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CORAM:

VAN RHYN, AJ

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HEADS OF ARGUMENT

RECEIVED ON:

14 APRIL 2022

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DELIVERED ON:

10 JUNE 2022

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**INTRODUCTION.**

[1] On 4 August 2021 an order was granted by Van Zyl J pursuant to an urgent application launched by the applicant. The question to be determined in the

present application is whether the order granted on 4 August 2021 stands to be varied in terms of the provisions of Rule 42(1)(b) of the Uniform Rules of Court as a result of an alleged ambiguity or a patent error or omission in the order made by Van Zyl J.

- [2] The first applicant is a major business man from the farm Portion 1, Aanvang, district Wepener (“the farm Aanvang”). The second applicant is the wife of the first applicant. First respondent is Wonderhoek Farms (Pty) Ltd (“Wonderhoek”), a company which has subsequent to the hearing of the initial urgent application, become the registered owner of the farm Aanvang. Wonderhoek opposes this application, unlike the other respondents who do not oppose this application.

#### **RELEVANT BACKGROUND.**

- [3] The applicants issued an urgent application on 24 March 2020 in which they applied for the following relief:

“PLEASE TAKE NOTICE THAT the Applicants will apply on 25 March 2020, at 14h15, or as soon thereafter as counsel for the Applicants may be heard, for the following order:

1. That the requirements of notice and service be dispensed with and that this application be heard as one of urgency in terms of rule 6(12) of the Uniform Rules of Court;

#### **PART A**

2. That a rule *nisi* be issued with return date 23 April 2020, at 09h30, calling upon the First to Fifth Respondents why the following order should not be made final:
  - 2.1 First Respondent and all those acting on instruction of the First Respondent who is present on Portion 1 of the Farm Aanvang, in the district of Wepener, be interdicted and restrained, pending finalisation of the relief claimed in Part B of the Notice of Motion, from:
    - 2.2 Breaking and entering any of the chalets, storerooms or any other buildings on the farm, or in any way interfering with the Applicants’ undisturbed possession and occupation of the said farm;
    - 2.3 Harassing, intimidating, victimising and/or threatening the Applicants.
    - 2.4 That the First to Fifth Respondents be interdicted from implementing the Settlement Agreement;
    - 2.5 That prayers 2, 2.1 to 2.4 shall serve as an interim interdict with immediate effect, pending the return day;

2.6. Further and or alternative relief.

**PART B**

3. That the Court order under number 5049/2014 dated 20 February 2020 be set aside;
4. That it is declared that the claim of the First Respondent, as Plaintiff in the main action,  
lapsed, due to non-compliance with section 75(1) of the Insolvency Act, Act 24 of 1936;
5. That the Settlement Agreement incorporated in the above Court order be declared null and void *ab initio*;
6. Alternatively, and in the event that the Court is not inclined to grant prayer 5 *supra*, that the First to Fifth Respondents be interdicted from implementing the Settlement Agreement, pending the institution and finalisation of an action, to declare the Settlement Agreement null and void, *ab initio*, which action must be instituted within 30 (thirty) days from date of this order;
7. That the First Respondent pays the costs of the application on an attorney and client scale.”

[4] The urgent application was served upon Wonderhoek on 24 March 2020. The application was set down for hearing on 25 March 2020. The urgent application was drafted in the form of a rule *nisi*, with return day on 23 April 2020 to afford the respondents the opportunity to file opposing papers whilst the interim relief would serve as an interim interdict with immediate effect pending the return day. However, Wonderhoek filed its answering affidavit during the morning of 25 March 2020. No other answering affidavits by any of the other respondents were filed. The second to fifth respondents as well as the seventh and eighth respondents, who attended court on the 26<sup>th</sup> March 2020, did not participate in the proceedings since they had no interest in the relief sought in Part A of the notice of motion.

[5] On 25 March 2020 Van Zyl J heard arguments in respect of urgency pertaining to the relief under Part A and the *locus standi* of the first applicant. On 26 March 2020 the relief claimed by the first applicant, an unrehabilitated insolvent, in respect of paragraph 2.4 of the notice of motion was dismissed on the ground that the first applicant had no legal standing. The court held that the second respondent’s relief in respect of prayer 2.4 was not urgent and same was struck from the roll. Van Zyl J made a finding

that the first and second applicants' relief in respect of the remainder of the relief sought in Part A was urgent. Arguments were heard on behalf of the applicants and Wonderhoek on the remainder of the relief sought in Part A. Judgment was reserved on 26 March 2020. At midnight, on 27 March 2020, the Covid-19 lockdown commenced for a period of 5 weeks.

[6] On 4 August 2021 Van Zyl J issued the following order:

- “1. A rule *nisi* is issued, returnable on 26 August 2021 at 09h30, calling upon the respondents to show cause, if any, why the following order should not be made final:
  - 1.1 That the first respondent and all those acting on instruction of the first respondent who is present on a Portion 1 of the farm Aanvang, in the district of Wepener, be interdicted and restrained, pending finalisation of the relief claimed in Part B of the Notice of Motion, from:
    - 1.1.1 Breaking and entering any of the chalets, storerooms or any other buildings on the farm.
    - 1.1.2 Harassing, intimidating, victimising and/or for frequenting the applicants.
2. Prayers 1.1, 1.1.1 and 1.1.2 shall serve as an interim interdict with immediate effect, pending the finalisation of the aforesaid part of the application.
3. The cost stand over for later adjudication.”

[7] Costs have not been argued as at date of hearing hereof. It had been envisaged that the relief claimed in respect of Part B of the Notice of Motion would be argued on the return day, but to date Part B has not been heard. On 3 June 2020, the applicants filed their replying affidavit which dealt with certain aspects in respect of Part A of the Notice of Motion. On 16 August 2021 the first respondent filed a supplementary answering affidavit. On the return date, 26 August 2021 the rule *nisi* was extended until 17 September 2021 for adjudication. The issue of costs was reserved. On 17 September 2021 the rule *nisi* was again extended until 2 December 2021 with a further order that costs is reserved.

[8] On 19 October 2021 the applicants issued the present application in terms of the provisions of Rule 42(1)(b) on the basis that the order issued on 4 August 2021 contains a patent error, alternatively an ambiguity in respect of

the formulation of the order in that a rule *nisi* was issued and not a final order. This application was heard on 10 March 2022. During the hearing of arguments on behalf of counsel for applicants and Wonderhoek, a ruling was made that the parties are granted leave to file supplementary heads of argument pertaining to the contents of the transcript of the proceedings before Van Zyl J on 25 March 2020 and 26 March 2020. The transcript of the proceedings was handed up and the applicants filed their supplementary heads of argument on 30 March 2022. Wonderhoek's supplementary heads of argument was filed with the Registrar on 14 April 2022, but only came to my attention on 28 April 2022.

### LEGAL PRINCIPLES.

[9] Rule 42(1) (b) provides as follows:

“(1) 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) ...
- (b) an order or judgment in which there is an ambiguity, a patent error or omission, but only to the extent of such ambiguity, error or omission;
- (c) ...”

[10] The general, well-established principle is that once the court has duly pronounced a final judgment or order, it has itself no authority to set aside or to correct, alter or supplement it.<sup>1</sup> The court has become *functus officio* – its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter ceases.<sup>2</sup> The purpose of Rule 42 is to correct expeditiously an obviously wrong judgment or order.<sup>3</sup> A ‘patent error or omission’ has been defined as ‘an error or omission as a result of which the judgment granted does not reflect the intention of the judicial officer pronouncing it’,<sup>4</sup> in other words, the ambiguous language or the patent error or the omission must be attributable to the court itself. The court is thus not entitled to revisit the whole of its order or judgment and its competence is

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<sup>1</sup> Firestone South African (Pty) Ltd v Genticuro A.G. 1977 (4) SA 298 (AD) at 306F-G.

<sup>2</sup> Estate Garlick v Commissioner for Inland Revenue 1934 AD 499 at 502.

<sup>3</sup> Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz 1996 (4) SA 411 (C) at 417B – I.

<sup>4</sup> Seattle v Protea Assurance Co Ltd 1984 (2) SA 537 (C) at 541.

limited to the interpretation of the order. This subsection effectively confines the powers of this court to the exclusion of the ambiguity, error or omission.

### THE APPLICANTS' ARGUMENTS.

[11] Mr Lüderitz SC, counsel on behalf of the applicants argued that, despite the fact that the relief under Part A was argued in full on the merits on 26 March 2020 and that the initial relief sought by the applicants for a rule *nisi* had been overrun by events, in that Wonderhoek filed an answering affidavit in respect of both Part A and Part B on 25 March 2020, Van Zyl J “curiously” still issued a rule *nisi* with a return date, 26 August 2021, calling upon Wonderhoek to advance reasons why the order should not be made final. It is argued that the court had in fact adjudicated the relief in Part A on the merits as is evident from the following reasons as it appears from the written judgment of Van Zyl J:

“[4] ...I subsequently entertained arguments on the merits of prayer 2.1, 2.2 and 2.3 of the application the afternoon of 26 March 2020 after conclusion of Motion Court.”

And further’

“[35]...Considered in conjunction with the conduct of the security guards, the Applicants have in my view made out a proper case for the relief sought in terms of prayer 2.1, 2.2 (as amended) and 2.3 of Part A of the notice of motion and for the request that the said relief should serve as an interim interdict with immediate effect.”

[12] The applicants therefore argue that the court has finally pronounced upon the merits of the relief under Part A and it is therefore clear that the relief in respect of Part A has become *res judicata*. It was therefore a patent error by the court to have included a rule *nisi* returnable 26 August 2021. The applicants furthermore rely on the conduct of the legal representatives of Wonderhoek for a costs order sought *de bonis propriis* on the basis that, despite a request subsequent to the order of Van Zyl J being issued, to agree that the rule *nisi* be confirmed and that Wonderhoek pay the costs in line with the principle that costs follow the result, alternatively and if Wonderhoek is not in agreement with the proposal, that the parties’ legal representatives should approach Van Zyl J in chambers to have the mistake rectified. Wonderhoek did not agree with applicants’ proposals.

### **ARGUMENTS ON BEHALF OF WONDERHOEK.**

[13] The application in terms of the provisions of Rule 42(1)(b) is opposed by Wonderhoek, mainly on the basis that the interim relief, prayed for by the applicants in the notice of motion and requested during the hearing of the matter on 26 March 2020, was granted by the court. Furthermore, the conduct of the applicants, by filing a replying affidavit approximately three months after the hearing of the matter, is consistent with the applicants' request for interim relief. The first respondent merely complied with the interim court order issued on 4 August 2021 by filing a further answering affidavit when ordered to show cause why the interim order should not be made final. In compliance with the rule *nisi* issued on 4 August 2021, it had filed a further answering affidavit on 16 August 2021.

[14] With regard to the cost order sought *de bonis propriis* against the legal representatives of Wonderhoek, the arguments raised on behalf of Wonderhoek are that the rule *nisi* constitutes an order of a Court of Law and stands until set aside, varied or altered by a court of competent jurisdiction and must be obeyed. That is in accordance with the Rule of Law. The order in fact called upon the respondents to file a further affidavit and on this basis alone Wonderhoek was entitled to do so. The legal practitioners acting on behalf of Wonderhoek did not make themselves guilty of conduct covered by the principles pertaining to costs *de bonis propriis* and therefore did not make themselves guilty of unprofessional, vexatious and opportunistic conduct or any other such conduct warranting a *de bonis propriis* order of costs.

### **DISCUSSION.**

[15] Rule 42(1)(b) clearly provides that an order or judgment in which there is an ambiguity, or a patent error or omission may be varied, but only to the

extent of such ambiguity, error or omission. To my mind, it is crucial for the outcome in this application, to ascertain what transpired at the hearing of the urgent application on 25 and 26 March 2020 in order to understand and interpret the order and the judgment handed down by Van Zyl J.

[16] On 26 March 2020, Mr Janse van Rensburg, counsel on behalf of the applicants addressed the court on the merits of the application and the return day as follows:

“MR JANSE VAN RENSBURG: ... I do not want the parties in these circumstances of the Covid- 19 lockdown to run to court for every small incident and on that basis I submit that the applicants would be satisfied with an order in terms of prayer 2.1, 2.2 but excluding the part that I had indicated yesterday to stop after ‘*buildings on the farm*’ [full stop]” and to delete, “*or in any way interfering with the applicants undisturbed possession and occupation of the said farm*”, which may be open to interpretation that is going to inconvenience the Court and then obviously prayer 2.3 and also 2.5: ‘That it serves as an interdict with immediate effect pending the return date.’

COURT: Talking about the return date?

MR JANSE VAN RENSBURG: Yes, M’Lady, at 23 April.

COURT: That was requested as 23 April.

MR JANSE VAN RENSBURG: Yes.”

[17] The uncertainty regarding the period of the lockdown was discussed as well as problems relating to further consultations and the filing of further affidavits during lockdown. The discussion that followed regarding return date was as follows:

“COURT: He will in any event constitute extra motion court both unopposed and opposed for the Wednesday and the Friday. So..

MR JANSE VAN RENSBURG: As the Court pleases. So in other words ....[intervenes]

COURT: You can keep it on 23 April.

MR JANSE VAN RENSBURG: We will keep it on 23 April, subject to my learned friend’s submissions. As the Court pleases.”

[18] Counsel on behalf of Wonderhoek, Mr Kloek, then raised the question that the second applicant does not have any connection with the relief claimed in Part B of the Notice of Motion. She is married out of community of property to the first applicant and is not a party to the Settlement Agreement. On the basis that the court already made a finding that the first applicant has no *locus standi* in respect of prayer 2.4 of the notice of



motion, it simply equates that he will also have no *locus standi* in respect of Part B of the notice of motion. Mr Kloek then made the following submission:

“MR KLOEK: ... So in essence what the second applicant now seeks is an order for an interim interdict that simply will come back to court on a future date and it wants the court to re-adjudicate as to whether an interim interdict should be confirmed or not, but Part B in the notice of motion does not ask for confirmation of the interim interdict. It deals with other relief. It deals with other relief that does not concern the second applicant.”

COURT: No, but Part A has got a return date as it stands. So obviously on the return date confirmation can be asked for orders issued in Part A.”

- [19] Mr. Kloek referred to the relief sought by the applicants being an interim interdict and the principles as set out in **Webster v Mitchell** pertaining to the question whether the applicants have in fact made out a case in the founding affidavit for final relief. Mr. Janse van Rensburg argued that in respect of the evidence relating to the harassment, the applicants would file a replying affidavit as to when there was an attendance at the police station, an aspect which played an important role in respect of Part A of the notice of motion. Mr Janse van Rensburg submitted that he requested an interim interdict on behalf of the applicants and not a final interdict which is evident from the following submission:

“... I submit that it is clear and there is no basis to argue that this is a final interdict. This is an interim interdict, pending the return day and pending the setting aside of the Court Order and the Settlement Agreement...”

- [20] In paragraph 27 of her judgment, Van Zyl J mentioned that, during his presentation of argument on the merits of the application, Mr Janse van Rensburg “...indicated that the applicants will, with regard to prayer 2.2 of the Notice of Motion, be satisfied if a rule *nisi* is to be issued in terms of only the first part thereof up to after the words “or any other building on the farm” and that

“...the applicants do not persist with an order in terms of the remainder of the said prayer. The applicants are consequently persisting with their request for a rule *nisi* in terms of prayers to 2.1, 2.2 as amended, as aforesaid and 2.3, with the additional relief that the said order is to serve as an interim interdict with immediate effect.”

[21] In paragraph [35] of her judgment Van Zyl J concluded as follows:

“Considered in conjunction with the conduct of the security guards, the applicants have in my view made out a proper case for the relief sought in terms of prayers 2.1, 2.2 (as amended) and 2.3 of Part A of the Notice of Motion and for the request that the same should serve as an interim interdict with immediate effect”

[22] In matters of urgency, the utilisation of the rule *nisi* procedure is to be encouraged. In **Safcor Forwarding (Johannesburg) (Pty)Ltd v National Transport Commission**<sup>5</sup> Corbett JA (as he then was) held as follows:

“The Uniform Rules of Court do not provide substantively for the granting of a rule *nisi* by the Court. Nevertheless, the practice, in certain circumstances, of doing so is firmly embedded in our procedural law.

And further.

“The procedure of a rule *nisi* is usually resorted to in matters of urgency and where the applicant seeks interim relief in order adequately to protect his immediate interests.”

[23] Rule 42(1) (b) provides for the variation of an order or judgment in which there is an ambiguity or a patent error or omission. In **First Consolidated Leasing Corporation Ltd v McMullin**,<sup>6</sup> as followed in **Seadle v Protea Assurance Co Ltd**,<sup>7</sup> it was held that the ambiguous language or the patent error or the omission must be attributable to the court itself. Under the subsection, relief will only be granted where the terms of the judgment do not reflect the true intention of the presiding judge. It is also irrelevant whether the reasoning of the court was sound or unsound<sup>8</sup>.

[24] In the **Seadle** case, Caney AJ (as he then was) held as follows:

“The judgment which was expressed in the action between the parties in 1946 did ‘express that true intention and decision of the Court’. There was no mistake, inadvertent omission or oversight on the part of the Court or in the issue of the order, which was the very order for which the plaintiff had asked; and the relief for which she now asks would not add a supplementary detail or give consequential or accessory relief claimed but inadvertently omitted; on the contrary, it would be in direct conflict with what was granted. If a litigant, by mistake of himself or his legal advisers, abandons relief to which he is, or may be, entitled, the Court has no jurisdiction or power to recall or amend the order it has in consequence deliberately made, in the absence of fraud or the other party in the course of the

<sup>5</sup> 1972 (3) SA 654 (A) at 674 H-675C.

<sup>6</sup> 1975 (3) SA 606 (T).

<sup>7</sup> 1984 (2) SA 537 (C).

<sup>8</sup> *Seadle v Protea Assurance Co Ltd* 1984 (2) SA 537 (CPD) at 541A -D.

proceedings including the order. Vellyammal v Winser 1928 N.P.D 36; Florence v Florence 1948 (3) SA 71 (N).” (My underlining)

[25] In **Marshall v Ahmed and Another**<sup>9</sup> the court held as follows:

“The result of this mistake is that the discretion which the magistrate intended to exercise as to costs was not carried into effect by the order which he made and that is equivalent to saying that in making the order he failed to exercise a discretion at all. His failure to do so is an irregularity which should entitle the aggrieved party to a remedy. This irregularity cannot be remedied by way of appeal because it does not appear *ex facie* the record but it was argued for the respondent that the procedure of review was unnecessary and wrong inasmuch as the magistrate had power to correct his order if it did not carry out his intention. Now it is true that under s 36(3) of Act 32 of 1971 a magistrate's court may correct patent errors in any judgment in respect of which no appeal is pending; but this was not a patent error. On the face of the record there was nothing whatever to show that the order made was not the order which the magistrate intended to make. As a matter of fact the magistrate made the order which he intended to make and it was not till some time afterwards that he became aware of the fact that the order which he had made did not have the effect which he intended it to have. This fact could only be ascertained *dehors* the record and could only be brought to the notice of this court by means of affidavits. (My underlining)

[26] In the present matter the judgment, read in conjunction with the transcript of the proceedings, do not disclose that Van Zyl J expressed herself ambiguously or committed an error in granting an interim order with a return date set for 26 August 2021. In my view, it is quite clear that the order made by Van Zyl J on 4 August 2021 reflects her considered decision as given expression to in her judgment, which is in any event in accordance with the relief prayed for by the applicants at the time when the matter was argued on 26 March 2020.

[27] The transcription demonstrates that Mr Janse van Rensburg requested interim relief pending a return day, anticipated to be 23 April 2020. Even though Mr Kloek tried to convince Van Zyl J that, in the event of an interim order with a return date being granted, it will inevitably result in the merits being re-argued on the return date. Van Zyl J responded as follows:

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<sup>9</sup> 1937 CPD 435 at 438

“No, but Part A has got a return date as it stands. So obviously on the return date confirmation can be asked for the orders issued in Part A”

[28] The parties were alive to the fact that Part B will have to be adjudicated upon on a future date. I agree with Mr Kloek that there can be no doubt that the application was understood by Van Zyl J that a return day was to be included in her order as sought in the notice of motion in respect of part A. The issue of costs pertaining to the urgent application heard on 25 and 25 March 2020 has not been argued and adjudicated upon.

[29] **ORDER:**

In the result the following order is made:

1. The application is dismissed with costs.

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**VAN RHYN AJ**

On behalf of the Applicants:	Adv KW Luderitz SC
Instructed by:	Adv F G Janse Van Rensburg Willers Attorneys Bloemfontein
On behalf of the First Respondent:	Adv J W Kloek
Instructed by:	MDP Attorneys Bloemfontein
On behalf of the legal representatives of the First Respondent:	Adv M C Louw
Instructed by:	MDP Attorneys Bloemfontein