REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

23/03/2022 **.....**
DATE **SIGNATURE**

CASE NO. 2019/41752

In the matter between:

KHATHUTSHELO MAKHOMISANI N.O. First Applicant

IYONDA MAPHUTHI MAKHOMISANI N.O. Second Applicant

and

SB GUARANTEE COMPANY (RF)(PTY) LIMITED Respondent

JUDGMENT

NGCONGO AJ:

> "Like all things in life, like the best of times and the worst of times, litigation must, at some point, come to an end."[1]

Introduction

1 This matter concerns a dispute that has been brewing between the parties since November 2018. It comes before me as an application to set aside an earlier order of this Court. The applicants refer to it as an "application for the reinstatement" of a previous rescission application that this Court dismissed with costs in August 2020.

2 It conduces to clarity to start at the beginning. Therefore I commence with a brief history of the various applications and orders in this matter.

The various applications

3 In November 2018, the respondent, SB Guarantee Company (RF) Proprietary Limited brought an application for an order for payment by the applicants, in their capacity as trustees of the Makhoms Family Trust, of the amount of R6 504 121.54 plus interests and costs, and to declare the Trust's immovable property[2] specially executable.

4 An order along these terms was granted by this Court, by Judge Vally, on 5 December 2018 ("**the Default Judgment**"). It was granted in the absence of the applicants.

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[1] *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* [2021] ZACC 28 at para 1.

[2] The immovable property is Portion 50 (of 37) of Erf 464 Port Zimbali, Registration Division FU, Kwazulu-Natal ("**the Property**").

5 The applicants only became aware of the Default Judgment sometime later[3] and, at that stage, brought an urgent application to be determined on 6 August 2019 to rescind the Default Judgment. The urgent application consisted of two parts, Part A on urgency and Part B concerning the rescission of the Default Judgment.

6 The matter was removed from the urgent roll on 6 August 2019. Part B remained as a self-standing rescission application ("**the Rescission Application**").

7 The respondent filed its answering papers in the Rescission Application in 11 October 2019. Shortly thereafter, on 5 November 2019, the respondent filed its consolidated index. This was followed by the filing of its heads of argument, list of authorities and practice note on 30 January 2020. There was no action taken by the applicants during this time.

8 Frustrated by the lack of action by the applicants, the respondent brought an interlocutory application on 6 February 2020 in terms of paragraph 2.11 of the Judge President's Directive, 2 of 2020 ("**the Practice Directive**") to compel the applicants to deliver their heads of argument in the Rescission Application ("**the Application to Compel**").

9 Paragraph 2.11 of the Practice Directive states:

> "Where a party fails to deliver and/or upload heads of argument and/or a practice note within the stipulated period the complying party may provisionally enrol the application for hearing. Such party shall, upon

[3] According to the applicants' papers in the urgent application, the applicants became aware of the Default Judgment on 1 August 2019 when they were presented with a condition of sale in execution of immovable property.

provisional enrolment, simultaneously initiate and/or upload an interlocutory application on notice to the defaulting party that on the date set out therein, (which shall be at least 5 days from such notice), he or she will apply for an order that the defaulting party delivers and/or uploads his or her heads of argument and practice note within 3 days of such order, failing which the defaulting party's claim or defence will be struck out. Such application shall be enrolled in line with the provisions set out in Practice Directive 2 of 2019 dealing with interlocutory applications."[4]

10 In the Application to Compel, the respondent therefore sought an order along the following terms:

10.1 The applicants be ordered to deliver their heads of argument, practice note and list of authorities in the Rescission Application within 3 days of the order.

10.2 In the event of the applicants failing to comply with the above, the respondent be granted leave to approach the Court for an order striking out the Rescission Application.

10.3 The applicants be ordered to pay the costs of that interlocutory application.

11 The applicants did not oppose the Application to Compel.[5] An order on the above terms was granted by this Court on 12 March 2020 ("**the March 2020 Order**").

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[4] Emphasis added.

[5] The applicants submit that they never received the notice for this application, although there is a return of service dated 20 February 2020, which states that on 12 February 2020, the notice of motion and founding affidavit in the Application to Compel was served personally on the first applicant, who received service on his behalf and on behalf of the second applicant, who was not in.

12 The applicants received the March 2020 Order on or about 31 May 2020.[6] Nonetheless, the applicants still did not deliver their heads of argument, list of authorities or practice note in the Rescission Application.

13 Consequently, in July 2020, the respondent brought an application that the rescission application be struck out, as was threatened in the Application to Compel ("**the Striking Out Application**"). Though the notice of motion in the Striking Out Application seeks an order that the "applicants' *defence* be struck out and/or alternatively dismissed". I do not consider this to be of any great significance. The matter was set down for 20 August 2020.

14 The applicants filed a late notice of intention to oppose the Striking Out Application on 18 August 2020.[7]

15 On 20 August 2020, the Striking Out Application came before Judge Keightley. According to both of the parties, a legal representative for the applicants was present at the hearing and made certain, *albeit* limited, representations, including requesting a postponement of the application, which was not granted.

16 This Court consequently dismissed the applicants' Rescission Application, with costs ("**the August 2020 Order**").

17 Unhappy that their recission application had been dismissed, in September 2020 the applicants launched the current application ("**the Reinstatement Application**"). This application sought an order that the August 2020 Order be

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6 This is according to the applicants' own papers.

7 The applicants contend that the notice of motion only came to their attention on 17 August 2020. The return of service in the record indicates that the applicants' son, appearing older than 16, received the notices on behalf of the applicants on 6 August 2020.

set aside and that the applicants' Rescission Application of the Default Order be reinstated. This is the application with which this judgment is concerned.

18 In January 2021, the applicants launched an urgent application that, pending the finalisation of the Reinstatement and Rescission Applications, the Sherriff and Registrar of Deeds be interdicted from registering or conveyancing the Property into the name of any third party. This was struck off the roll by Wright J on 26 January 2021. The January 2021 interlocutory application is not relevant for current purposes.

Relief sought in the current proceedings

19 In the current proceedings, the applicants seek an order along the following terms:

19.1 The 20 August 2020 order is set aside, including the order to costs.

19.2 The applicants' application for rescission of the default judgment granted on 5 December 2018 is reinstated.

19.3 The respondent is interdicted and/or restrained from transferring and/or registering the Property into the name of any third party.

20 In the heads and during argument, counsel for the applicants sought to extend the relief beyond that requested in the notice of motion to include that this Court not only reinstate the Rescission Application but also *determine* the Rescission Application and order the rescindment of the Default Judgment. No amendment to the notice of motion was effected and the applicants do not advance any reasons as to why I should consider the Rescission Application,

notwithstanding their failure to include that relief in the notice of motion or in the founding papers.

21 I consider that it would be a misdirection for this Court to adjudicate upon a matter not requested in the notice of motion and not canvassed by the applicants on their papers – neither in the founding papers nor on reply. Parties cannot substantially extend the relief they seek during argument in the manner the applicants have attempted to do here. The other party is entitled to know what case they must meet on the papers.[8] And they are certainly entitled what the relief is which is properly sought by the other side.

22 In any event, given the conclusion I reach on the other issues, the consideration of the merits of the Rescission Application does not arise.

23 What, then, are the issues for determination by the Court?

Issues for determination

24 The central issue for determination is whether the applicants are entitled to have the Rescission Application reinstated so that they may be heard on the merits of that application.

25 Whether the applicants are entitled to this is based on the answers to the following:

25.1 Was the August 2020 Order a final order?

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[8] The Constitutional Court, albeit in the context of raising new arguments on appeal, noted the following basic principle in *Prince v President of the Law Society of the Cape of Good Hope* [2000] ZACC 28; 2001 (2) SA 388; 2001 (2) BCLR 133 at para 22:

> "It is not sufficient for a party to raise . . . only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought."

25.2 If it was, should the August 2020 Order be rescinded?

26 Counsel for the respondent submitted in his heads of argument and during his oral address that there is also a preliminary issue of whether the non-joinder of the new owner of the Property is fatal to the application. In my view, that would only be relevant if I were to consider the merits of the Rescission Application, which, as I have said, is not necessary. I therefore need not consider this preliminary issue.

27 Before I turn the first question of whether the August 2020 Order was a final order, I wish to outline the submissions made by the applicants in their papers in the current matter. I do this because it is on their papers that the applicants need to make out a case for the relief sought and their case on the papers differs in a number of respect from the case argued by counsel, the latter focusing largely on the merits of the rescission of the original Default Judgment.

Applicants' submissions

28 The applicants submit that the purpose of this Reinstatement Application is to "seek indulgence" from this Court for the reinstatement of the Rescission Application and to set aside the August 2020 Order.

29 As background facts, the applicants contend that, shortly after the Rescission Application was launched in August 2019, their erstwhile attorneys were no longer willing to assist them due to outstanding legal fees. The attorneys officially withdrew in October 2019. I understand that this is raised by the applicants as a reason for their failure to provide the heads of argument, practice note and list of authorities timeously.

30 Furthermore, the applicants allege that they were not aware of the Application to Compel in early 2020[9] and it was only on 31 May 2020 that the March 2020 Order came to their attention. Glaringly absent, of course, is an explanation by the applicants for why this order was not complied with when the applicants became aware of it at the end of May. The answer to this question is particularly wanting in light of the fact that it was only in mid-July, some six or so weeks later, that the Striking Out Application was launched.

31 The applicants state that they became aware of the Striking Out Application on 17 August 2020.[10] They approached their current attorneys the following day to appear on their behalf. A notice of intention to oppose was filed on 18 August 2020. According to the applicants, the short time between when they became aware of the application and the 20 August 2020 set-down meant that counsel could not be briefed.

32 With the above as general background, the applicants proceed to submit that this Court ought to grant them an indulgence for reinstatement of the Rescission Application and raise the following as "good cause" for why the Court should do so:

32.1 First, the applicants contend that they did not receive any notices and were unaware of the Practice Directive 2 of 2020 or what it required.

32.2 Second, and connected to the first, the applicants submit that the notices[11] were never brought to their attention.

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9 I have taken note of the returns of service dated 20 February 2020, which constitute *prima facie* proof that the Application to Compel was served on the applicants.

10 I note that the returns of service indicate that the notice was served on the applicants' son on 6 August 2020.

11 It is unclear precisely which notices the applicants are referring to in this submission.

32.3 Third, the applicants seek to rely on the fact that they do not have a legal background and were therefore unaware of how legal proceedings are conducted.

32.4 Fourth, the applicants contend that if the notice alleged to be served around May 2020[12] was brought to their attention, they would not have ignored it.

32.5 Finally, the applicants concede that they had legal representation on 20 August 2020 but state that their request for a postponement or indulgence on that day was unfortunately refused, resulting in their application being dismissed or struck off.

33 The applicants' case is that, by the Court refusing to grant them the postponement, they were denied their right to *audi alteram partem* and their right in terms of section 34 of the Constitution.

34 They continue that they "are not in wilful default" and that they will suffer severe prejudice if the Rescission Application remains dismissed. In their words, this will be a "denial of justice", as they require judicial redress and the notices did not come to their attention.

35 They submit that there is good cause for their non-compliance with the rules and their failure to file heads of argument. Furthermore, they say that their explanation is *bona fide*.

[12] It is unclear which notice this refers to, as there was no notice served in May 2020. I will presume that this is either the March 2020 notice in the Application to Compel or July 2020 notice in the Striking Out Application.

36 Consequently, so they say, because they have furnished a sufficient explanation for the court to understand the non-compliance,[13] the Court should reinstate the rescission application for reasons of fairness.

Was the August 2020 Order final?

37 On the founding papers the applicants do not submit that the August 2020 Order was not final. Rather, the applicants submit that "it is unfortunate that at the hearing on 20 August 2020, [the applicants'] plea and requests [for a postponement] were dismissed" and that the applicants "unfortunately view this as closing the door of the court to [them]". It was only in reply that the applicants then raised the point that Keightley J had allegedly informed their legal representative that it was possible for the applicants to reinstate the Rescission Application, on the basis that the dismissal was "technical" and not a dismissal on the merits.

38 The applicants submit that this "technical" dismissal cannot override, or supersede, their section 34 right to have their dispute decided in a fair hearing. A failure to reinstate the Rescission Application would, in their view, deny them of their section 34 right as they were never afforded an opportunity to deal with the merits of the Rescission Application in open court. I was provided with no cogent explanation as to what a so-called technical dismissal is or what its legal status, if any, is.

39 As unfortunate as it may be for the applicants that they do not feel like they have aired their position in oral argument in the Rescission Application in the

[13] Presumably, this refers to the applicants' non-compliance with the practice directives and the March 2020 order.

manner they would have liked, that does not in itself mean that the order granted on 20 August 2020 dismissing that application was not final. As to the applicants' contention that section 34 allows them the right to have their argument heard in open court, it is trite that such a right cannot simply trump all rules and procedures set to ensure the efficient functioning of the Courts. Litigants do not simply have a right to argue their case *no matter what.*

40 The wording of the order is clear and unequivocal. It states:

> "Having read the documents filed of record and having considered that matter:
>
> **IT IS ORDERED THAT**
>
> 1. Draft order marked "X" signed and dated 20 August 2020 is made an order of court."

41 The draft order marked "X" signed and dated 20 August 2020 read as follows:

> "Having heard counsel for the [respondent] and having read the papers filed of the record, the following order is granted:
>
> 1. The [applicants'] rescission application dated 6 August 2019 is dismissed with costs, including the reserved costs of 6 August 2019.
>
> 2. The [applicants] are liable for the costs of this application."

42 In my view, there is no ambiguity in the wording of the order. It states in clear terms that this Court considered the matter and reached a decision that the applicants' rescission application be dismissed, with costs.

43 Counsel for the applicants did not contend, nor could he have, that Keightley J did not properly consider the matter, as she had purported to do in the order.

Nor could he explain how the unequivocal wording of the order (namely, that the rescission application dated 6 August 2019 is dismissed with costs) could be reconciled with the applicants' version that this Court did not finally dismiss the application, but merely "technically dismissed" it with the effect that it could be reinstated on a later date. Counsel has additionally not pointed this Court to any authorities that support his distinction between a technical dismissal and a dismissal properly so-called.

44 In argument, counsel for the applicants submitted that the respondent had abused the court processes and thereby denied the applicant an opportunity to defend themselves in Court. It was submitted that the respondent "manipulated" the court's system to obtain orders in circumstances that they ought not to have been obtained. For this submission, counsel stated that a legal process is being abused where it is used for a purpose other than for what it has been intended or designed.

45 An accusation of abuse of process is a serious matter. In my view, there must be a proper foundation for it. In any event, I am not sure in what way this supports the applicants' argument that the decision given by this Court on 20 August 2020 is not final. In any event, I do not accept that the respondent's invocation of the procedures in the Practice Directive could be said to amount to an abuse of process. If anything, the papers indicate that the respondent did it by the book.

46 The applicants have not convinced me that there is any reason to doubt the express words of the August 2020 Order – that this Court has dismissed the Rescission Application.

47 I therefore find that the August 2020 Order is final.

Reinstatement of the Rescission Application and/or setting aside the August 2020 Order

48 The applicants speak of "reinstatement" of the Rescission Application, "indulgence" and "setting aside" of the August 2020 Order. It is unclear to me from the applicants' papers on what *legal basis*, however, they seek the reinstatement of an application or such an indulgence where (a) a final order by this Court was granted dismissing that application and (b) this decision was made in the presence of the applicants.

49 Courts are generally not empowered to reopen their own cases once they have been finally concluded.[14] This is based on the principle that, "once a court has pronounced on a final judgment or order . . . it becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject- matter has ceased".[15]

50 Nonetheless, where a final order has been granted by the Court, it is empowered by Rule 31(2)(b) to set aside a default judgment granted in terms of Rule 31(2)(a); alternatively, it can set aside a final judgment in terms of Rule 42 or under the common law of rescission.

51 As a general point of departure, however, apart from the exceptions mentioned above, a Court does not have the inherent power to set aside its own final orders or grant a party an indulgence to reinstate an application that has been

[14] *Ex parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Council* 2001 (4) SA 1288 (CC) at para 4.

[15] *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306FBG; *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) at para 22.

dismissed by the very same Court. Further remedies for an aggrieved party include review or appeal (in the applicable circumstances).

52 The relief sought by the applicants is not, in my view, competent relief, unless it is found that the applicants are in fact requesting this court to rescind the August 2020 Order. I will give the applicants the benefit of the doubt and assume that, despite the unclear wording of the notice and founding papers, the current application seeks a rescission of the August 2020 Order.

Requirements for rescission

53 There are three avenues through which rescission of a judgment can be obtained: the setting aside of a default judgment in terms of Rule 31(2)(b), rescission in terms of Rule 42 and rescission under the common law.

54 The applicants do not state under which of these they bring their application to set aside the August 2020 Order. I will therefore consider whether the applicants meet the requirements under any of these, bearing in mind, of course, that even if the requirements are met, the Court retains a discretion as to whether rescission ought to be granted.

Setting aside a default judgment under Rule 31(2)(b)

55 Rule 31 concerns default judgments granted in action proceedings where a defendant has failed to file a notice of intention to defend or a plea after being barred. A defendant may, within 20 days of acquiring knowledge of the judgment apply for the Court to set it aside, which the Court may do, on good cause shown.

56 It is quite evident that Rule 31, concerning action proceedings, is not applicable to the current circumstances.

57 I turn then to consider Rule 42.

Rescission under Rule 42

58 Rule 42(1) of the Uniform Rules of Court empowers a court to rescind an order or judgment erroneously sought or granted in certain circumstances.

59 Rule 42(1) reads as follows:

> "**Variation and Rescission of Orders**
>
> (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)* An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
>
> *(b)* an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
>
> (c) an order or judgment granted as the result of a mistake common to the parties."

60 A litigant must establish the jurisdictional facts in subrule (1) of Rule 42 before a Court may exercise its discretion to set aside the order.[16]

61 The only possibly applicable ground to the current matter under Rule 42(1) is paragraph (a). Thus, the applicants must show that the August 2020 Order was

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[16] *Minister for Correctional Services v Van Vuren; In re Van Vuren v Minister for Correctional Services* [2011] ZACC 9; 2011 (10) BCLR 1051 (CC) at para 7.

either erroneously sought or erroneously granted and that it was granted in the absence of any party affected thereby. There are therefore two grounds to be met: the order sought to be rescinded was granted in the party's absence *and* it was erroneously sought or granted. It is well-established that both grounds must be shown to exist.

62 To be clear, the Rule applies where an order is granted in the absence of the affected *party*. The word "party" in the Uniform Rules is defined to include such party's legal representative. Thus, if a legal practitioner represents a person who is party to litigation, as occurred in the current matter, then the latter person, even if not physically in court (or in the online MS Teams hearing), is not considered "absent" for purposes of Rule 42.[17]

63 Once again, it is quite clear that the applicants cannot rely on this provision. This, for the simple reason that the first ground is glaringly missing: the August 2020 Order was not granted in the applicants' absence.

64 There is no dispute between the parties that the August 2020 was granted in the presence of the applicants' legal representative. On the applicants' own account, their attorney appeared on 20 August 2020 and, at a minimum, requested an indulgence from this Court that the hearing be delayed. This indulgence was not granted and the order to dismiss the applicants' Rescission Application was given in his presence.

65 Furthermore, the applicants have not alleged on what basis the August 2020 Order was erroneously sought or erroneously granted.

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[17] See, too, *De Allende v Baraldi t/a Embassy Drive Medical Centre* 2000 (1) SA 390 (T). That case concerned the section in the Magistrates' Court Act that empowered a Court to rescind or vary any judgment granted by it in the absence of the *person* against whom the judgment was granted, and not Rule 42, but the rationale at p 395 is apposite for applications under Rule 42, too.

66 The applicants have therefore not met the jurisdictional requirements of Rule 42(1)(a) and this Court is therefore not endowed with a discretion to rescind its order in terms of this Rule.

Rescission under the common law

67 Under the common law, a Court is empowered to rescind a judgment obtained on default of appearance, provided sufficient cause for the default has been shown.[18] The Appellate Division in *Chetty* held that the term "sufficient cause" (or "good cause") has two essential elements for rescission of a judgment by default. These are (a) that the party seeking relief must present a reasonable and acceptable explanation for his default; and (b) that on the merits such party has a *bona fide* defence which, prima facie, carries some prospect of success.[19] For there to be good cause, both of these elements must be met. A failure to meet one of them may result in refusal of the request to rescind.[20]

68 As the applicants were not absent from the proceedings, this ground for rescission under the common law is not applicable in relation to the August 2020 Order.

69 It is possible to rescind a final judgment at common law on other, but very limited, grounds, namely fraud and *iustus error*.[21] Neither of these were pleaded by the applicants and, on the facts before me, neither is present in the current matter.

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18 *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764.

19 *Chetty* at 765.

20 *Government of the Republic of Zimbabwe v Fick* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) at para 85.

21 *KR Sibanyoni Transport Services CC v Sheriff, Transvaal High Court* 2006 (4) SA 429 (T) at para 6. See, too, Harms in LAWSA, Volume 4, Third Edition Replacement, at 601.

70 Based on the above, I see no basis for the August 2020 Order to be rescinded or set aside.

No good cause shown for the August 2020 Order to be set aside

71 Even if this Court were empowered to grant the applicants an indulgence and reinstate the Rescission Application, I am not convinced by the applicants' reasons in support of why the Rescission Application should not have been dismissed. The applicants attempt to show that they have good cause for their non-compliance with the rules or Practice Directives. However, this "good cause" consists primarily of submissions that the applicants are ignorant of legal proceedings, never received the various notices and were not in wilful default.

72 However, no explanation was given for why, right until the August 2020 hearing, no heads of argument, practice note or list of authorities was filed by the applicants in the Rescission Application. This was despite the fact that, from at least 31 May 2020, the applicants were in possession of an order from this Court that the applicants were to file their heads of argument, practice note and list of authorities in the rescission application. That order also gave the respondent leave to approach the Court for an order striking out the main application if the applicants failed to comply. It is difficult to understand this non-compliance with a Court order as *bona fide* or not constituting wilful default.

73 The applicants further adduced no evidence to counter the returns of service that indicated that the various notices were, in fact, served on the applicants, both in February 2020 and in August. Their plea of ignorance of legal

proceedings is also not sufficient. On their own account, they were able to retain a legal practitioner within a day to represent them at the 20 August 2020 hearing. There is no reason why legal advice could not have been sought earlier or at least in relation to the March 2020 Order.

74 Finally, the applicants can point to nothing that indicates that this Court did not properly consider the matter on 20 August 2020 that would justify this Court granting a reinstatement of a matter that has been finally determined by this very Court.

75 The current application must accordingly be dismissed, with costs.

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NGCONGO PMP

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the 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 for hand-down is deemed to be 23 MARCH 2022.

Date of Hearing: 08 September 2021

Date of Judgement: 23 March 2022

Appearances:

For the applicant: Advocate Mashudu Tshivhase

Advocatemashudu@gmail.com

advtshivhase@law.co.za

For the respondent: Advocate AJ Venter

ajventer@law.co.za