REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 2019/2080

DELETE WHICHEVER IS NOT APPLICABLE	
1.REPORTABLE:	NO
2.OF INTEREST TO OTHER JUDGES:	NO
3.REVISED	NO
21/02/2022	**Judge**
Dippenaar	

In the matter between:

UNODA JOHAN N.O 1st Applicant

KATJA DOROTHEA MARTINI N.O 2nd Applicant

And

KENSINGTON RESIDENTS AND RATEPAYERS ASSOCIATION NPC 1st Respondent

CORLIA ROBERTS 2nd Respondent

JOHANNESBURG CITY BACK PACKERS CC 3rd Respondent

THE CITY OF JOHANNESBURG

METROPOLITAN MUNICIPALITY 4th Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 21st of February 2022.

DIPPENAAR J:

[1] The applicants, by way of application launched on or about 15 February 2021, seek orders respectively rescinding and varying different portions of an order granted in this court on 21 May 2019 pursuant to a provisional order granted by agreement between the parties on 11 April 2019. It was common cause that the final order granted was in terms of the respondents' notice of motion dated 23 January 2019 and that in terms of the interim order, the parties had agreed on attenuated relief. The applicants are the sole trustees of the Martin John Family Trust ("the Trust"). The application is opposed by the first respondent.

[2] The applicants' case is that it was not open to the respondents to seek the relief granted in the final order on the return date as the basis of the orders differ fundamentally from the interim order which should have been subject to finality. As the applicants were under the impression that on the return date the provisional order granted by agreement would be made final, they did not appear on the return date and the order was erroneously granted in their absence as envisaged in r 42(1)(a) of the uniform rules of court. On their version, the parties through their legal representatives had agreed that it would not be appropriate for the court to prohibit the use of the property for accommodation purposes and the Trust could not be prohibited from

conducting a business it was always intended for. They further contended that there was no justification for the punitive order granted against them.

[3] In its answering papers, the first respondent opposes the application on the basis that there are no bona fide reasons why the final order should not have been granted and the applicants' misunderstanding of the interim order, which clearly envisaged that on the return date the respondents would seek relief in terms of their notice of motion. It further disputes that any final agreement was concluded not to prohibit the property from being used for accommodation purposes and contend that the agreement was limited to the interim order. The first respondent further contends: (i) that the first applicant was not authorised to depose to the founding affidavit or to launch the application on behalf of the Trust, which lack of authority could not be ratified; and (ii) that there is no valid explanation for the unreasonable delay in the launching of the present application. It seeks the dismissal of the application as an abuse.

[4] I agree with the applicants that the objection pertaining to the lack of authority of the first applicant lacks merit. In its answering papers, objection was taken to the authority of the first applicant to depose to the founding affidavit. It is well established that it is the institution of the proceedings which must be authorised[1] rather than the authority of a witness to depose to an affidavit. The Martini John Family Trust, which owns the properties in question has two trustees and both are cited as applicants in the proceedings[2]. The first respondent did not put up any countervailing evidence casting doubt upon their status as such.

[5] Whilst there was a considerable delay in the launching of the proceedings and there is merit in the first respondent's criticism, it is not necessary for a party to show good cause under r42(1)(a) if the applicants establish that the order had been erroneously sought or erroneously granted[3].

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[1] Ganes and Another v Telecom Namibia Ltd (608/2002) [2003] ZASCA 123; [2004] 2 All SA 609 (SCA) par [19]
[2] Mariola and Others v Kayeeddie NO and Others 1995 (2) SA 728 (W) at 731C-E

[6] The principles pertaining to an order being erroneously sought or granted are usefully summarised in *Kgomo v Standard Bank of South Africa*[4]. Relevant to the present proceedings are the principles that : (i) the rule caters for a mistake in the proceedings; (ii) the mistake may either be one which appears on the record of the proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgment; (ii) the error may arise either in the process of seeking the judgment on the part of the applicant for default judgment or in the process of granting default judgment on the part of the court; and (iv) a judgment cannot be said to have been erroneously granted in the light of a subsequently disclosed defence which was not known or raised at the time of default judgment.

[7] Prayer 6 of the interim order, granted by agreement between the parties, provides:

> "*The Respondents are called upon to show good cause in this Honourable Court on the return date of the rule nisi being 13 May 2019 at 10h00 why the Prayers in terms of the Notice of Motion in this matter should not be made a Final Order*".

[8] The wording of the order is clear. At the time the applicants were legally represented. The applicants admitted not appearing on the return date as *"we did not know that the court could procedurally go beyond the interim order and make a far-reaching order with unintended consequences"*. I agree with the first respondent that ignorance of the law is not a valid defence. The applicants were at the time legally represented and any incorrect legal advice received[5], cannot be translated into a procedural irregularity in the granting of the order.

[9] The agreement now contended for by the applicants in any event would constitute a subsequently disclosed defence which was not disclosed at the time of

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[3] Rossiter and Others v Nedbank Limited (96/2014) [2015] ZASCA 196 para 6; Kgomo v Standard Bank of South Africa 2016 (2) SA 184 (GP) para [11] and the authorities referred to therein

[4] 2016 (2) SA 184 (GP) at 187F-188C.

[5] De Wet v Western Bank Ltd 1979 (2) SA 1031 (A)

granting of the final order. That is not, however, dispositive of the issue, as the first respondent contends.

[10] It is trite that an order is erroneously granted if there existed at the time of its issue a fact of which the court was unaware, which would have precluded the granting of the judgment and which would have induced the court, if aware of it, not to grant the judgment.[6] This is such a case.

[11] In their founding affidavit, the applicants contend that the respondents' application was opposed and rely on an answering affidavit dated 10 April 2019 and delivered on 11 April 2019.

[12] In its answering papers, the first respondent pleads that the answering affidavit *"was not accepted by the above Honourable Court as being properly before the court… As such, for the Trust to now aver that the matter was fully opposed is disingenuous and seeks to mislead the above Honourable Court herein"*.[7] Elsewhere in the answering affidavit, the first respondent pleads: *"Lastly and most importantly, it should be noted that the Answering Affidavit which was attached to the Founding Affidavit…as proof of a bona fide defence, was previously rejected by the above Honourable Court as not being properly before the Court and was as such disregarded by the above Honourable Court for the purposes of the Main Application. The reason for this was due to the fact that the affidavit was out of time and the Trust did not seek condonation for the late filing of the Affidavit. As such, same should be disregarded in this application, for the same reasons.* In reply the contention that the court discarded the answering affidavit was hotly contested as being untrue and applicants persisted in contending the application was opposed. The record of the proceedings on 11 April and the interim order make no reference to the fate of the answering affidavit.

[6] Occupiers, Berea v De Wet 2017 (5) SA 346 (CC) at 366E-367A
[7] Para 13 and 22 answering affidavit

[13] On this issue there has been a procedural irregularity. Even if the answering affidavit was not considered by the court who made the interim order, which appears to be the case as an order was granted by agreement between the parties on 11 April 2019, the answering affidavit was served and filed and should have been placed before the court which made the final order on 21 May 2019.

[14] From the record and specifically the index to the main application dated 13 May 2019, it does not appear that the answering affidavit formed part of the application papers which served before the court when the final order was granted on 21 May 2019.

[15] That court was not aware of the existence or content of the answering affidavit, which may well have induced the court, if aware of it, not to grant the order or at least to have taken the contents of the answering affidavit into account in considering the matter. For present purposes it is not necessary to consider the merits of the defences raised in the applicants' answering affidavit.

[16] Moreover, the final order was granted, not on the designated return date of 13 May 2019, but on 21 May 2019. A notice of set down of respondents' application in the unopposed motion court for 21 May 2019 was served on the applicants' attorneys on 13 May 2019. No notice of set down was delivered for 13 May 2019. The interim order lapsed on that date. These discrepancies were however not raised or explained by either of the parties in their papers.

[17] Although the main emphasis of the applicants' challenge was the limitation of the order to that agreed upon in the interim order, which in my view lacks merit for reasons already stated, I am persuaded that there has been a procedural irregularity which renders the order of 21 May 2019 "erroneously sought or erroneously granted" as envisaged by r42(1)(a) and justifies the rescission of the order.

[18] I am not however persuaded that a valid basis has been established to vary the final order in the terms contended for by the applicants.

[19] There is no reason to deviate from the normal principle that costs follow the result. Although the applicants are not granted all the relief sought, they have achieved substantial success.

[20] I grant the following order:

[1] The order granted on 21 May 2019 is rescinded;

[2] The first respondent is directed to pay the costs of the application.

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EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 08 February 2022
DATE OF JUDGMENT	: 21 February 2022
APPLICANTS' COUNSEL	: Adv. C. Malatjie
APPLICANTS' ATTORNEYS	: Mathopa Sebushi Attorneys

1st RESPONDENT'S COUNSEL : Adv. T. Paige-Green

1st RESPONDENT'S ATTORNEYS : Schindlers Attorneys