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

(1) REPORTABLE: ~~YES~~/NO (2) OF INTEREST OF OTHER JUDGES: ~~YES~~/NO (3) REVISED _____ _____ DATE SIGNATURE

Case no: 2021/6725

In the matter between:

PRESHNEE GOVENDER N.O. **Applicant**

and

MOHAMED AABID HASSEN **First Respondent**

EIGHT OTHER RESPONDENTS **Second to Ninth Respondents**

JUDGMENT

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1 On 19 April 2021, this Court (Mbongwe J) made the following order:

> 1. *Declaring the agreement of sale of immovable property known as Erf 415, Dadaville Township, Registration Division IQ, Province of Gauteng, measuring*

857 m² and held by Deed of Title T28945/1991 concluded between the late Halima Hassan and the first applicant on or about 1 November 2018 to be valid and binding.

2. *Directing the executors of the estate of the late Halima Hassan, being the first and second respondents, to take all steps necessary to give effect to the sale agreement and to sign all documents reasonably required of them to allow the conveyancers to give effect to the transfer of the property into the name of the first applicant or his nominee.*

3. *Directing the applicant to pay the purchase price in the sum of R775,000.00 into the conveyancers' trust account within 14 (fourteen) days after granting of this order [sic].*

4. *Should the first respondent and or the second respondent fail to comply with any provision of the order, then and in that event the Sheriff of the Court, alternatively his deputy, be authorised and directed to sign all documentation and to do all things necessary and to bring all necessary applications, on behalf of the first respondent and the second respondent to give effect to the transfer of the property.*

5. *No order as to costs as no Respondent has opposed this application.*

2 The reference in the order to the "first applicant" is a reference to the first respondent in the proceedings before me, Mr Mohamed Aabid Hassen ("Mr Hassen").

3 This is an application brought by Preshnee Govender N.O. ("Ms Govender"), the executrix of the estate of the late Halima Hassen ("the deceased"), to rescind the order and to join her as a party to the application in which the order was made ("the main application"). Ms

Govender does not say, in her founding affidavit, whether she brings her application in terms of this Court's rules or under the common law.

4 The background to this rescission application is as follows:

4.1 In February 2021, Mr Hassen brought the main application, which was an application seeking the relief ultimately granted by Mbongwe J. The basis of his application was his allegation that, before her death, the deceased concluded a sale agreement with him in terms of which she sold to him the immovable property described in the order made by Mbongwe J and which I shall describe as "Erf 415".

4.2 A power of attorney and other preparatory paperwork was prepared to give effect to the transaction between Mr Hassen and the deceased. The deceased signed the power of attorney but died before the other paperwork, necessary to give effect to the transfer, had been completed and signed. As Mr Hassen put it in his founding affidavit in the main application, transfer of the property "was left in limbo".

4.3 The reason why it was necessary for Mr Hassen to bring the main application was that the heirs to the deceased's estate disputed the validity of the sale. Mr Hassen was the deceased's grandson. The heirs to the deceased's estate were her children. In terms of her will, the deceased left Erf 415 to her five children, in equal shares.

4.4 Two of the deceased's daughters were nominated as executrixes of the deceased's estate. Some time after the deceased's death, one of the executrixes ("Ms Hasmet Hassen") wrote to Mr Hassen disputing the validity of the sale agreement in respect of Erf 415. She took the view that the property was to be inherited by the deceased's children in terms of the will. She did, however, offer Mr Hassen the

opportunity to purchase Erf 415. However, whereas the agreement with the deceased determined the purchase price as R775 000, Ms Hasmet Hassen informed Mr Hassen that, if he wanted the property, he would have to pay R2 950 000.

4.5 Mr Hassen took the view that he had a valid agreement, which he was entitled to enforce. He viewed the revised proposed purchase price as highly inflated, taking into account a reasonable valuation of the property. A dispute unfolded between Mr Hassen and Ms Hasmet Hassen as to the validity of the agreement and related matters. I shall not discuss the details here – some aspects of the dispute are relevant to the present application, and I return to discuss them below. The bottom line is that, because the heirs disputed the validity of the agreement, Mr Hassen brought the main application in which he sought the relief reproduced in paragraph above.

4.6 After the application was launched, but before the order was made by Mbongwe J, Ms Govender was appointed as executrix to replace Ms Hasmet Hassen and the other executrix, Ms Mumtaz Booley. I deal with this in more detail below. The order made by Mbongwe J was made on an unopposed basis.

5 On 3 September 2021, Ms Govender brought the present rescission application. In her founding affidavit, she says the following:

5.1 She was appointed executrix of the deceased's estate on 16 March 2021. (I pause to note that the main application was launched in February 2021.) Ms Hasmet Hassen and Ms Booley were removed as executrixes on the same date.

5.2 She was unaware of the application and, had she been aware of it, she would have opposed the application on various grounds. (I discuss those grounds below.)

5.3 She first became aware of the application on 20 August 2021, when Mr Hassen's attorney addressed a letter to her. She accepts that Mr Hassen was unaware of her appointment as executrix and records that she has no doubt that, had he been aware of her appointment, he would have brought the application to her attention.

6 Ms Govender says that the application was defective (by which, I think that she means that the order ought not to have been granted) because she was a necessary party to it, and accordingly seeks the rescission of Mbongwe J's order. She wishes either to be joined as an additional party to the main application, or to substitute herself for the former executrixes, so that she can oppose it.

7 Mr Hassen opposes the rescission application. It would be fair to describe Mr Hassen's opposition as aggressive and he has accused Ms Govender of perjuring herself and acting in bad faith. The basis of these allegations is Mr Hassen's contention that, three weeks after she was appointed as executrix of the estate, she attended a meeting in which she was informed of the application. He says that she deliberately failed to substitute herself as a party and then lied under oath when she said that she only became aware of the application after the order was granted and sent to her.

8 As I explain when I address the law below, it is well-known that, in South African law, an applicant in a rescission application which is based on the proposition that that applicant was a necessary, but absent, respondent to the proceedings must show (a) that he or she was not in wilful default – ie, he or she did not deliberately refrain from participating in the proceedings and (b) he or she has a bona fide defence to the application.

9 Mr Hassen opposes the rescission application because he says that Ms Govender was in wilful default. He also takes issue with her criticisms of the sale agreement and so disputes the notion that Ms Govender has a bona fide defence to his application.

10 It will be necessary for me to return to discuss Mr Hassen's allegations of bad faith against Ms Govender, because they largely turn on the contents – and, indeed, admissibility – of a transcript of the meeting at which he says Ms Govender first learned of the main application. Mr Hassen did not attend the meeting, and so is constrained to rely on the transcript and also the confirmatory affidavit of Ms Booley, who attended the meeting. Ms Govender, for her part, strongly objects to the admission of the transcript into evidence, arguing that it is unreliable, and, more importantly, was unlawfully obtained. I return to consider all of these issues. But, first, the law.

THE LAW

11 I had occasion to consider the law as it relates to rescission applications in the unreported decision of *Zam Zam Logistics v Trademore (Pty) Ltd* 2022 JDR 0715 (GJ). The discussion below is drawn from my judgment in that case.

12 The leading summary of the approach to rescission under the common law is reflected in *Chetty*:[4]

> "The appellant's claim for rescission of the judgment confirming the rule *nisi* cannot be brought under Rule 31 (2) *(b)* or Rule 42 (1), but must be considered in terms of the common law, which empowers the Court to rescind a judgment obtained on default of appearance, provided sufficient cause therefor has been shown. (See *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042 and *Childerly Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163.) The term "sufficient cause" (or "good cause") defies precise or comprehensive definition, for many and various factors require to be considered. (See *Cairn's Executors v Gaarn* 1912 AD 181 at 186 *per* INNES JA.) But it is clear that in principle and in the long- standing practice of our Courts two essential elements of "sufficient cause" for rescission of a judgment by default are:

(i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and

(ii) that on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success. (*De Wet's case supra* at 1042; *PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A); *Smith NO v Brummer NO and Another; Smith NO v Brummer* 1954 (3) SA 352 (O) at 357 - 8.)

It is not sufficient if only one of these two requirements is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

13 The Supreme Court of Appeal ("SCA") has, relatively recently, confirmed that a court has a discretion as to whether to grant a rescission application under rule 42(1).[5] The Constitutional Court has described the discretion to grant rescission under the common law as "fairly wide".[6]

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4 Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 764-5

14 The wording of rule 42 is inconsistent with the notion that the applicant bears any sort of onus. A court may rescind a judgment under rule 42 of its own accord (mero motu) – ie, even where no party has brought an application for rescission. This seems to me to be inconsistent with the notion that a rescission applicant (at least under rule 42) bears the onus of showing that rescission should be granted.

15 In *Wright*,[7] a full bench of the Cape Provincial Division (as it then was) considered the scope of the discretion of a magistrate to grant rescission under rule 49 of the Magistrates' Courts Rule, which is broadly equivalent to rule 31(2)(b) of the Uniform Rules (which applies to true default judgments, in the sense that no appearance to defend has been entered). The amended version of the rules provides that the "court may, upon good cause shown, or if it is satisfied that there is good reason to do so …." rescind a default judgment.

16 The phrase "or if it is satisfied that there is good reason to do so" was introduced by amendment, and the Court in *Wright* considered that the purpose of this amendment (ie, the purpose of distinguishing between good cause being shown, which implies that it is demonstrated by the applicant, and the court being "satisfied" that there was good reason to rescind the judgment) was to afford:

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5 See Botha v Road Accident Fund 2017 (2) SA 50 (SCA) at para 13

6 Occupiers, Berea v De Wet NO 2017 (5) SA 346 (CC) at para 71

7 Wright v Westerlike Provinsie Kelders Bpk 2001 (4) SA 1165 (C) at paras 54 to 60

> "the jurisdictional power to a court to grant an application for rescission of judgment in a case where 'good cause' has not been shown *by the applicant*. The power could be exercised in circumstances where the court considers, for reasons other those bearing on 'good cause' as defined with reference to the requirements listed in Rule 49(3), that the justice of the case merits granting the application. In other words, the court is empowered by the introduction of the phrase to grant a rescission application if the exigencies of justice require it in an exceptional case, notwithstanding the existence of what would previously have been fatal deficiencies in the applicant's founding papers. It allows the court to have regard *mero motu* to the justice of the case untrammelled by the incidence of *onus*."

17 This reasoning applies, as a perfect fit, to the wording of rule 42.

18 *Harris*[8] demonstrates that it might not be appropriate to speak in terms of a true onus even under the common law. Although in that judgment (delivered by Moseneke J, before his elevation to the Constitutional Court) the court confirmed that, under the common law, the applicant bears the onus to demonstrate sufficient cause for rescission, it also held that the Court has a very wide discretion. Moseneke J counselled for a holistic approach to the question whether there was good cause to rescind a judgment, avoiding focusing on any one factor in isolation.

19 Based on everything that I have said above, it seems to me that the correct position is the following:

19.1 Under rule 42, at least, it is not quite right to speak of the applicant having an "onus". Rather, the court has a broad discretion to decide whether to rescind a judgment granted in the absence of the rescission applicant.

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[8] Harris v Absa Bank Ltd t/a Volkskas 2006 (4) SA 527 (T)

19.2 Under the common law, there are suggestions that the applicant does have an onus to demonstrate good cause for rescission. Even if that is correct, the court has a wide discretion to refuse to grant rescission even if the applicant has, for instance, demonstrated that he or she was not in wilful default (or, by the same token, has a good defence to the main claim).

19.3 Even if there is no true onus on a rescission applicant, the failure of the applicant to persuade the court on the two core issues – ie, that there was no wilful default and that there is a good defence on the merits – will normally be a decisive factor militating against the granting of rescission. Put differently, if the court is in genuine doubt as to whether the rescission applicant was in wilful default, this would normally count against the granting of rescission.

19.4 When exercising its discretion in a rescission application, a court should take into account all relevant factors. These would include, at least (and this is not intended to be a closed list):

19.4.1 The length of time between the granting of the judgment and the bringing of the rescission application in respect of that judgment;

19.4.2 In cases of delay, whether there is a reasonable explanation for the delay;

19.4.3 The underlying merits of the matter and whether it is in the interests of justice for the merits to come before court again;

19.4.4 The reasons why the judgment was granted in the absence of the rescission applicant and his or her explanation for this state of affairs;

19.4.5 The balance of prejudice between the parties;

19.4.6 The balance of prejudice between the applicant and society; in particular, the balance between society's need for finality in litigation as against the rescission applicant's interest in being able to defend a claim against him or her.

APPLICATION TO THE FACTS

20 I now proceed to apply these principles to the facts.

The debate about the transcript – what Ms Govender knew, and when

21 A great deal of energy was devoted in these proceedings to the admissibility and relevance of a transcript which was put up by Mr Hassen. The transcript is of a meeting which was held on 9 April 2021 between Ms Govender and the majority of the heirs to the deceased's estate. According to Mr Hassen, Ms Govender was informed of the litigation (pending, at that stage) which he had brought in relation to the property.

22 In the founding affidavit, Ms Govender alleges that she only became aware of the main application after the order was granted – in particular, she says that she was made aware of the order when she received a letter, on the day after it was granted, from Mr

Hassen's attorney. In his answering affidavit, Mr Hassen makes hard-hitting allegations of perjury against Ms Govender, and relies on the transcript as evidence of the alleged perjury. In essence, his argument is that the transcript shows that Ms Govender lied when she said that she first became aware of the main application only after the order was made, because it shows that the pending application was discussed in detail at the meeting held four months before the order was granted.

23 Ms Govender, for her part, objects to the admission of the transcript. *Mr Desai*, who appeared for Ms Govender, referred in argument to an application to strike out the transcript, as well as the allegations of dishonesty levelled at Ms Govender. I informed *Mr Desai* that there was no strike-out application in the Caselines file and that I had not seen it. *Mr van der Vyver*, who appeared for Mr Hassen, said that he too had not seen the strike-out application in advance of the hearing. After the hearing, and without any prior warning or leave of the Court, the strike-out application was uploaded to Caselines for the first time. This was, self-evidently, improper. I make it clear that I do not blame *Mr Desai* for this. I simply make the point that it is impermissible for a litigant to upload a formal application to Caselines after argument in the main matter and without leave.

24 It is not necessary for me to say anything more about the strike-out application. Many of the same points about the admissibility of the transcript and the vexatiousness of the allegations of dishonesty had already been made by Ms Govender in her replying affidavit. The point of substance – which was made in the replying affidavit and which I can determine with or without a formal strike-out application – is that the transcript was, according to Ms Govender's argument, of a recording which was obtained without Ms Govender's knowledge and (as a consequence) permission, and constitutes a breach

of the Protection of Personal Information Act 4 of 2013. In addition, Ms Govender says that the transcript is unreliable evidence of what transpired at the meeting, which was 3-hours long and not adequately captured in the 9-minute extract reflected in the transcript.

25 In her replying affidavit, which was her first opportunity to address the contents of the transcript, Ms Govender provides the background to the 9 April 2021 meeting to which the transcript relates. She says that, in advance of the meeting, she was told about Mr Hassen's claim against the property, but was not made aware of any application brought by Mr Hassen. She explains that, prior to the meeting, correspondence was exchanged which demonstrated that there was much acrimony between the heirs. She explains that, at the meeting itself, there was a "violent fracas", which led to her having to separate the two groups of heirs (ie, the two groups forming the different sides of the dispute). She said her primary efforts were devoted to restoring calm.

26 In her meeting with the first group of heirs (having separated them) Ms Govender says that Ms Hasmet Hassen, who, it will be recalled, was one of the children of the deceased and one of the executrixes of the estate (prior to her replacement by Ms Govender) revealed a "stack of documents". Ms Govender says that Ms Hasmet Hassen informed her that there were two protection orders amongst the documents, and that there may have been mention of Mr Hassen's application. But none of these documents was left behind by Ms Hasmet Hassen at the end of the meeting and Ms Govender could not make copies.

27 Ms Govender says that, in her meeting with the second group of heirs, there was again mention of the protection orders and, in passing, the main application. But she says that, given that she was now the executrix of the deceased's estate, she assumed that the

application would be served on her. She says that she was not shown or taken through any papers in any application brought by Mr Hassen and was not worried about the prospect of such an application because she assumed she would be joined as a party to it – ie, because she was the executrix of the deceased's estate. She says that after the meeting, Essa Ahmed, the attorney representing Ms Booley, emailed her two agreements of sale, including the one on which Mr Hassen relies, but no mention was made of any pending application.

28 A fair summary of Ms Govender's position, as I understand it, is, in my view, the following: she says that she worked diligently on appointment to understand the identity of the beneficiaries of the deceased's will and issues relevant to her role as executrix. She quickly learned of acrimony between some of the heirs and the first meeting which she held with them was acrimonious and challenging for her. She concedes that there was mention of Mr Hassen's application, but she says that she was provided with no details of it and assumed that, if such an application was indeed pending, she would have been, or would be, joined as a party. She says that, if she had concrete knowledge of the application and the fact that she had not been joined as a party, she would have taken urgent steps to intervene. She says that she had no motive to ignore the application and wait until an order was granted before taking any steps to involve herself in the litigation.

The general discretion

29 It seems to me that this is one of those cases where it is not appropriate to draw bright lines between each of the traditional categories relevant to rescission applications – ie, wilful default and bona fide defence. In my view, the following factors suggest that the application should be granted:

29.1 It is common cause that, in the ordinary course, the executrix of the deceased's estate would have been a necessary party in the proceedings brought by Mr Hassen. This is self-evident: by the time that the deceased died, the property had not been transferred into Mr Hassen's name. The deceased estate therefore had a clear interest in the question whether the sale agreement was valid and binding (the premise of Mr Hassen's application). As the representative of the estate, Ms Govender had to be joined and there is no dispute about that.

29.2 Even if I were minded to have regard to the transcript – and I do not intend to decide the formal question of whether it is admissible – it does not serve to contradict the version of Ms Govender in the replying affidavit. The transcript would seem to suggest that the application was discussed, but does not give conclusive guidance as to precisely what Ms Govender understood the position to be regarding the pending application. In particular, it does not contradict her assertion that she assumed that she would be joined in any application in relation to the property and so could address such an application in due course.

29.3 It is true that, after the 9 April 2021, Ms Govender could have been hyper vigilant and made comprehensive enquiries about the status of the application. But, against that proposition is that this is no ordinary rescission application. Ms Govender was appointed to be the executrix of this estate because she is independent and because there was too much in-fighting at the time (before Ms Govender's appointment) when two of the heirs (ie, Ms Hasmet Hassen and Ms Booley) served as executrixes. She was therefore appointed to discharge a fiduciary duty to wind up the deceased's estate. Her interest in the order obtained by Mr Hassen in her absence is not personal; it is professional and

forms part of her duties as executrix. In this context, although wanton and wilful default will never be condoned, some leeway I believe is warranted when assessing Ms Govender's conduct. Leeway which at least acknowledges the role she is meant to fulfil and the context in which the rescission application is brought.

29.4 The point is that I can see no incentive on the part of Ms Govender, other than to attempt to discharge her duties properly, to seek now to rescind the order with energy. And the implication of this is that, as she says in her replying affidavit, she would have had no incentive to sit back for months after the 9 April 2021 meeting, only to swing into action urgently the moment she heard about the order. In this regard, it is noteworthy that she says that she heard about the order for the first time the day after it was granted – 20 August 2021 – and the rescission application was launched on 3 September 2021, which is exactly two weeks later. This energy is inconsistent with a construction that Ms Govender was in wilful default of the order.

29.5 There is then the question of the merits of the underlying dispute about the property. *Mr Van der Vyver* put up a valiant attempt to argue that Ms Govender has no prospects of success in opposing Mr Hassen's application if the rescission application succeeds. But, in my view, there is at least a reasonable prospect that Ms Govender will successfully oppose Mr Hassen's application – with the implication that the property will then form part of the deceased's estate. I say this because:

29.5.1 In the founding affidavit in the rescission application, Ms Govender says that the sale agreement does not comply with section 6 of the

Alienation of Land Act 68 of 1981. More substantively, she points out that the agreement provided for payment of the purchase price of R775 000 in instalments of R5000 per month. No instalments were ever paid by Mr Hassen. She acknowledges that the agreement is silent on when the first instalment was to be paid, but she argues that it was a tacit term of the agreement that payments would have to begin the month after signature. She says that the failure to pay the purchase price for a period of two years and ten months (ie, the period between the conclusion of the sale agreement and the date of Mbongwe J's order) constituted a repudiation of the agreement. She says that by 8 December 2020, one of the executrixes had accepted the repudiation and terminated the agreement. This is a reference to a letter, annexed to the founding affidavit in the main application, sent by Ms Hasmet Hassen to Mr Hassen in which she took the view that Mr Hassen had repudiated the agreement and/or that it was "not valid from the outset".

29.5.2 In his answering affidavit in the rescission application, Mr Hassen took the stance that it was a tacit term of the agreement that the first instalment would be payable on demand from his deceased grandmother. In terms of his grandmother's will, the property was bequeathed to her children. After the deceased's death, Ms Hasmet Hassen wrote to Mr Hassen to take the view that the agreement was invalid (this was in 2019, and is a different letter to the one which I have mentioned above). In response, Mr Hassen's attorneys wrote to her and, amongst other things "tendered payment for the instalment

[sic] upon the executor's demand". In other words, his stance was that the first instalment was payable on demand from his grandmother, and now the executrix on behalf of the deceased estate. Mr Hassen, in his answering affidavit, relies on a letter sent by Dockrat Jassat Attorneys and Conveyances on 13 June 2019 to VDW Attorneys. It seems from the correspondence that Mr Jassat (the author of the letter) assumed VDW Attorneys to be the attorneys representing the executrixes of the deceased estate. In any event, in the letter, Mr Jassat informed VDW Attorneys that the deceased had sold the property to Mr Hassen and instructed Dockrat Jassat to pass transfer in terms of a power of attorney which the deceased signed shortly before her death and that the deceased informed him that the instalments were payable on demand.

29.5.3 In reply, Ms Govender takes the point that Mr Jassat's letter is not supported by a confirmatory affidavit. She also takes the point that Mr Jassat's version is an attempt to vary the terms of the agreement and that his "allegation is parol evidence in the main application and inadmissible".

29.5.4 *Mr van der Vyver*, in his argument, placed emphasis on the fact that Ms Govender has no personal knowledge of any of the circumstances surrounding the issues to do with repudiation, breach and the like. He therefore casts doubt on her ability to oppose the main application. But it is apparent from my discussion of the merits above that there is a range of legal and interpretive issues which

show that there is a reasonable debate to be had about the validity of the sale agreement.

29.5.5 There is some awkwardness arising from the fact that the purpose of this rescission application is to enable Ms Govender to participate in motion proceedings rather than a trial. If the main proceedings in this matter were a trial action, it would be easy to imagine a whole host of issues which could only be resolved with the leading of evidence (and in respect of which this Court, hearing the rescission application, would be unsighted). When it comes to an application which will largely be determined on papers which are already before me, there is the temptation to try to minimise the burden on our courts (and a judge who will have to determine the main application in the future) by deciding the merits now. And of course, to an extent that is the purpose of the bona fide defence requirement in rescission applications. But a court hearing a recission application should in my view be astute not to conflate the power to determine whether there is a bona fide defence (a power which clearly it has) with the power to pre-empt the future proceedings by preferring one arguable position over another (a power which it does not). The discussion above demonstrates that each party has an arguable position, and I consider it to be in the interests of justice for Ms Govender to be afforded an opportunity to put up a version in opposition to the main application, with evidence accumulated from whatever sources are available to her.

29.6 Lastly, there is a clear conflict between the terms of the sale agreement and the terms of the deceased's will. However that conflict is ultimately resolved, it is essential in my view that the way in which it is to be resolved should be determined with the participation of the executrix. It is common cause that the failure to join Ms Govender before the order of Mbongwe J was granted was entirely innocent. It is therefore unfortunate, in a sense, that Mr Hassen has to go through the expense and inconvenience of ventilating the merits of the main application again. But when consideration is given to all of the circumstances summarised above, it is my view that this is what fairness requires.

30 Overall, therefore, I consider it to be in the interests of justice to grant the rescission application to enable Ms Govender to defend Mr Hassen's application. She has at least a triable case, and, given her role, should be given the opportunity to ventilate it.

COSTS AND THE APPROPRIATE ORDER

31 In her notice of motion, Ms Govender did not seek a costs order. *Mr Desai* said in argument that, although there is a case for a punitive costs order on the papers (when regard is had to the accusations of dishonesty made by Mr Hassen against Ms Govender), Ms Govender did not press for any sort of costs order. He said that, to avoid any further acrimony between the parties, the most appropriate order would be simply to grant the relief sought in the notice of motion and either make an ordinary costs order or let the costs be held over to the rescission application. *Mr van der Vyver* argued that, in the event of me granting the application, costs should be reserved to be determined in the main application. Even leaving aside Ms Govender's failure to seek costs in her notice of motion, it seems to me to be appropriate not to make a costs order at this stage. I do not, however, wish to burden the judge hearing the rescission application

with having to decide the issue of the reserved costs of this application – all the issues relating to costs are before me now, and it would make no sense to avoid that issue only for it to come before the rescission court. Rather, the rationale of deferring the costs order now is that Mr Hassen may win the main application, which would make it unfair for him to bear the costs of this application. For that reason, the fairest order to make is simply for the costs of this application to form part of the costs in the main application.

32 Regarding the rest of the order which I intend to make, I intend simply to follow the prayers in the notice of motion.

33 I accordingly make the following order:

1. **The judgment of Mbongwe J made on 19 August 2021 under the above-mentioned case number is rescinded.**

2. **The applicant ("Ms Govender") is joined as the ninth respondent in the application under case number 2021/6723 brought by Mr Mohamed Aabid Hassen ("the main application").**

3. **Ms Govender is to file her answering affidavit in the main application within 10 court days of the date of this order.**

4. **The costs of this rescission application are to be costs in the main application on the ordinary party and party scale.**

ADRIAN FRIEDMAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above 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 26 January 2023.

APPEARANCES:

Attorney for the applicant:	Shamla Pather Attorneys
Counsel for the applicant:	M Desai
Attorney for the first respondent:	Ayoob Kaka Attorneys
Counsel for the first respondent:	H van der Vyver

Date of hearing: 21 November 2022

Date of judgment: 26 January 2023