IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

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

08 November 2022
DATE

SIGNATURE

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Appeal Case no: A390/2019
Court *a quo* case no: 43130/10 (Jhb)

In the matter between:

REZAEI, HOSSEIN N.O.	**First Appellant** **First Plaintiff *a quo***
REZAEI, NASRIN N.O.	**Second Appellant** **Second Plaintiff *a quo***
REZAEI, REZA N.O.	**Third Appellant** **Third Plaintiff *a quo***
THE BEST TRUST COMPANY JHB (PTY) LTD N.O.	**Fourth Appellant** **Fourth Plaintiff *a quo***
and	
ADINOLFI. MICHELE	**First Respondent** **First Defendant *a quo/*** **Plaintiff in Reconvention**
REGISTRAR OF DEEDS, PRETORIA	**Second Respondent** **Second Defendant *a quo***

ABSA BANK LTD **Third Respondent**
Third Defendant a quo

JUDGMENT

LINGENFELDER, AJ

Introduction

1. This is an appeal against the dismissal of an application for rescission of a judgment granted by default by the Registrar in terms of the provisions of Rule 31(5)(a). The granting of judgment followed on the appellants' failure to deliver a plea to the respondent's counterclaim, after a notice of bar was served on the appellants. The first respondent applied for default judgment on 4 July 2012 in terms of the provisions of Rule 31(5) in respect of her counterclaim.

2. Judgment was granted by the Registrar on 28 September 2012 against the appellants on the first respondent's counterclaim in the main action, for payment of an amount of R830 000.00, together with interest; and costs in an amount of R650.00.

3. A writ of execution was issued against immovable property registered in the names of the appellants and was served on 17 October 2014.

4. An application for the rescission of the judgement and orders on the counterclaim was brought by the appellants in their capacities as trustees of

the Neda Property Trust on 29 October 2014, after the writ of execution was served and the immovable property attached. The application was opposed by the first respondent. The application for rescission of the default judgment was dismissed by the court a quo in a judgment on 25 October 2018.

5. The appellants applied for leave to appeal the dismissal of the application for rescission and leave to appeal was refused by the court a quo. The appellants then approached the Supreme Court of Appeal for leave to appeal, and on 11 November 2019 the Supreme Court of Appeal granted leave to appeal to the full bench of this division.

Factual background

6. The Neda Property Trust (of whom the appellants are all trustees and cited as such) made a written offer to purchase of certain immovable property from the first respondent (as seller) on 15 August 2008, which offer was accepted in writing by the first respondent, thereby bringing about a written agreement between the parties (" the Sale Agreement"). The first appellant signed the offer to purchase on behalf of the Trust.

7. The parties on 15 September 2008 entered into a written addendum to the aforementioned Sale Agreement. The addendum was again signed by the first appellant on behalf of the Trust, and by the first respondent.

8. In terms of the addendum the first respondent granted the Neda Property Trust a loan of R830 000.00, and it was agreed that the suspensive condition in the original Sale Agreement was deemed to be fulfilled.

9. On 8 October 2008 the appellants adopted resolutions which were signed by all four appellants, confirming the signature of the offer to purchase the immovable property, and authorising the first appellant to sign all documents on behalf of the Trust to effect transfer of the immovable property.

10. The immovable property was transferred and registered in the name of the Trust on 8 December 2008.

11. The appellants instituted action on 26 October 2010 against the respondents, wherein the appellants sought inter alia Claim A, and in the alternative Claim B, an order declaring the offer to purchase and the resultant Sale Agreement to be void *ab initio* and/or invalid and unenforceable, payment of certain amounts, and an order directing the second respondent to transfer the property out of the name of the Trust and retransfer the property back into the name of the first respondent. The appellants allege that the offer to purchase and addendum were signed by only the first appellant in contravention of the provisions of the trust deed which require two trustees to sign contracts, alternatively was signed by the first appellant acting as an agent of the trust, without written authority having been given to him to act as such, and that the Sale Agreement therefore failed to comply with the provisions of Section 2(1) and Section 28(2) of the Alienation of Land Act.

12. In a further alternative Claim C, the appellants pleaded that the Trust was induced by a deliberate and material misrepresentation by the first respondent to sign and make the offer to purchase and to enter into the addendum, and

that as a result thereof the appellants are entitled to claim cancellation of the Sale Agreement and the addendum.

13. The first respondent entered an appearance to defend the main action, and thereafter delivered a plea. In the plea filed on behalf of the first respondent, the first respondent denied that the offer to purchase and addendum are void and/or that the appellants are entitled to cancellation thereof. A counterclaim was also instituted against the appellants by the first respondent for payment of R830 000.00 in respect of the loan made by the first respondent to the Trust in terms of the addendum signed, on 13 May 2011.

14. The appellants failed to file a plea to the first respondent's counterclaim within the time provided for in the Rules.

15. On 20 June 2011 a notice of bar was delivered, wherein the first, second and third appellants in their capacities as trustees were called upon to deliver a plea to the first respondent's counterclaim within 5 days from date of delivery thereof. A separate notice of bar was drawn calling upon the fourth appellant in its capacity as trustee to deliver a plea to the first respondent's counterclaim within 5 days from date of delivery thereof. The notice of bar was served on all the first, second and third appellants on 27 June 2011; and the notice of bar addressed to the fourth appellant was served on 8 July 2011. Service was effected by the Deputy Sheriff at the place of residence of the first and second appellants, and at the registered address of the fourth appellant. Service on the third respondent in his capacity as trustee was effected at another address,

apparently the address of the immovable property which forms the subject matter of the Sale Agreement. For purposes of this judgment, it is accepted that the first respondent properly put the Neda Property Trust under bar to deliver a plea to the counterclaim and that proper service of the notice of bar was effected.

16. The first respondent applied for default judgment in terms of the provisions of Rule 31(5) on 4 July 2012 in respect of his counterclaim, which judgment was granted on 28 September 2012.[1]

Provisions of Rule 31(5)

17. Rule 31(5)[2] reads as follows:

"(a) *Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, who wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated amount, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than five days' notice of the intention to apply for default judgment.* (My underlining)

(b) The registrar may –

(i) grant judgment as requested;

(ii) grant judgement for part of the claim only or on amended terms;

(iii) refuse judgement wholly or in part;

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[1] Caselines 006-1; 007-1

[2] Erasmus, Superior Court Practice RS 8, 2019, D1 - 359

(iv) postpone the application for judgment on such terms as may be considered just;

(v) request or receive written submissions;

(vi) require that the matter be set down for hearing in open court.

Provided that if the application is for an order declaring residential property specially executable, the registrar must refer such application to the court.

(d)……

The reference to "*defendant*" in the rule clearly also includes a defendant in reconvention, as is the position in the present matter.

Application for rescission of a default judgment in general

18. As a general rule, a court has no power to set aside or alter its own final order. There are however exceptions to this general rule. A default judgment may only be set aside by a High Court in circumstances specifically provided for in the Rules or in terms of the common law.[3] The grounds for rescission of a judgment are particularly, and deliberately, narrow in scope in order to preserve the doctrine of finality and legal certainty. This judgment will not deal with the requirements for setting aside a judgment in terms of the common law, but with the Rules of Court that make provision therefor.

Setting aside of a judgment in terms of Rule 31(2)

19. Rule 31(2)(b)[4] makes provision for a defendant to apply to court on notice to the plaintiff to set aside a judgment within 20 days after acquiring knowledge of

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[3] Freedom Stationary (Pty) Ltd and others v Hassam and others 2019 (4) SA 459 SCA at 465 E
[4] Erasmus, Superior Court Practice supra

such judgment, and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit. The court has a wide discretion in evaluating "good cause" in order to ensure that justice is done. The requirements for an application for rescission under this rule have often been stated to be that a defendant should give a reasonable explanation of his default, the application must be *bona fide* and not be brought with the intention of delaying the plaintiff's claim; and the applicant must show that there is a bona fide defence to the plaintiff's claim.[5]

20. Rule 31(6) relates to situations where a judgement creditor has consented in writing to a judgment being rescinded, or where the judgement debt, interest and costs have been paid, and is not applicable in the present matter.

Rescission or variation of an order in terms of Rule 42(1)(a)

21. Rule 42[6] makes provision for rescission and variation of order under certain circumstances and reads as follows:

"*(1) The court may, in addition to any powers it may have, mero motu or upon application of any party affected, rescind or vary:*

(a) An order or judgment erroneously sought or erroneously granted in the absence of a party affected thereby;

(b) An order or judgment in which there is an ambiguity, error or omission;

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[5] Wahl v Prinswil Beleggings (Edms) Bpk 1984 (1) SA 457 (T).

[6] Erasmus Superior Court Practice RS 18, 2022, D1-561

(c) An order or judgement granted as a result of a mistake common to the parties.

(2)……"

Rule 42 was introduced against the common-law background, which imparts finality to judgments in the interest of certainty. The Rule caters for mistake. Rule 42 is confined by its wording and context to the rescission or variation of an ambiguous order or an order containing a patent error or omission, an order resulting from a mistake common to the parties or an order erroneously sought or erroneously granted in the absence of a party affected thereby.[7]

The present application for rescission

22. The founding affidavit in the rescission application deals with all the requirements set out in Rule 31(2)(b), and the deponent deals with the absence of wilful default, the *bona fides* of the application and the appellants' defence to the counterclaim. The founding affidavit also deals with the service of the notice of bar on the third appellant, which was not served at the address for the third respondent as set out in the particulars of claim, but at another address. It is submitted in the affidavit that the third appellant was therefore not placed under bar, and not in default of delivery of its plea. The appellants were cited in the counterclaim in their capacities as trustees, and as stated above, for purposes of this judgement it is assumed that the Trust was placed properly under bar. The founding affidavit as such does not foreshadow rescission of the judgment in terms of Rule 42(1)(c), namely that the order was erroneously sought and/or erroneously granted.

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[7] Colyn vTiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) at 6G – 7 D

23. In the heads of argument filed on behalf of the appellants however, it was submitted that the application for rescission of the default judgment falls under the provisions of Rule 42(1)(a), in that the order was erroneously sought or erroneously granted in the absence of the party (appellants in their capacities as trustees of the Neda Property Trust) affected thereby. The provisions of Rule 31(2) are not applicable in applications for rescission under this rule, in other words the appellants do not need to show good cause for the rescission to be granted. All that is required is to show that the judgment was erroneously sought and/or granted in the absence of the affected party.

24. The submission was that the respondent was not procedurally entitled to apply for default judgment in terms of the provisions of Rule 31(5)(a), as the respondent did not comply with the procedural requirements of Rule 31(5)(a) where a plaintiff wishes to obtain judgment by default for a debt or liquidated amount in circumstances where the defendant is in default of delivery of a plea, in two respects.

25. Rule 31(5)(a) contains a proviso that a party under the circumstances described "*shall give such defendant*" at least 5 days' notice of the intention to apply for default judgment (supra). No such notice was given to the appellants by the first respondent before filing with the Registrar the written application for judgment against the appellants (defendants in respect of the counterclaim). The submission was that if rescission is sought in terms of Rule 42(1)(a), there

is no requirement of showing "good cause", as would be a requirement for the rescission of a judgement under the provisions of Rule 31(2)(b).

First respondent's grounds of opposition

26. The first respondent opposes the appeal herein and submits that none of the substantive grounds that an applicant is required to establish for rescission of a judgement, is addressed in the application.

27. The first respondent submits that a notice of bar was served on all the appellants, a plea to the counterclaim was not filed and that the appellants have taken no steps to have the notice of bar uplifted or to file a plea.

28. The submission on behalf of the first respondent was that the appellants' conduct amounts to a flagrant abuse of the process of court and that there is no reason why the appellants cannot proceed with the prosecution of their claim even though default judgment was granted on the claim in reconvention.

29. The first respondent does not submit that he has fulfilled the proviso of Rule 31(5)(a) and that notice as required by the rule was given to the appellants. In fact, it was conceded by counsel on behalf of the first respondent that this requirement was not fulfilled.

The meaning of "Erroneously sought or erroneously granted"

30. The phrase "erroneously granted" relates to the procedure followed to obtain the judgment in the absence of another party, and not the existence of a defence to the claim.[8] A judgment to which a party was procedurally entitled cannot be said to have been erroneously granted, and accordingly the provisions of Rule 42(1)(a) would not be applicable in those circumstances.

31. Where a party was not procedurally entitled to a judgment in the absence of a party, the provisions of Rule 42(1)(a) do apply to the rescission of such a judgment.

Was the first respondent procedurally entitled to seek and obtain the order for default judgment ?

32. When an affected party invokes Rule 42(1)(a) for rescission of a default judgment as is done by the appellants in this appeal, the question arises whether the party that obtained the order was procedurally entitled thereto, in order to decide whether the order was erroneously sought or granted, or not. If the party seeking the order was procedurally entitled to do so, although the order may have been granted in the absence of a party, it cannot be said that the order was erroneously granted.

33. A party would be procedurally entitled to an order if all the requirements to obtain such an order have been met. Rule 31(5)(a) contains a clear proviso in peremptory language that notice must be given to an affected party by the

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[8] Freedom Stationary (Pty) Ltd and others v Hassam and others 2019(4)SA 459 SCA at 465 F - H

plaintiff who intends to apply for default judgement, prior to such a party lodging a written application for default judgment to be granted in terms of Rule 31.

34. Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him, such judgment is granted erroneously. In such a case, the party in whose favour the judgment is given was not entitled to judgement because of an error in the proceedings, and such judgment granted in the absence of the party concerned is granted erroneously.[9]

35. Mr Garvey on behalf of the first respondent conceded that the first respondent was not procedurally entitled to the judgement, as the procedural requirement of giving the appellants at least 5 days' notice, was not fulfilled, but submitted that the court has a discretion to refuse the rescission under these circumstances as the appellants' conduct is clearly an abuse of the process of court.

36. The first respondent did not give notice as required to the appellants that he intends to apply for default judgement, accordingly did meet the requirements for such a default judgment to be sought, and the order was erroneously sought and erroneously granted in the absence of the appellants.

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[9] Lohdi 2 Properties Investment CC v Bondev Developments 2007 (6) SA 87 (SCA) at 93H – 94C

37. The power of a Registrar of a division of the High Court to grant and enter a default judgment is granted in terms of the provisions of Section 23 of the Superior Courts Act 10 of 2013. Section 23 clearly states that such a judgment may be granted and entered by the Registrar in the circumstances prescribed in the Rules. A Registrar has no inherent power or discretion as to whether such judgment may be granted and entered, and may only exercise that power afforded in terms of the Superior Courts Act and the Rules. If the judgment is granted and entered in circumstances which are not prescribed and permitted by the Rules, it is erroneously granted and entered.

38. At the time of the granting of the default judgment against the appellants, the provisions of Section 27A of the Supreme Court Act 59 of 1959 applied to judgments granted and entered by the registrar of a division of the High Court. The wording of Section 27A is in all material respects identical to that of Section 23 of the Superior Courts Act, save for a reference to the Rules being made by the Rules Board, which is no longer applicable.

Applicable principles required for rescission under Rule 42(1)(a)

39. Based on the judgments of the Supreme Court of Appeal in *Colyn v Tiger Food Industries Ltd t./a Meadow Feed Mills (Cape)*[10], *Lohdi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd*[11] and *Kgomo v Standard Bank*[12] the following principles govern rescission under Rule 42(1)(a):

    (i) The rule must be understood against its common-law background;

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[10]2003 (6) SA 1 (SCA)
[11] 2007 (6) SA 87 (SCA)
[12] 2016 (2) SA 184 (GD)

(ii) The basic principle at common law is that once a judgment has been granted the judge becomes functus officio, but subject to certain exceptions of which Rule 42(1)(a) is one

(iii) The rule caters for a mistake in the proceedings

(iv) The mistake may either be one which appears on the recordof proceedings or one which subsequently becomes apparent from information made available in an application for rescission of judgment

(v) A judgment cannot be said to have been granted erroneously in the light of a subsequently disclosed defence which was not known or raised at the time of the default judgment

(vi) The error may arise either in the process of seeking the judgment on the part of the applicant or in the process of granting default judgment on the part of the court

(vii) The applicant for rescission is not required to show, over and above the error, that there is good cause for the rescission as contemplated in Rule 31(2)(b).

40. It is clear that the default judgment granted in respect of the first respondent's counterclaim, falls within the ambit of a "judgment erroneously sought or erroneously granted" due to the fact that the procedural requirement of notice as prescribed in Rule 31(5) was not complied with. It is common cause that such notice was not given prior to the written application by the first respondent for judgment to be granted in the absence of the appellants. The judgment was therefore erroneously granted within the meaning of Rule 42(1)(a) and on that basis the appellants are entitled to rescission of the judgment granted against

them. In view thereof, it is not necessary to deal with the appellants submissions that the registrar did not have the authority to grant the judgment having regard to the fact that it was granted in respect of a counterclaim, which pre-supposes a finding on the main claim and the validity of the offer to purchase and addendum in conflict with the *pari passu* rule that a claim and counterclaim based on the same or similar facts should be decided together in the same hearing.

41. This court also does not have to enquire into or decide the question whether the appellants have a *bona fide* defence to the counterclaim of the first respondents, or consider the effect of Section 28(2) of the Alienation of Land Act 1981 which states that "*any alienation which does not comply with the provisions of section 2(1) shall in all respects be valid ab initio if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee*", on the relief sought by the appellants in the main action.

42. The court's discretion whether an order was erroneously sought or granted and therefore stands to be rescinded, cannot be influenced by an argument, unsupported by evidence before us, that there is an abuse of the process of court, especially where the party who sought the judgment erroneously clearly also did not comply with the process of court. At the time that the first respondent applied for the default judgment, he was in receipt of a letter from

an attorney enquiring as to whether application for judgment has been made[13], but apparently ignored this request and proceeded to apply for default judgment some months later, without giving the requisite notice to the appellants. The application for default judgment was made more than a year after the notices of bar were served.

43. The prescriptive proviso in Rule 31(5) is a safeguard to warn a party that a judgment in its absence will be applied for, and that gives such a party the opportunity to ensure that this does not happen, should the party wished to avoid such judgment being entered. The appellants did not receive such warning.

44. The first respondent was not procedurally entitled to apply for default judgment, the judgment was accordingly erroneously sought and granted in the absence of a party; and the affected party is entitled to rescission thereof under the circumstances.

Order

45. The following order is made herein:

1. The appeal against the dismissal of the application for rescission of default judgment is upheld;
2. The default judgment granted on 28 September 2012 is rescinded;
3. The Writ of Execution issued in respect of the default judgment is set aside;

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[13] Caselines, 009-55

4. The first respondent is ordered to pay the costs of the application for rescission and the costs of the appeal.

M M LINGENFELDER AJ
Acting Judge of the High Court
Gauteng Division, Pretoria

I agree

MBONGWE J
Judge of the High Court
Gauteng Division, Pretoria

I also agree and it is so ordered

TLHAPI J
Judge of the High Court
Gauteng Division, Pretoria

Appellants' attorneys:	Michael Krawitz & Company
Appellants' counsel:	Adv CJ Mouton
First respondent's attorneys:	Otto Krause Inc Attorneys
First respondent's counsel:	Adv CB Garvey
DATE OF HEARING:	5 OCTOBER 2022
DATE OF JDUGMENT:	8 NOVEMBER 2022