



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

**CASE NO. 54944/2021**

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

\_\_\_\_\_  
DATE

\_\_\_\_\_  
SIGNATURE

**THE COMPENSATION COMMISSIONER**

**FIRST APPLICANT**

**DIRECTOR –GENERAL OF THE DEPARTMENT  
APPLICANT**

**SECOND**

**OF EMPLOYMENT AND LABOUR OF THE NATIONAL  
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA**

**THE MINISTER OF THE DEPARTMENT OF EMPLOYMENT  
APPLICANT**

**THIRD**

**OF EMPLOYMENT AND LABOUR OF THE NATIONAL  
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA**

**AND**

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**JUDGMENT**

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**MAKHOB A J**

- 1) This is an opposed rescission application of a summary judgement order. The applicants did file a plea and during the hearing their counsel was present in court when summary judgement was granted.
- 2) The respondent raised a conditional counter application calling on the applicants, and their attorney, Mr Sikhala to show cause why they should not pay for the costs of the application personally on an attorney and client scale.
- 3) The applicants were defendants and the respondent the plaintiff in an action where summary judgement was granted in the respondents favour.
- 4) The first applicant is the compensation commissioner, an official appointed by the Minister of Labour in terms of Section 2(1)(a) of the Compensation for Occupational Diseases and Injuries Act, Act 130 of 1993(“COIDA”) and who is cited as such, with offices at 197 Thabo Sehume Street, Pretoria;

- 5) The second applicant is the director-general of the department of employment and labour of the national government of the republic of south Africa, a state official vested with the power, duties and functions set out in COIDA (and more in particular in section 3,4,16 and 29 thereof), with offices at Laboria House, 215 Frances Baard Street, Pretoria.
- 6) The third applicant is the minister of the department of employment and labour of the national government of the republic of south Africa, a member of the National Executive of the Government of the Republic of South Africa, and the Minister responsible for the implementation of COIDA, with address for purposes hereof at care of State Attorney Pretoria, 316 SALU Building, Corner Thabo Sehume and Francis Baard Streets, Pretoria,
- 7) The respondent is the compensation solutions (PTY) LTD, a company with limited liability duly incorporated and registered in accordance with the provisions of the Companies Laws of South Africa, with principal place of business at 33 Seventh Avenue, Newton Park, Port Elizabeth.
- 8) The respondent served summons on the applicants on 2 November 2021, for payment of R16 356 367.11. A Plea was delivered on 27 January 2022.
- 9) On the 29 March 2022 counsel for the applicants asked for postponement, which application was refused by the court. The respondent asked for summary judgement which application was granted on the 29 March 2022.
- 10) Thus the application for rescission of the summary judgement by the applicants.

11) In his opening address in this court counsel for the applicants submitted that, the applicant's application is based solely on Rule 42. He articulated the following as reasons why the judgement should be rescinded.,

11.1 Respondent induced the court to make the error in granting judgement in respondent's favour.

11.2 The respondent's claim is not for a liquidated amount in money.

11.3 Even though no opposing affidavit was filed by the applicants the court a quo should have viewed the matter as opposed and referred it to the opposed roll.

11.4 The respondent was aware that the applicant will raise various defences against its claims.

12) On behalf of the applicant counsel submitted that based on the above raised points individually or cumulatively the court must rescind the judgement.

13) The respondent submitted that the applicants on 2 August 2022 sent a letter requesting the respondent to identify the paid invoices and provide them with a spreadsheet setting out these with a spreadsheet setting out these invoice. This amounts to an express acquiescence to the judgement debt.

14) The respondent raised two points in limine.

**Fist point in limine**

Since the applicants were represented when summary judgement was granted by default against the applicants. No fraud or common mistake is alleged in the papers.

The plea contained all defences that the applicants wanted to raise thus the defences were considered by the court before summary judgement was granted.

Rule 42 does not find application as the respondent was procedurally entitled to the summary judgement.

The application for rescission is fundamentally flawed and fatally defective because instead of bringing a rescission, the applicants ought to have appealed.

**2<sup>nd</sup> point in limine**

Applying the doctrine of peremption applicants by their own conduct acquiesced to the summary judgement. In this regard the respondent relies on the letter written to the respondents by the attorney of the applicants.

15) Conditional counter application.

In the event the court dismisses the applicant's application counsel for the respondent asked the question of costs be reserved with a *rule nisi* calling upon the applicants to show cause why a costs order should not be made against them in their personal capacities and in the personal capacity of the attorney of record for the applicants, namely the State attorney Mr Sikhala.

- 16) It is further submitted that the applicants intentionally withheld all the relevant judgements from this Division. The current application is an abuse of court process and a delaying tactic that justifies a punitive cost order.
- 17) The main issue before this court is whether the applicants succeeded to show on preponderance of probabilities that the judgement ought to be rescinded in terms of rule 42.
- 18) Rule 42(1)(a) was intended to provide for rescission of an order that had been erroneously sought or erroneously granted. Whether the rule applied depended on the nature of the error and not whether the error appeared from the record of the proceedings. The error had to be one related to the proceedings themselves<sup>1</sup>.
- 19) The meaning of the word “erroneously granted” was dealt with in the case of Bakoven Ltd Vs G J Howes (PTY) Ltd <sup>2</sup> where the Judge stated the following:
- “An order or a judgement is ‘erroneously granted’ when the Court commits an ‘error’ in the sense of a ‘mistake in a matter of law appearing on the proceedings of a Court or record’ (The Shorter Oxford Dictionary). It follows that a Court in deciding whether a judgement was ‘erroneously granted’ is, like a Court of appeal, confined to the record of proceedings. In contradistinction to relief in terms of Rule 31 (2)(b) or under the common law, the applicant need not show ‘good cause’ in the sense of an explanation for his default and a bona fide defence...Once the Applicant can point to an error in the proceedings, he is without further ado entitled to rescission”.*

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<sup>1</sup> Colyn Vs Tiger Food Industries Ltd t/a Meadow Feed Mills cape [2003] 2 All SA 113 (SCA)

<sup>2</sup> 1992 (2) SA 466 at 471 F-G

20) The question to be answered in this case is whether the presence of the counsel for the applicant and the plea is enough to conclude that the judgement was not granted by default and therefore incapable of being rescinded.<sup>3</sup>

21) In his heads of argument counsel for the applicants in paragraph 4.8<sup>4</sup> says the following:

*“It is trite that Summary judgement may be opposed by the defendant without actually filling an affidavit opposing summary judgement save that the defendant would be confined to issue / defences raised in the plea or points in limine”.*

22) In my view it is therefore common cause that the matter was opposed and the respondents were properly represented and the plea filed was also before court. It was common practice at the time that opposed Summary judgements were heard in the unopposed court.

23) Accordingly all the papers that had been filed were before the court, parties were, represented and the court made its judgement upon the record before it. Based on the papers before it the court was entitled to grant the judgement. Therefore, the judgement was not erroneously granted nor was it a default judgement.

24) It is furthermore my view that if the applicants are of the view that the court erred in some way by granting the summary judgement or for any

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<sup>3</sup> Benson and Another Vs Standard bank (17143/2011) (2014) ZAGPJHC 428 (14 October 2014) paragraph 9 and 10

<sup>4</sup> 013-7 Caselines

other reason, they should have filed an application for leave to appeal. The applicants do not have a remedy in this court as the application was not granted by default.

- 25) The dilatory way in which the attorney for the applicants conducted himself in this matter is frowned upon.
- 26) The submission made against Mr Sikhala by counsel for the respondent have merit. However, I do not think that a personal cost order against Mr Sikhala is justified.
- 27) The applicant's officials and attorney are called upon to desist from their unprofessional conduct levelled against them in this matter.
- 28) Accordingly the application is dismissed with costs on an attorney and client scale including the costs of two counsel.

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D. MAKHOBA  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA

I AGREE

## **APPEARANCES**



**For the Plaintiff:**

**Adv MV Makhubele**

**Adv AM Mbedzi**

**Instruction**

**For the Defendant:**

**Adv MP Van Der Merwe SC**

**Adv CJ Welgemoed**

**Instructed by:**

**KMG & Associates Incorporated**

**Date heard:**

**27/02/2023**

**Date delivered:**

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