IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 45744/17

DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: NO
OF INTEREST TO OTHERS JUDGES: NO
REVISED

20 June 2023 .....

DATE SIGNATURE

In the matter between:

Zodwa Dlamini Applicant/First Respondent

And

Glenpark Body Corporate Sectional Respondent/Applicant

Scheme SS109/2003

JUDGMENT

MOGALE, AJ

INTRODUCTION

1. This is an opposed application for the rescission of a judgment granted by Mali J on 21 July 2017. The application is launched in terms of Rule 42(1)(a) and the common law.

2. The judgment sought to be rescinded was granted pursuant to an urgent application launched by the respondent (applicant in the urgent application) against the applicant (first respondent in the urgent application) and her former co-trustees of the body corporate of Glenpark Apartments, who were cited as the second to the fifth respondents in the urgent application.

3. The applicant also seeks condonation for the late filing of the application. The application is opposed.

BACKGROUND

4. On 28 July 2016, at the Respondent's Annual General Meeting, the applicant was appointed together with four other trustees to act as the Board of Trustees of the Respondent. The applicant was appointed as Chairperson of the Board of Trustees.

5. During the applicant’s tenure as the Chairperson of the Board of Trustees, the Board was on the mission of routing out reported corruption, mismanagement, and fraud that their predecessors allegedly committed in the office with a resolution taken by the Board of Trustees to commission a forensic investigation.

6. The Board of Trustees appointed Mr. Mbhoni Sonda Kufika Logan Mavunda as its attorney. He was given clear instructions to represent the Board, the instruction of which he continued to execute.

7. On 4 July 2017, the Body Corporate of Glenpark Apartments brought an urgent application against the applicant and the four Board of Trustee members. The applicant was cited as the first respondent, Sibusiso Mahlangu as the second respondent, Morathashane Asser Dolamo as the third respondent, Fane Fanuel Mvula as the fourth respondent, and Malose Jonas Masalesa as the fifth respondent. This resulted in the order granted by Mali J on 21 July 2017.

8. On 7 September 2017, the applicant applied for leave to appeal against the order granted. Mali J had by then relocated and served in Mpumalanga High

Court. Application for leave to appeal was dismissed on 23 January 2020 (two and half years later).

FACTS

9. The applicant raised a point in limine-misjoinder that Mr. Mavunda (legal representative appointed by the board of trustees) acted contrary to the instructions given by the board. Mr. Mavunda filed the notice to oppose, and answering affidavit only for the applicant, although the instructions were to represent all board members as cited on the application.

10. The applicant contended that the first respondent answering affidavit opposing the application was not her instruction; Mr. Mavunda wrote his own words. The applicant never signed nor initiated the answering affidavit; the appended signature of the first respondent answering affidavit is not hers; it is a fraudulent affidavit, and she never met Kenneth Sithole, the commissioner who commissioned it.

11. On 16 April 2021, the applicant lodged a complaint of misconduct against Mr. Mavunda with the Gauteng Legal Practice Council under reference number 3185/2021; the matter is currently under investigation and still pending.

12. The applicant approached the South African Police Service at the Forensic Science Laboratory with the answering affidavit for evaluation. On the 4 of July 2022, the applicant received an affidavit in terms of section 212 of the Criminal Procedure Act[1], which reached the following conclusion:

> *"There is sufficient evidence to support the proposition that the signature in question marked Q1 was not signed by the writer of the specimen signature marked as A1 to A177 and B1 to B9 and therefore is a forgery."*

13. Subsequently, on 30 April 2022, the applicant laid a criminal charge of forgery under Garsfontein CAS 10/05/2022 against Mr. Mavunda.

[1] 77 Act 51 of 1977.

14. The applicant contended that false evidence in the first respondent's answering affidavit was the proximate cause of the unfavorable judgment against him.

ISSUES TO BE DECIDED

15. This court must consider the following: whether the applicant is entitled to condonation for the filling of this application. The misjoinder of the second to the fifth respondents. Whether the judgment was erroneously sought or granted as contemplated in terms of Rule 42(1)(a), and whether the applicant has shown sufficient cause for rescission under common law

CONDONATION APPLICATION

16. In respect of the late filing of the application, the applicant avers that there was no undue delay and that condonation may be granted since there is a reasonable explanation for the delay; the application is made bona fide and not to delay costs payment; there has been no reckless disregard of the court rules, and the respondent has not suffered any prejudice. She mentioned that she applied for leave to appeal, and the file went missing. She instructed Mkhabela's Attorney to represent her after the disappearance of Mr. Mavunda, but the attorney experienced difficulties locating the court file. After locating the file in 2020, Mkhabela and one Advocate, Kekana, drew her attention to the opposing affidavit purported to be signed by herself, wherein some concessions she was unaware of were made. She investigated the matter after discovering fraudulent facts and signatures appearing in the answering affidavit. The conclusion or finding by the South African Police Forensic Science Laboratory is a bona fide defence for this court to condone the application. The respondent avers that the delay in applying for rescission of a judgment is excessive, more than a year, and thus requires the applicant to provide a plausible and justifiable reason for this court to grant condonation for the excessive delay.

17. The chronology is important. As correctly submitted by the respondent, when applying for condonation, the explanation for the delay must cover the entire duration of the delay. On 21 July 2017, Mali J granted the judgment. On 07 September 2017, the applicant lodged leave to appeal; afterward, the file could

not be located, and ultimately, the leave to appeal was dismissed on 23 January 2020. On 28 January 2020, a writ of execution of the bill of costs in the urgent application was issued, but pursuant to the null bona return of service, the respondent launched an application in terms of Rule 46 to declare the applicant's immovable property executable. The applicant was served in terms of Rule 46 on 28 October 2020, the application was opposed, and the applicant's answering affidavit was filed on 28 April 2021,

18. In December 2020, the applicant discovered a fraudulent first respondent answering affidavit, and in her answering affidavit opposing the Rule 46 application; she raised the issue of fraud on 28 April 2021. She decided to consult with the aggrieved owners and refer the matter to Legal Practice Council for investigation. On 16 April 2022, the applicant lodged a misconduct complaint against Mr. Mavunda with the Gauteng Legal Practice Council. On 30 April 2022, the applicant laid a criminal charge of forgery under Garsfontein CAS 10/05/2022 against Mr. Mavunda. On 04 July 2022, the applicant received an affidavit in terms of section 212 of the Criminal Procedure Act[2] from the South African Police Service Forensic Science Laboratory. This application was launched on 11 July 2022.

19. The explanation provided for the delay is broad, as there were ongoing court processes launched after granting of the judgment. The main contention of the delay is about the fraud report obtained in an affidavit in terms of section 212 of the Criminal Procedure Act from the South African Police Service Forensic Science Laboratory.

20. The principle for considering this application for condonation is the interest of justice. Whether it is in the interests of justice to grant condonation depends upon the facts and circumstances of each case. Factors that are relevant to this application include but are not limited to the nature of the relief sought, the effect of the delay on the administration of justice, the reasonableness of the

[2] Act 51 of 1977.

explanation for the delay, the importance of the issues raised in the application, and prospects of success[3].

21. I considered the explanation given by the appellant for the delay and the respondent's reasons in opposing this application, the nature and importance of the relief sought, the interest of justice, the convenience of the court, the avoidance of unnecessary delay in the administration of justice, and the prospects of success. I also considered any prejudice to be suffered by the respondent if the condonation was granted and none was found. Therefore, I concluded that granting the condonation would be in the interests of justice. The prospects of success are dealt with more fully by considering the merits of the rescission application. This is explored more fully below.

MIS-JOINDER OF THE SECOND TO FIFTH RESPONDENTS

22. The applicant raised misjoinder as a point in limine to demonstrate that Mr. Mavunda failed to carry out the mandate of the board members when instructed to oppose the application.

23. Notice of Motion reads: "*Kindly take notice that the above applicant intends making an application on 18 July 2017 at 10h00, or as soon thereafter as counsel for the applicants may be heard for an order in the following terms". The* applicant (the first respondent in the urgent application), together with the second to the fifth respondent in the urgent application, were cited and properly served.

24. The Board of Trustees (the first to the fifth respondent in the urgent application) instructed Mr. Mavunda to oppose the urgent application. The Notice to oppose was filed for the first to the fifth respondent. Notice to oppose reads: "*Be pleased to take notice that the first respondent hereby gives notice of her intention to oppose the above application."* Mr. Mavunda also made a confirmatory affidavit confirming only the first respondent's affidavit.

[3] *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae* [2007] ZACC 24, 2008 (2) SA 472(CC) at 477A-B.

25. The applicant argued that she did not act in her personal capacity, as cited in the Notice to oppose. The respondent does not know why Mr. Mavunda chose to oppose only on behalf of the first respondent. No explanation was given.

26. The order granted by Mali J reads as follows:

1. *The application is deemed as an urgent application as contemplated in Rule 6(12) of the Uniform Rules of Court, and the non-compliance with the normal methods and periods for service is condoned:*
2. *The first respondent immediately closed the bank account of the applicant held at Standard Bank with account number 373009437 and paid over the funds to the new bank account of the applicant held at Absa Bank under account number 9273327575 within seven days of this order;*
3. *The first, second, third, fourth, and fifth respondents are to hand over all books, records, documents, and accounting records of the applicant in their possession or under their control within five days of this order;*
4. *The first, second, third, fourth, and fifth respondents are interdicted from presenting themselves as Trustees of the applicant:*
5. *The first, second, third, fourth, and fifth respondents to pay the costs of this application, jointly and severally, the one paying the other to be absolved from payment."*

27. The issues of misjoinder are regulated in Rule 10 and the common law specifically. The test for misjoinder of a defendant was coined in Rule 10(3), which states the following:
"*Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative*, *whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action."*

28. There is no explanation provided for the failure by Mr. Mavunda to mention the second to the fifth respondent in the notice to oppose the application and confirmatory affidavit; as a result, I find an objection to a misjoinder not to be a

ground for rescission. The second to the fifth respondents were cited, and according to paragraphs 3, 4, and 5 of the judgment, they are jointly and severally liable. As a result, the point in *limine* for misjoinder must be dismissed.

WHETHER THE JUDGMENT WAS ERRONEOUSLY SOUGHT OR GRANTED AS CONTEMPLATED IN RULE 42(1)(a)

29. Rule 42(1)(a) provides that the High Court may, in addition to any other powers it may have*, mero motu* or upon the application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any affected thereby.

30. According to *Bakoven Ltd v GJ Howes (Pty) Ltd*[4] the court dealt with the meaning of erroneously granted:

> "*An order or judgment 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 of record' (The Shorter Oxford Dictionary). It follows that a Court in deciding whether a judgment 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."*

31. The argument before this court centres around the question of whether the fact that applicant's attorney deliberately disregarded and ignored given instructions from the outset to the detriment of the case despite consultation with the members of the Board of Trustee, as set out in the first respondent's answering affidavit, was the cause of the unfavourable or erroneous judgment granted by Mali J. Regarding principles guiding common law, once a judgment is given, it is final; the judge who delivered it, may not alter it, and the judge becomes *functus officio* and may not ordinarily vary or rescind his own order.

[4] 1990 (2) SA 446 at page 471E to H.

32. In *Zuma v Secretary of Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*,[5] the Court had to determine whether the applicant had met the requirements, either in terms of rule 42 or the common law, for rescission. Secondly, whether the applicant has established any reasonable grounds upon which the Court may rescind its order. The Court held that:

> "*It should be pointed out that once an applicant has met the requirements for rescission, a court is merely endowed with the discretion to rescind its order. The precise wording of rule 42, after all, postulates that a court "may," not "must," rescind or vary its order – the rule is merely an "empowering section and does not compel the court" to set aside or rescind anything. This discretion must be exercised judicially."*

33. There is no substance in this argument, and there is no question of any irregularity on the part of the respondent. The applicant described what her attorney did as a filing error, and I find that it is not a mistake that occurred in the court proceedings. This is not a procedural irregularity or mistake regarding the judgment granted; therefore, it cannot be correct to conclude that the court a quo erroneously granted it.

34. I find that for the judgment to be granted, there was no error regarding the rules or the record of the proceeding. The error must be patent from the record of proceedings, and the court is confined to the four corners of the record to determine whether or not rule 42(1)(a) is applicable.[6] Honesty, reliability, and integrity are expected of an attorney. The lawyer is required to present the client's case in the best possible light with indifference to the moral of case[7]. The court a quo expected the same professionalism, and it is clear that it applied

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[5] 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 and Others (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) at para 53.

[6] *Bakoven Ltd v GJ Howes (Pty) Ltd, and Tom v Minister of Safety and Security 1992 (2) SA 466 (E); Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* Cape (127/2002) [2003] ZASCA 36; [2003] 2 All SA 113 (SCA) (31 March 2003) at para 10 and *Webb v Fourie and Another* (3571/2018) [2020] ZAMPMHC 36 (30 January 2020) at para 10.

[7] Eshete *Does a lawyer's character matter?* In Luban D (ed) The good Lawyers' Roles and Lawyers' Ethics (1985) 270-285 at 272.

the law when dealing with this matter. In light of the evidence presented, I find that a rescission order cannot correct the irregularity, omission, or mistake committed by the applicant's attorney.

RESCISSION UNDER THE COMMON LAW

35. The court is empowered under common law to rescind a judgment obtained on default of appearances, provided sufficient cause for the default has been shown. *The Appellant Division in Cairn's Executors v Gaarn*[8] held that the term *"sufficient cause"(or good cause) has two essential elements for the rescission of a judgment by default:*

(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 prospects of success.

34 The applicant was present at the proceedings; therefore, this ground of rescission does not apply to the judgment granted on 21 July 2017.

35. However, it is possible to rescind or set aside a judgment under common law on the ground of fraud, Justus error (on rare occasions), in certain exceptional circumstances when new documents have been discovered when the judgment had been granted by default, and in the absence between the parties of a valid agreement to support the judgment.[9]

36. The applicant's main contention is fraud. The false evidence, as set out in the fraudulent first respondent's answering affidavit, was the cause of the unfavourable judgment. The facts noted in the first respondent's answering affidavit belong to the attorney, and the applicant did not append the signature appearing in the affidavit. The 212 affidavit from the South African Police Service Forensic Science Laboratory proves forgery.

[8] 1912 AD 181 at 186.

[9] *Colyn v Tiger Food Industries Ltd/a Meadow Feed Mills (Cape)* 2003(6) SA 1 SAC at 9C.

37. It is trite that for the applicant to succeed on the ground of fraud, the applicant must allege and prove the following:[10]

a. That the successful litigant was a party to the fraud,[11]
b. That the evidence was, in fact, incorrect,[12]
c. That it was made fraudulently and with the intent to mislead the court, [13]
d. That such false evidence diverged from the true facts to such an extent that the court, had it been aware, would have given a different judgment.[14]

38 In J*.A.N v N.C.N* [15], the court confirms the test to be applied in rescission applications on the basis of fraud under the common law and set out as follows;

> "*Considering that the judgment was not taken by default, the test to be applied is stringent, as elucidated in Moraitis:*
>
> *'A judgment can be rescinded at the instance of an innocent party if it were induced by fraud on the part of the successful litigant, or fraud to which the successful litigant was party. As the cases show, it is only where the fraud – usually in the form of perjured evidence or concealed documents – can be brought home to the successful party that restitutio in integrum is granted, and the judgment is set aside. The mere fact that a wrong judgment has been given on the basis of perjured evidence is not a sufficient basis for setting aside the judgment. That is a clear indication that once a judgment has been* given, it is not lightly set aside, and De Villiers JA said as much in *Schierhout*. …
> *Apart from fraud, the only other basis recognized in our case law as empowering a court to set aside its own order is justus error. In Childerley, where this was discussed in detail, De Villiers JP said that "non-fraudulent misrepresentation is not a ground for setting aside a judgment" and that its only relevance might be to*

[10] *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163 at 169.
[11] *Fraai Uitzicht 1798 Farm (Pty) Ltd 2017 v McCullough* (unreported SCA case no 118/2019 dated 5 June 2020) at 16.
[12] Fraai supra.
[13] Fraai supra.
[14] *Robinson v Kingswell 1915 AD 277 at 285; Swart v Wessels 1924 OPD 187 at 189–90; Smit v Van Tonder 1957 (1) SA 421 (T) at 426H; Groenewald v Gracia (Edms) Bpk 1985 (3) SA 968 (T) at 971E; Rowe v Rowe 1997 (4) SA 160 (SCA) at 166I; Fraai Uitzicht 1798 Farm (Pty) Ltd v McCullough (unreported, SCA case no 118/2019 dated 5 June 2020) at paragraph [16]. See also Simon NO v Mitsui and Co Ltd 1997 (2) SA 475 (W) at 517E–F.*
[15] (2283/2021) [2022] ZAECMKHC 14 (17 May 2022) at para 26.

explain how an alleged error came about. Although a non-fraudulent misrepresentation, if material, might provide a ground for avoiding a contract, it does not provide a ground for the rescission of a judgment. The scope for error as a ground for vitiating a contract is narrow, and the position is the same in regard to setting aside a court order. Cases of justus error were said to be "relatively rare and exceptional.""[16]

39. While not calling these requirements in question, there is no evidence before me to suggest that the respondent was involved in any collusive or corrupt relationship with the first respondent's attorney. Furthermore, there is no evidence that the respondent was a party to the fraud[17] and that it does not encompass the first respondent's signature. This factor must be taken into account in weighing the prejudice to the plaintiff in granting a rescission and the prejudice to the respondent in refusing it.[18]

40. It is important to note that the applicant's complaint regarding the fraud pertains to her legal representative and not the respondent. She also complains that false evidence was contained in her affidavit. There is no suggestion that the first respondent played a role in drafting her affidavit. As a result, the two requirements set out cannot be the basis for rescission on a ground of fraud.

41. The respondent contends that the onus lies on the applicant to prove that the evidence presented was incorrect by placing the correct evidence before this court. In addition to the allegations about the fraudulent first respondent answering affidavit, the applicant needed to present the true facts for this court to determine that there was a divergence from the true facts.

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[16] *Moraitis Investments (Pty) Ltd and Others v Montic Dairy (Pty) Ltd and Others* [2017] ZASCA 54; 2017 (5) SA 508 (SCA) ('Moraitis' 12. The reference to 'Schierhout' relates to *Schierhout v Union Government* 1927 AD 94 ('Schierhout'). The reference to 'Childerley' is to *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163 ('Childerley'). Also *see De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (AD) ('De Wet') at 1041B-E, which dealt with a wider discretion for rescission in cases of procedural defaults and default judgments.

[17] The principles of our law indicate that fraud is not easily inferred (*Gilbey Distillers & Vintners (Pty) Ltd v Morris NO* 1990 (2) SA 217 (SE)), and that fraud must not only be pleaded but also proved clearly and distinctly (*Courtney-Clarke v Bassingswaighte* [1991] 3 All SA 625 (Nm), 1991 (1) 684 (Nm)p. 689).

[18] *Minister of Police v Kunene and others* [2020] 1 All SA 451 (GJ) at para 77.

42. I agree with the respondent's submissions that the applicant failed to present the correct evidence to prove that the first respondent answering affidavit contained false evidence, that such evidence diverged from the true facts, and further that it was submitted with the intent to mislead the court. As a result, it is difficult to set aside judgment on the ground of fraud without having been placed with the true facts. In light of my conclusion that the judgment cannot be set aside based on fraud, the applicant can pursue other remedies as she has indicated above.

43. In conclusion, I am of the view that the court a quo applied the law. Without evidence of fraudulent misrepresentation on the part of the respondent, the application for the rescission of the judgment cannot be granted.

44. In the result, I make the following order:

1. Condonation is granted.
2. The application for the rescission is dismissed with costs.

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K MOGALE,

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, PRETORIA

Date of hearing: 11th MAY 2023

Date of judgment: 20th JUNE 2023

APPEARANCES

Applicants' council:	A E MALANGE
Instructed by:	G W MASHELE ATTORNEYS
Respondents' council:	S W DAVIES
Instructed by:	LOOCK DU PISANE INC