REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 1012/2019

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

SIGNATURE: PD. PHAHLANE

DATE: 10-01-2023

In the matter between:

HMT PROJECTS (PTY) LTD	**Applicant**
and	
VAN DEN HEEVER, THEODORE WILHELM N.O	**1st Respondent**
PEMA, JAYANT DAJI N.O	**2nd Respondent**
STANDER, MONIQUE N.O	**3rd Respondent**
RONNIE DENYSON AGENCIES (PTY) LTD t/a WATER AFRICA SYSTEMS (PTY) LTD (in liquidation)	**4th Respondent**
THE SHERIFF OF THE HIGH COURT GERMISTON SOUTH	**5th Respondent**

In re:

VAN DEN HEEVER, THEODORE WILHELM N.O	**1st Applicant**
PEMA, JAYANT DAJI N.O	**2nd Applicant**
STANDER, MONIQUE N.O	**3rd Applicant**
RONNIE DENYSON AGENCIES (PTY) LTD t/a WATER AFRICA SYSTEMS (PTY) LTD (in liquidation)	**4th Applicant**
THE SHERIFF OF THE HIGH COURT GERMISTON SOUTH	**5th Applicant**

And

HMT PROJECTS (PTY) LTD	**Respondent**

JUDGMENT

PHAHLANE, J

1. This is an opposed application to rescind the judgment granted by Tuchten J, by default against the applicant (the respondent in the main application) in favour of the respondents (the applicants in the main application) on 2 July 2019.

2. The application is premised on the ground that the judgment was erroneously sought and erroneously granted as provided for in Rule 42(1)(a) of the Uniform Rules of Court as the applicant had served a notice of its intention to oppose the main application on 27 June 2019 and was not served with a notice of set down for the date of hearing.

3. The facts can briefly be summarised as follows:

   3.1 The fourth respondent ("Water Africa") was placed in liquidation in terms of a court order granted on 28 October 2015. During November 2015, Water Africa made

payments to HMT ("the applicant") and subsequent thereto, the respondents brought an application ("the main application") that this money be repaid.

3.2 On 28 January 2019 the sheriff attempted service of the main application to the applicant and recorded in his return that the process was purportedly served on the employee of the applicant, Ms. Belinda, by handing a copy thereof in terms of Rule 4(1)(a)(v). The sheriff further recorded that Ms. Belinda "*also refused to accept document*". (Underlining added for emphasis)

4. The issue to be determined in this application is whether the applicant has satisfied the requirements for rescission of the default judgment in terms of Uniform Rule 42(1)(a). Accordingly, the court's discretion must be exercised judicially after a proper consideration of all the relevant circumstances to come to a just decision. The rule provides that the court may rescind an order or judgment erroneously sought and granted in the absence of any party affected thereby. It has often been held that where the rules prescribe a particular procedure and that procedure is not followed, then such procedural error renders the order or judgment sought and granted "erroneous" within the meaning of Rule 42(1)(a). Effectively, what is being rescinded is the procedure in terms of which the order or judgment was granted.

5. To show that the order or judgment was erroneously granted, the applicant seeking rescission must show that at the time the order or judgment was made, there existed a fact which would have induced the court, had the court been aware of it, not to grant the order[1]. In this regard, the applicant must provide a reasonable and satisfactory explanation for its absence or default.

6. The applicant contends that the respondent's notice of motion in the main application expressly excluded their right to persist with the main application on the unopposed

[1] See: Daniel v President of the Republic of South Africa and Another 2013 (11) BCLR 1241 (CC) at [6]; Van Heerden v Brnnkhorst (Case no 846/19) [2020] ZASCA 147 (13November 2020) at [10].

roll after the notice to oppose was served by expressly stating in the notice of motion that: *"If no such notice of intention to oppose be given, the application will be made on the 2nd July 2019 at 1Oh00 or so soon thereafter as counsel may be heard"*[2].

7. It is common cause that the respondents were served with a notice of intention to oppose on 27 June 2019. The applicant contends that the respondents failed to serve on the applicant, a notice of set down and/or notify the applicant that they intend to proceed seeking the relieve in the main application in the unopposed court, despite being required by the Practice Manual of this court and this Division to do so.

8. On the other hand, the respondents contend that the notice to oppose was served late, and the applicant was as such required to bring an application for condonation, and having failed to do so, they (the respondents) were entitled to proceed with the hearing in the unopposed court and obtain a final judgment against the applicant.

9. It is on record that between the date of 29 July 2019 when the applicant became aware that the order had already been granted and the date when this current application was brought before court on 25 October 2019, there was an exchange of correspondence between the parties with an understanding that the order granted will not be executed. This is so because in a letter dated 30 July 2019, the respondents' attorney wrote to the applicant's attorney informing them that they are waiting for the applicant's answering affidavit to be filed because the *"sheriff had already been given instructions not to proceed with a warrant of execution".* (Underlining added for emphasis)

10. The applicant understood this to mean that the respondents had abandoned the judgment, at least, according to the applicant's version. Mr van der Berg appearing for the respondents argued that the applicant should have brought an application for

[2] Vide Notice of Motion.

condonation and delivered its answering affidavit when it was requested, and that failure to do so does not entitle the applicant to proceed with its application and that the application should be dismissed.

11. I do not agree with this argument because in terms of Uniform Rule 6(5)(d)(ii), *"any person opposing the grant of an order sought in the notice of motion must within fifteen days of notifying the applicant of his or her intention to oppose the application, deliver his or her answering affidavit, if any, together with any relevant documents"*. Accordingly, the time for the delivery of the answering affidavit only commenced to run on the day after the notice to oppose was served on the respondents. In this regard, Mr Cooke on behalf of the applicant submitted, and correctly so, that there was ten (10) days still outstanding before the answering affidavit was due on 19 August 2019, because the judgment was granted prior to the expiration of the period allowed for the delivery of the answering affidavit. (Underlining added for emphasis)

12. It is not in dispute that the applicant was not served with the notice of set down of the main application for the date of hearing. This position was confirmed by Mr van der Berg who stated that the notice of set down was prepared after the notice of intention to oppose was given/served. This is further confirmed by the Sheriff's return of service as stated in paragraph 3.2 *supra,* because the return of service does not state whether the sheriff fully complied with the provisions of Rule 4(1)(a)(v) by affixing a copy of the documents to the main door of the applicant's office or place of business, or in any manner provided by law after Ms. Belinda refused to accept the documents.

13. It is on this basis that Mr. Cooke argued that there was no proper service of the main application on the applicant because *ex facie* the return, the service of the main application was materially defective. He argued in his heads of argument that the respondents having failed to comply with these basic procedural requirements, were not entitled to proceed to the main application and obtain a final judgment. He submitted that under these circumstances where there was no proper service and no

notice of set down, the default judgment was erroneously sought and erroneously granted, and it stands to be rescinded in terms of Rule 42(1)(a).

14. Relying on the decision of ***Top Trailers (Pty) Ltd & another v Kotze***[3] in which the court referred to the Practice Manual of this court, he submitted that - given that there was a notice of intention to oppose (which is not disputed), a notice of set down was required in terms of the Practice Manual which makes provision for the enrolment of applications after the delivery of a notice to oppose, - and that was not done. This court stated the following at paragraph [16]:

> *"Para 13.10 of Gauteng: Pretoria Practice Manual regulates the enrolment of applications after a notice of intention to oppose has been filed. It provides:*
>
> ***1.*** *Where the respondent has failed to deliver an answering affidavit and has not given notice of an intention only to raise a question of law (rule 6(5)(d)(iii)) or a point in limine, the application must not be enrolled for hearing on the opposed roll*.
>
> ***2.*** *Such an application must be enrolled on the unopposed roll. In the event of such an application thereafter becoming opposed (for whatever reason), the application will not be postponed as a matter of course. The judge hearing the matter will give the necessary directions for the future conduct of the matter.*
>
> ***3.*** *The notice of* ***set down*** *of such an application* ***must*** *be served on the respondent's attorney of record."*

15. The respondents on the other hand holds the view and submitted that Rule 42(1)(a) is not a competent ground of rescission on the facts of this case because the order was not erroneously granted. Mr van der Berg submitted that the order was granted

[3] (1006/2018) [2019] ZASCA 141 (1 October 2019).

because the applicant did not oppose the main application. Referring to the unreported judgment of Justice Victor in the matter of ***BMW Financial Services SA (Pty) Ltd v Jacob***[4]***,*** he argued that "it has always been the practice of this Division to grant the orders on an unopposed basis because it appears from this judgment that the court was aware at the time it granted the order that service of the proceedings was served on the respondent but the respondent failed to file an affidavit for condonation and an opposing affidavit setting out his defence, and as such, the court still granted the order on an unopposed basis. He submitted that *in casu,* the applicant should have applied for condonation.

16. I do not agree with this submission because the facts of the case referred to relates to the National Credit Act and do not deal with rescission. The facts are clearly distinguishable from the facts in this case. It is clear from paragraph 8 of the ***BMW Financial Services*** judgment that service of the proceedings was properly effected. Having said that, Mr van der Berg had difficulty explaining why notice of set down was not served as required by the Practice Manual. He firstly submitted that there was no need to serve the applicant with a notice of set down because the notice of motion specified the date on which the matter would be heard. He further submitted that after notice of intention to opposed was served on the respondents on Thursday, notice of set down could not be served or filed between that Thursday and Tuesday when the matter came before court because the roll had already been closed by 12:00 o'clock that Thursday.

17. In my respectful view, there is no merit in this submission. The Practice Manual obliges every party to the proceedings to comply with a specific peremptory requirement as regards the enrolment of applications when it becomes clear that the matter has become opposed and the notice of intention to oppose has been delivered. In this regard, the **notice of set down** of such an application **must** be served on the respondent's attorney of record, and the respondents neglected or ignored this requirement. The respondents were therefore obliged to serve the applicant with a set

[4] 2017 JDR 2033 (GJ).

down even before the Thursday when a notice to opposed was delivered. It should be noted that the Practice Manual has the same force and effect as the Uniform Rules of Court and **must** be complied with. Non-compliance to serve the notice of set down constitutes a procedural error or irregularity.

18. On the same token, Mr van der Berg's submission that the applicant did not oppose the main application cannot be correct because the applicant was never served with the main application and the notice of set down. In those circumstance, it follows that the applicant would not have known that the matter was placed on the unopposed roll when the respondents deliberately neglected to make the applicant aware of this position. I do not know on what basis Justice Tuchten granted the judgment, but there are two probabilities, that is: (1) either the court was not made aware that the notice to oppose have been served, so as to allow the court to properly exercise its discretion when granting the judgment, or (2) the court was informed that there was proper service of the main application by the sheriff, as well as the notice of set down on the applicant. Be that as it may, what is relevant in my view is that - had the court been informed of the true state of affairs, namely:- notice to oppose being served on the respondents and the non-service of the main application and the notice of set down on the applicant, who undoubtedly had no knowledge of the application, then I have no doubt in my mind that Justice Tuchten would not have granted the default judgment order.

19. As already stated, the return of service does not state whether the sheriff fully complied with the provisions of Rule 4(1)(a)(v). In my view, the respondents were duty bound to ensure that the rules were complied with by serving the notice of set down on the applicant and failure to do so constitutes an error or irregularity which resulted in the judgment being sought and granted erroneously within the meaning of Rule 42(1)(a). I therefore align myself with the decision in ***Top Trailer*** because the directives in the

Practice Manual are peremptory. Accordingly, I do not agree with the respondent's submission that Rule 42(1)(a) is not applicable[5].

20. *In* ***Lodhi 2 Properties investments CC & another v Bondev Developments (Pty) Ltd[6],*** the court dealt with the interpretation of the words 'erroneously granted' as follows:

> "*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 given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the sheriff's return of service wrongly indicates that the relevant document has been served as required by the Rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted erroneously."*

21. I have properly given due consideration to all the relevant factors, and in light of the circumstances of this case, I am satisfied of the reasonable explanation given by the applicant for its default, and by showing that this application is made bona fide. On the strength of the decision in ***Top Trailers,*** I am of the view that the applicant has satisfied the requirements for the rescission of the default judgment in terms of Uniform Rule 42(1)(a). Consequently, I find that the default judgment was erroneously sought and

[5] See: Theron NO v United Democratic Front (Western Cape Region) and others 1984 (2) SA 532 (C) at 536E - the court held that Rule 42(1) is a procedural step designed to correct an irregularity and to restore the parties to the position they were in before the order was granted.
[6] [2007] ZASCA 85; 2007 (6) SA 87 (SCA) para 24.

granted, and the applicant is entitled to an order rescinding the order and judgment granted on 2 July 2019.

22. In the circumstances, I make the following order:

1. The judgment granted by default on 2 July 2019 is rescinded.

2. The following orders granted against the applicant in favour of the respondents are set aside:

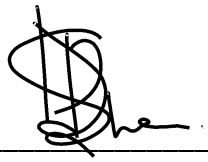
2.1 Declaring in terms of section 341(2) of the Companies Act, Act 61 of 1973 that the dispositions made to the Respondent in the amount of R1,610,677.46 by Ronnie Denyson Agencies (Pty) Ltd t/a Water Africa Systems (Pty) Ltd (in liquidation] after the commencement of its winding-up be void.

2.2 That the Respondent is to make payment to the First, Second and Third Applicants in their capacities as joint liquidators of the Fourth Applicant, alternatively the Fourth Applicant in the amount of R1 610 677.46.

2.3 That the Respondent pay the costs of this application.

3. The writ of execution issued pursuant to the said order is set aside.

4. The respondent is ordered to pay the costs of this application on attorney and client scale.



PD. PHAHLANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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Date of Hearing	: 20 JULY 2022
Judgment Delivered	: 10 JANUARY 2023