Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No. **2023-064996**

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

[redacted]

SIGNATURE

04 JULY 2024
DATE

In the matter between:

MTHUTHUZELI BARNABAS NDIYA	First Applicant
KETHIWE JOYCE NDIYA	Second Applicant

and

FERDINANTUS BOTHA	First Respondent
MAGRIETA MAGDALINE BOTHA	Second Respondent
LEGAL PRACTITIONER FEDELITY FUND BOARD	Third Respondent
VOSTER INCORPORATION ATTORNEYS	Fourth Respondent

This matter was heard virtually (Ms teams) and disposed of in terms of the directives issued by the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

JUDGMENT

KUBUSHI J

INTRODUCTION

[1] On 10 July 2023 judgment was granted in the urgent court against the first and second applicants ("the applicants"), in their absence. The application had been served on the applicants by email with the date of hearing set for 11 July 2023.

[2] As is practice, the Judge sitting in the urgent court would normally reallocate matters in her/his discretion, in spite of the date on which such matters would have been set down for hearing. In this instance, the Judge in his discretion, reallocated the matter to be heard on 10 July 2023, which was a day before the date on which the application had been set down for hearing by the first and second respondents ("the respondents"). The applicants did not file a notice to oppose the matter. The matter was heard unopposed, as the applicants were not in court when the matter was called, and judgment was granted by default, in their absence.

[3] The applicants are now before court in terms of Rule 42(1)(a) of the Uniform Rules of Court ("the Rules"), as well as in terms of the common law, to rescind the order or judgment granted in their absence. The common law rescission was however not seriously pursuit by the applicants as it was not addressed in the founding papers nor did the applicants' counsel argue it either in the heads of argument or in oral argument.

[4] The application is opposed only by the respondents, who are contending that the reliance by the applicants on rule 42(1)(a) for the relief they seek, is ill-founded and that the requirements in terms of the common law have not been met by the applicants. They submit, therefore, that as a proper case for the rescission of the judgment has not been made out in the papers, the application stands to be dismissed with costs.

[5] Due to the decision finally reached in this judgment, only rule 42(1)(a) will be addressed.

QUICK BACKGROUND

[6] The main dispute between the applicants and the respondents ("the parties"), that served in the urgent court, revolved around the fact that the applicants paid certain funds towards the purchase of an immovable property owned by the respondents. They were also to pay occupational rent pending the transfer of the property into their names. The money was paid into the trust account of the respondents' attorney. The attorney was later removed from the roll of attorneys because he squandered trust funds. The applicants claimed the money from the Legal Practitioners Fidelity Fund Board ("the Fidelity Fund"), that agreed to refund the money. In the meanwhile, the parties had entered into a settlement agreement that the money claimed from the Fidelity Fund be paid into the trust account of the respondents' current attorneys. It now appears as if the applicants want to renege from the settlement agreement, hence the urgent application which sought an order interdicting the Fidelity Fund from paying those funds to the applicants and that the funds be paid as agreed in the settlement agreement.

APPLICABLE LAW

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

[8] The essential elements of this type of rescission are that the judgment was erroneously sought or granted; and that the judgment was granted in the absence of the parties affected thereby. This is the threshold that the applicants have to surpass in order to succeed in their claim for the rescission of the judgment.

ANALYSIS

Whether the judgment was granted in the absence of the applicants

[9] It is the applicants' submission that the judgment they seek to rescind was granted in their absence. The reason they proffer for their absence is that they did not know that the matter had been reallocated to be heard on 10 July 2023. They were served with an urgent application that notified them that the matter was to be heard on 11 July 2023. They went to court on that day with the intention to oppose the matter, only to be informed that judgment was granted against them a day before.

[10] In response thereto, it was argued on behalf of the respondents that the date change was at the behest of the urgent court Judge, and not by the respondents. It was further alleged that all the parties were supposed to be informed by the court roll that the matter has been reallocated to Monday, 10 July 2023 instead of Tuesday, 11 July 2023. The submission was further that it was upon the applicants to have checked the roll or contacted the urgent court Judge's secretary to find out if the date of hearing had been changed. Their failure to do so is indicative of the applicants' election not to participate in the proceedings, so the respondents argued.

[11] Relying on the judgment in *Zuma*,[1] it was argued on behalf of the respondents that the word 'absence' in terms of rule 42(1)(a) "exists[s] to protect litigants whose presence was precluded, not whose absence was elected." The contention being that the applicants' absence was clearly elected and wilful and was not precluded as the applicants elected not to participate in the urgent application. As such, a litigant's strategic election not to participate does not constitute "absence" for the purposes of rule 42(1)(a).

[12] Failing to participate in court proceedings whilst being aware of same, is similar to electing not to participate and tantamount to being in wilful default, which is an element that is required to establish the term "absence" as envisaged in rule 42(1)(a).

[13] The question is, under the circumstances of this case, can it be said that the applicants elected not to participate in the proceedings, where they contend that they did not attend court on the day that the judgment was granted because they did not know that the date has been changed by the urgent court Judge.

[14] The applicants' argument that they were not in wilful default and that the judgment was granted in their absence, has substance. It is trite that for a party to be in wilful default, she/he must have knowledge of the action against her/him, as well as steps required to avoid the default, and that if such party deliberately fails to take any steps to avoid the default and appreciate the consequences that emanate from such omission, then she/he is guilty of wilful default, and cannot be heard to complain after judgment has been taken against her/him.[2] In this instance, the applicants did not have

[1] 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 [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) at para 61.

[2] See Harris v ABSA Ltd (Volkskas) 2006 (4) SA 527 (T) para 8.

the knowledge, thus, it cannot be said that they were in wilful default. They did not elect not to participate in the proceedings but were precluded from taking part.

[15] The court in *Liphosa*,[3] whilst dealing with the rescission of judgment in terms of rule 42(1)(a) in relation to a summary judgment application held that the rescission of a summary judgment can be claimed under subrule 42(1)(a) when neither the defendant nor the defendant's legal representative appeared at the hearing of the application for summary judgment, an affidavit opposing the application was not filed and the plaintiff did not bring an application condoning the late filing of the application for summary judgment.

[16] The principle finds application in a case that is before this court, where in an urgent application neither the respondents nor their legal representative appeared at the hearing of the urgent application and no opposing papers were filed.

[17] It is common cause that at the time the urgent application was granted the respondents were not before court, nor were they legally represented in court and they had not filed opposing papers. It is also, common cause that the date that was provided to the applicants when the urgent application was served on them was 11 July 2023 and not 10 July 2023 which is the date on which the judgment was granted against them. Furthermore, it is not in dispute that the applicants were not informed of the changed date of the hearing of the application.

[18] The respondents' argument that if the applicants had opposed the matter they would have been aware and informed by the respondents' attorneys of the date change, and that by failing to oppose the matter the applicants were in wilful default, is unmeritorious. There is no law or rule of practice that prohibits a litigant from personally appearing in court on the date set for the hearing of an urgent application and oppose the matter, even though such litigant had not filed a notice to oppose. This is what the applicants allege they did.

[19] It is, indeed, so that the fact that the applicants had not filed a notice to oppose did not mean that they had waived their right to be properly notified of the changed date of the hearing. The respondents' attorneys knew their email address. The application itself was served by email. Same could have been done to notify them of

[3] Liphosa v FirstRand Bank t/a Wesbank unreported GP case no 70343/2020 May 2016 at paras 6 and 16-18.

the changed date of hearing. The respondents seem to want to lay the responsibility at the applicants' door, whilst it fell on them to make sure that the applicants were aware of the date of hearing.

[20] The applicants' argument that they were not legally represented at the time that they were served with the urgent application and had no way of knowing that the matter had been reallocated for hearing on a day before the date on which it had been set down, is convincing, as against the respondents' supposition, which at best can be considered speculative, that the applicants' attorneys conveniently withdrew just before the hearing. The application was served on the applicants on 3 July 2023, and set to be heard the following Tuesday on 11 July 2023. They had only a week within which to get the services of an attorney.

[21] The applicants submitted that they attended court on 11 July 2023 with the intention to oppose the respondents' urgent application, and were informed that the matter was heard a day before, and they were given a copy of the court order. The alleged arrival of the respondents' attorney at court on that day served no purpose as her presence would not salvage the situation – judgment had already been granted by default a day before.

[22] Under the circumstances, it cannot be said that the applicants elected not to come to court on 10 July 2023 whilst they had been informed through service of the application that the matter would be heard on 11 July 2023. The respondents' submission that there is nowhere in the applicants' founding papers where they tell the court why it is that they did not check the roll or make enquiries with the judge's secretary, has no merit. It cannot be disputed that the applicants are lay persons, they would not have thought of checking the roll or contacting the Judge's secretary – that would not have been within their purview.

Whether the judgment was erroneously sought or granted

[23] It was submitted on behalf of the applicants that the error being referred to in rule 42(1)(a) should be the type that resulted in the judgment being granted. In this particular instance, it is the applicants' contention that the non-disclosure to the court by the respondents that the applicants did not show up because they were not notified

of the hearing of 10 July 2023, is the type of error that resulted in the court granting the order that it granted, without having heard the applicants' side of the story. The error is said to be, also, a violation of section 34 of the Constitution, which guarantees the applicants the right to be heard in an instance where there is a dispute that requires the application of law in order for it to be resolved.

[24] A further contention by the applicants was that the judgment was sought and/or granted in error because if they were in court when the judgment was granted the court would not have granted it.

[25] In support of their afore stated submission, the applicants referred to the judgment of Pickering J in *Great Kei Municipality*,[4] that held that rule 42(1)(a) is a procedural set designed to correct expeditiously an obviously wrong judgment or order, and that it does not require an applicant to establish good cause in the sense of an explanation for her/his default, or even a *bona fide* defence. Instead the applicants are entitled to rescission or variation as soon as they can establish an error in the proceedings. In this particular instance, the error lies in the fact that the respondents knew that there was a change of the hearing date, which they allege was made at the discretion of the court, but they elected not to inform the applicants or serve them with a notice of set down for 10 July 2023. They, also, failed to appraise the court that there was no service on the applicants of the new date of 10 July 2023. In so doing, the respondents denied the court of an opportunity to exercise its discretion judicially, by failing and refraining to disclose information that was material to proceedings before the court, when there was indeed a duty to do so, so it was argued.

[26] On behalf of the respondents, it was argued that the applicants failed to point out a mistake in the proceedings. The proposition was that the urgent court duly allocated its roll and informed all parties, and as the matter was unopposed, the court did not have to notify the applicants about the date change.

[27] In addition, the respondents argued that in terms of case law on the issue, the erroneously granted order would have to be reflected on the record of proceedings. The contention being that for the applicants to state that they were not aware that the

[4] Great Kei Municipality v Danmist Properties CC, 2004 (4) AII SA 298 E.

matter was set down on Monday, 10 July 2023 instead of Tuesday, 11 July 2023, is not a subject that is erroneously granted and is on the record. This, according to the respondents, does not constitute a mistake in the proceedings and neither is there a mistake pointed out by the applicants that appear from the record.

[28] In support of their submission the respondents relied on the judgment in *Promedia*,[5] wherein it was held that generally a judgment would have been erroneously granted if there existed at the time of its issue a fact which the court was not aware of which would have precluded the granting of the judgment and which would have induced the court, if aware, not to grant the judgment.

[29] Counsel for the respondents argued that she represented the respondents in the urgent court when the judgment was granted, and that the court did make enquiries about the service of the application on the applicants. She, also, informed the court that the matter was initially allocated to be heard on 11 July 2023 and that the applicants were served to attend court on that date. But the court insisted on proceeding with the matter. She argued that there was no duty on the respondents to re-serve the notice of set down.

[30] This submission has no merit as it was stated from the bar in argument. The matter was not canvassed in the opposing papers serving before court, as such the applicants were not afforded an opportunity to respond thereto.

[31] Similarly, as in *Promedia*, in this instance, there existed at the time the judgment was granted a fact which the court was not aware of which would have precluded the granting of the judgment and which would have induced the court, if aware, not to grant the judgment. If the court had been aware that the applicants were not aware that the matter had been reallocated for hearing on 10 July 2023 instead of 11 July 2023, it would not have granted the judgment as it did.

[32] As argued by the applicants, correctly so, it was incumbent upon the respondents to inform the Judge sitting in the urgent court that the other parties were not in court and that it might be because they are not aware of the changed date. Their

[5] Promedia Drukkers & Uitgawers (Edms) Bpk v Kaimowiz 1996 (4) SA 411 (C).

failure to do so, constituted a fact which if the court was aware of, would not have granted the judgment.

[33] In *Kgomo*,[6] where the applicants sought rescission of a judgment under subrule 42(1)(a) based on the fact that the bank did not comply with the notice requirements of section 129(1) and the relevant provisions of section 130 of the National Credit Act,[7] the court with reference to *Colyn*,[8] and *Lodhi*,[9] held the principles that govern rescission under rule 42(1)(a) to be, amongst others, that the mistake may either be one which appears on the record of proceedings or one which subsequently becomes apparent from the information made available in an application for rescission of judgment. And, further that 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).

[34] Therefore, the contention by the respondents that the applicants' submission that they were not aware of the changed date, does not constitute a mistake in the proceedings and does not point to a mistake that appear from the record, has no substance. Even though it can be accepted that the applicants' lack of knowledge is not apparent from the record, the fact remains that it has subsequently become apparent from the information made available in the application for rescission of judgment.

CONCLUSION

[35] The applicants have succeeded in establishing the required elements for a rescission of judgment in terms of rule 42(1)(a). The evidence on record indicates that the judgment sought to be rescinded was erroneously granted in the absence of the applicants.

[36] The applicants are, as a result, entitled to the relief they seek in the notice of motion.

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[6] Kgomo v Standard Bank of South Africa 2016 (2) SA 184 (GP).
[7] Act 34 of 2005.
[8] Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 SA 1 (SCA).
[9] Lodhi 2 Properties Investment CC v Bondey Developments (Pty) Ltd at 187F – 188C.

COSTS

[37] In respect of costs, it was submitted on behalf of the applicants that the costs which are being sought in this instance, should be costs on a party and party scale. It was, however, contended that this should not close the door to the court in the exercise of its discretion, by expressing its displeasure and disgust at the conduct of the respondents by means of a punitive cost order against them since they were the cause of the litigation which has brought the proceedings this far.

[38] The applicants are substantially successful and are therefore entitled to their costs on a party and party scale of costs. Counsel to be awarded costs on scale B level of costs.

ORDER

[39] The following order is made:

1. The judgment dated 10 July 2023 handed down by Mogotsi AJ is rescinded and set aside.
2. The first and second applicants are granted leave to oppose the application.
3. The first and second respondents are ordered to pay, jointly and severally the one paying the other to be absolved, the cost of the application.
4. Counsel is awarded costs on scale B level of costs.

E M KUBUSHI

Judge of the High Court

Gauteng Division

Appearances:

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For the1st, 2nd & 4th Respondents:	Vorster Inc. Attorneys
For the 3rd Respondent:	No appearance

Date of argument:	19 March 2024
Date of judgment:	04 July 2024