



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	
YES/NO	

Case number: 2155/2022

In the matter between:

O. C. MAROGOA

Applicant

and

NOBELXOLISI CHRISTINAH MALGAS

1st Respondent

**THE MEC: FREE STATE DEPARTMENT OF POLICE,
ROADS AND TRANSPORT**

2nd Respondent

**THE REGISTRAR: FREE STATE OPERATING,
LICENSING AND PERMIT BOARD**

3rd Respondent

**THE CHAIRPERSON: GREATER BLOEMFONTEIN
TAXI ASSOCIATION**

4th Respondent

CORAM: LOUBSER, J

HEARD ON: 1 FEBRUARY 2024

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: 18 APRIL 2024

[1] The Applicant makes application for the rescission of an order made in the unopposed motion Court by Reinders, J on 27 July 2023. The said order reads as follows:

- “1. The 3rd and 4th Respondents are directed to comply with Rule 53(1)(b) within ten days after this order has been served on the Respondents.
2. The 3rd and 4th Respondents are directed to pay costs of this application, jointly and severally, the one paying the other to be absolved.”

The Applicant featured as the 4th Respondent in the proceedings before Reinders, J while The Chairperson: Greater Bloemfontein Taxi Association was cited as the 3rd Respondent.

- [2] The Applicant now wants this order against him to be rescinded. In his Founding Affidavit, he indicates that the application is made in terms of Rule 42(1) and/or the common law. Rule 42(1) inter alia provides that a Court may rescind an order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby. In terms of the common law, a rescission may be granted where it is shown that there was fraud, or a justus error, when new documents have been discovered, where the judgement had been granted by default and in absence of a valid agreement between the parties to support the judgement. In respect of a judgement that had been granted by default, an application for rescission must show a reasonable and acceptable explanation for the default, a *bona fide* motive, and that there is a *bona fide* defence which *prima facie* carries some prospect of success.¹
- [3] At this point it is apposite to first refer to the background of this application. The dispute between the parties emanates from a review application filed by the 1st Respondent in which she sought the review and setting aside of a decision taken by the Respondents to transfer a permit to the Applicant herein. In the review papers, the 1st Respondent called upon the respondents to despatch within 15 days to the Registrar the record of the proceedings sought to be set aside, together with such reasons they wish to give. This demand was made in terms of Rule 53(1)(b).
- [4] When no such record or reasons were forthcoming, the 1st Respondent filed an application in terms of Rule 30A to compel the present Applicant and the

¹ Chetty v Law Society, Transvaal 1985 (2) SA 756 at 764 J - 765 C

Greater Bloemfontein Taxi Association (the 3rd and 4th Respondents in that application) to comply with Rule 53(1)(b). This application was filed on 19 June 2023. As we have seen, Reinders, J granted the application on 27 July 2023.

- [5] The transcribed record of the proceedings before Reinders, J shows that when the application was called, only the legal representative for the Applicant, that is N.C. Malgas, appeared. There was no appearance for the 3rd Respondent and the present Applicant. The legal representative of the Applicant then informed the Court that the 4th Respondent had only served him with a notice to oppose the matter that very same morning. He also referred the Court to the Answering Affidavit filed by the 4th Respondent (present Applicant) earlier. In that affidavit, the 4th Respondent indicated that he did not have the required records, he told the Court. The presiding Judge then responded by saying “then they must say so, are you with me, they must then say so, they must still properly in terms of the rules comply in the answer”. And “ja, so I do not accept that from the 4th Respondent, I still intend granting the orders unless you do not want the orders as sought in your notice of motion”.
- [6] It must be clear from this response of the learned Judge that she held the view that the version of no record in the 4th Respondent’s possession should have been stated in a reply to the demand in terms of Rule 53(1)(b), and not afterwards in the Rule 30A application.
- [7] The real question, however, is whether it was competent for the 1st Respondent to have called on the Applicant to despatch the record or reasons for the impugned decision to the Registrar. In this respect the provisions of Rule 53(1) are decisive. The Rule provides as follows: “Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected –

- (a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and
- (b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within 15 days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as the magistrate, presiding officer, chairperson or officer, as the case may be, is by law required or desires to give or make, and to notify the applicant that such magistrate, presiding officer, chairperson or officer, as the case may be, has done so.

- [8] It is clear that in terms of the Rule, no other persons apart from those mentioned may be called upon to despatch the required record. It is also clear that the Applicant in the relevant review application was well aware of this fact, because the first paragraph of the notice of motion is styled as follows: “Reviewing and setting aside the decision by the 1st Respondent, the 2nd Respondent and the 3rd Respondent on or about the 25th of February 2009, to transfer to the 4th Respondent the Mini Bus permit no: LFSLB 13353.”
- [9] As already indicated, the 4th Respondent mentioned in the notice of motion, is the present Applicant. The Applicant for the review therefore knew that the present Applicant was not the decision maker. Unfortunately, and inexplicably, the Applicant for the review then went on in the notice of motion to call upon the 1st, 2nd and 3rd Respondents as well as the present Applicant, to despatch the record within 15 days.
- [10] Clearly it was not competent for the review Applicant to call upon the present Applicant, who was not the decision maker, to despatch the record of the decision. The present Applicant, was under no obligation to despatch the record, and it follows that the application to compel the Applicant in terms of Rule 30A to do so, was equally without any merit. The court order of 27 July 2023 was therefore erroneously sought and granted against the present

Applicant, and stand to be corrected and set aside.² The 3rd Respondent did not apply for a rescission of the order, that is the Chairperson: Greater Bloemfontein Taxi Association, and the order against it will therefore remain as it is. As for costs, I find no reason why the only opponent to the rescission application should not pay the Applicant's costs of the application.

The following orders are made:

1. The application for rescission of the Court Order under case number 2155/2022 and dated 27 July 2023 succeeds as far as it pertains to the 4th Respondent.
2. The said Court Order is set aside and substituted by the following:
 - 2.1 The 3rd Respondent is directed to comply with Rule 53(1)(b) within ten days after this order has been served on the Respondent.
 - 2.2 "The 3rd Respondent is directed to pay the costs of this application."
3. The 1st Respondent in the application for rescission to pay the costs of the application.

P. J. LOUBSER, J

For the Applicant:

Adv. K.P. Mohono

Instructed by:

Moletsane Attorneys, Bloemfontein

For the 1st Respondent:

Adv. L.B.J. Moeng

Instructed by:

Holomo Rapapali Attorneys, Bloemfontein

/roosthuizen

² See *Stevens v Magistrate and Others* 2014(2) SA 150 (GSJ) at paragraphs 21 and 25