

SOUTH AFRICA / JUDGMENT

Lategan v Peacanwood Estate Homeowners Association NPC (58351/2017) [2025]

ZAGPPHC 168 (17 February 2025)

[2025] ZAGPPHC 168

COURT

North Gauteng High Court, Pretoria

BEFORE

Lesufi

CASE / FILE NUMBER

58351/2017

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION PRETORIA

CASE

NO: 58351/2017

(1) REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

DATE:

17/02/2025

SIGNATURE: In
matter between
LATEGAN
PHILIP FREDERICK
Applicant
and
THE
PEACANWOOD ESTATE HOMEOWNWERS Respondent
ASSOCIATION
NPC
In
re
LATEGAN
PHILIP FREDERICK
Applicant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 17 February 2025.

JUDGMENT

LESUFI AJ

Introduction

[1] The Applicant brought an application to rescind and/ or vary a court order granted on the 3 December 2018 in this court by Stoop AJ, in terms of common law, namely justus error and/ or justa causa. The Applicant also seeks an order that the Respondent pays for the costs of this application. The application is opposed by the

Respondent.

[2] The order sought to be rescinded reads as follows:

1. The Applicant's application is withdrawn.
2. The Applicant is to pay the taxed party and party costs of the application, inclusive of only the appearance costs for counsel for 8 May 2018 and 3 December 2018 and excluding the costs of preparation for 3 December 2018.
3. The Applicant tenders to pay the Respondent's counsel's invoice of 25 August 2018 subject to the Applicant being entitled to challenge this account on taxation.

Parties

- [3] The Applicant is a businessman currently residing at [...] S[...] Close, Bryanston. The Respondent is The Pecanwood Estate Homeowners Association NPC, a non-profit company duly registered and incorporated in terms of the company laws of South Africa, and its registered address is situated at R512, Provincial Road, Broederstroom, North West Province.

Background

and facts

- [4] The parties have a long history of litigation and there has been various correspondences changed between the parties and their legal representatives. I do not intent to rehash the points raised verbatim but only the crux thereof.
- [5] The Applicant's family Trust, known as the BPKA Lategan Family Trust ("the Trust"), was previously the registered owner of 1[...] C[...] Drive, Pecanwood, described as Erf 1[...] Pecanwood ("the Pecanwood property ") described as Erf 1[...] Pecanwood("the Pecanwood property") . The Applicant is the Trustee of the property. The property is situated within the Pecanwood Estate. The property was subjected to the rules and management of the Respondent.
- [6] During 2017 a dispute arose between a consortium of approximately fifteen to twenty homeowners and the Applicant agreed to lead as a spokesperson. Amongst other things, in respect of the voting of a new Memorandum of Incorporation (MOI) in respect of the Pecanwood Estate.

The 2017 interdict proceedings

- [7] In the light of the dispute mentioned above, on the 18 August 2017, consortium felt compelled to institute an interdict application to stop objectionable against the Respondent MOI drafted from being adopted. The matter was brought on an urgent basis. The urgent application was launched at Mafikeng High Court in North West under case number M388/2017 on the assumption that the address on the Respondent's website was correct and under the jurisdiction of the Mafikeng High Court in North West. The Respondent raised an argument in point in limine that the Mafikeng High Court lacked jurisdiction. As a result, the application was removed and re-issued under the jurisdiction of the Pretoria High Court. However, the Applicant was later advised to not to proceed with the application at the Pretoria High Court before the Annual General Meeting (AGM) has taken place. Consequently, the application was removed from the urgent roll and according to the applicant, no wasted costs were tendered because costs for an identical application were tendered and the Applicant would have been justified to bring the application on behalf of the consortium given their issues against the MOI.

Applicant's

submissions

[8] The Applicant submits, on 26 August 2017, an AGM took place and it was confirmed that the vote on the issue of the MOI will be removed from the agenda and that a committee will be formed to draft a new acceptable MOI. A settlement was also reached to allow the matter to be settled without further recourse of litigation, and an agreement to withdraw the pending litigation, and for each party to bear their own cost and wave any claim for costs against each other.

[9] The Applicant submits that despite the settlement reached between the parties on the 26 August 2017 as mentioned above, on the 3 December 2018, Gildenhuis Malatji (the Respondent's Attorney) continued with the urgent application persisting in seeking a tender for costs against the Applicant. Given that although a settlement existed

between the parties, they had to finalise the and conclude the matter before the court and agree to a draft order because when the matter was withdrawn the issue of costs was not mentioned in the notice of withdrawal. According to the Applicant the notice of withdrawal failed to mention costs or some similar formality which required his consent.

[10] It would appear that at the time the Applicant was represented by Mr Burrows from Thomson Winks Attorneys whom according to the Applicant was not fully familiar with the fact that the parties have entered in to a settlement agreement where the parties agreed to pay their own legal costs for the urgent application. The Applicant at the time gave instructions to Mr Burrows to enter into an agreement and consent to draft order regarding the notice of withdrawal. Mr Burrow filed a confirmatory affidavit. He therefore did not factually believe he was consenting to an order which required him to pay those costs. He contends that the draft order did not represent the true facts and agreement and therefore the court order even though it was by consent, it was flawed. According to the Applicant he was under the impression that the issue of costs for the urgent application was settled at the AGM meeting where it was agreed that each party will pay own costs.

Respondent's contentions

[11] The application is being opposed by the Respondent. The Respondent's contention is that the Applicant's application is without merit and that there is no material and/or reasonable error that gave rise to the order of 3 December 2018. There is no just cause and reliance that can be placed to seek rescission of that order. Firstly, the

order is four years old, the order was negotiated and brokered by the Applicant who was also assisted by legal team. The Respondent denies that the issue of costs was settled during AGM meeting held on the 26 of August 2018, instead it was reserved for adjudication thereof. Consequently, the issue of costs was only settled by means of consent order of 3 December 2018. According to the Respondent, the Applicant was being assisted by two Counsel of which one was Senior Counsel. The Respondent moves for a dismissal of the application with costs.

Issues

- [12] The main issue for contention is whether the costs and order of the 3 December 2018 was granted by error, hence the application for the rescission of the order.

The Law

- [13] In its application as stated above the Applicant is basing its application to rescind and/or vary the judgment on the common law ground of justus error and/or justus causa. At common law, an application to set aside a judgment must be brought within reasonable time.
- [14] In MEC for Economic Affairs, Environment and Tourism v Kruisenga and Another[1] the court as per Van Zyl J citing the Childerley Estate Stores v Standard Bank, 1924 OPD, De Vos v Calitz and De Villiers 1916 CPD 465 and Gollach & Gomperts v Universal Mills & Produce Co 1978 (1) SA 914 (A)said that:

“Except for fraud, ‘judgments by consent may be set aside under certain circumstances on the ground of justus error’. In De Vos the court recognised that any order or judgment made by consent may, generally speaking, be set aside upon any ground which would invalidate an agreement between the parties, and that a mistake of fact may provide a ground for relieving a litigant from a judgment entered into by the attorney’s consent. A consent judgment could be set aside on grounds that would justify rescission of the agreement to consent to judgment. The principle to be extracted from this is twofold: the first is that a consent judgment is founded on contract, and like any other contract, defects such as fraud and error would entitle an innocent party to avoid the agreement because his consensus, though real, was improperly obtained. For this reason, cases where a party to a consent judgment seeks to resile therefrom on the ground that consensus was induced by error, must be approached along the same lines and judged according to the same principles as cases where a party may resile from an agreement on the ground of justus error. Secondly, and flowing from this, is that the absence of a valid agreement between the parties to support the judgment, is capable at law of constituting a lawful ground or reason (iusta causa) which justifies an order of restitution in respect of the judgment.”[2] (Own emphasis)

- [15] The court in Deary v Deary[3] citing Childerley Estate Stores v Standard Bank, 1924 OPD 163 at 168 and 169 said that:

“This Rule does not alter the common law to the effect that a non-fraudulent misrepresentation inducing justus error on the part of the Court is not a ground for setting aside a judgment induced by such error.”

- [16] The court in Freedom Stationery (Pty) Ltd and Others v Hassam And Others[4] further held that:

“The requirements for relief under these exceptions depend on whether the judgment was given on the merits of the dispute between the parties after evidence had been led or whether the order was made in default of appearance of the party that seeks to have it rescinded. In respect of the first category the test is stringent. Such judgment can only be set aside on the ground of fraud or, in exceptional circumstances, on the grounds of justus error or the discovery of new documents.”[5]

- [17] Ultimately, the common law principle of justus error and/or justus causa sets out the grounds for rescinding or varying a judgment, especially in cases where a consent judgment was entered into due to a mistake of fact or misrepresentation. The courts have established that a consent judgment may be set aside where the grounds justify rescission of an agreement, including fraud, error, or absence of a valid agreement. The courts' approach to rescinding

or varying judgments in terms of the common law principle as alluded to above will be guided by the principles of justice and fairness.

- [18] In these circumstances, the Applicant avers that when he consented to the draft order, he was of the bona fide mistaken belief that the draft order was a mere formality because the notice of withdrawal did not mention costs. That the draft order was intended to deal with the notice of withdrawal. He did not factually believe that by consenting to the draft order, he would be required to pay the costs that were settled. Further he was unaware that the full import of the draft order did not represent true facts of the alleged agreement. In my view, the judgement cannot be set aside on the basis that the Applicant relies on his own mistake. The averment that at the time of the draft order, he was represented by someone who was not familiar with the settlement agreement cannot be accepted by this court. The Applicant has not demonstrated the exceptional basis before the court enough to warrant the rescission or varying of the order under justus error. As was expounded in *Slabbert v MEC for Health and Social Development of Gauteng Provincial Government*, [6] the court held that:

“The compromise agreement thus cannot be set aside on the basis of a mutual error as there was no mutual error. The MEC cannot rely on her own mistake to avoid a contract which was in any event initiated by her. This unilateral mistake accordingly did not amount to a justus error. As stated by Christie:

‘However material the mistake, the mistaken party will not be able to escape from the contract if his mistake was due to his own fault. This principle will apply whether his fault lies in not carrying out the reasonably necessary investigations before committing himself to the contract that is, failing to do his homework.’[7] (Footnote omitted.)

- [19] The High Court has limits in granting the rescission based on the interest of justice with regards to consent orders as was clearly expressed by the SCA in *Slabbert* above, the inherent discretion cannot be exercised against the recognised principles of substantive law. Accordingly, there is no basis to grant the relief claimed in the interests of justice. The circumstances in this matter do not warrant this outcome. The alleged averments that a

settlement agreement pertaining to costs and the Applicant's supposed bona fide mistake that he agreed to the draft order because some sort of formality was required fails to find application on this ground. He had legal representation to explain the contents and the meaning of the draft order.

- [21] Erasmus[8] further provides that "a consent judgment (including a compromise/transaction) cannot arbitrarily be repudiated or withdrawn." The following factors must be present for a judgment given by consent to be set aside, to wit:

"(i) the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered;

(ii) the bona fides of the application for rescission;

(iii) the bona fides of the defence on the merits of the case which prima facie carries some prospect of success; a balance of probability need not be established. All these factors must be viewed in conjunction with each other and with the application as a whole. A very strong defence on the merits may strengthen an unsatisfactory explanation."[9]

- [22] The factors proffered to warrant a rescission of a judgment under the circumstances before the court were not satisfied. The Applicant's explanation pertaining to the consent judgment cannot be sustained. Further, the application to rescind is not bona fide given the litigious history against the Applicant to avoid liability, and the Applicant's failure to file an affidavit to this application regarding the alleged settlement agreement that excluded costs for the urgent application this issue remains uncontested. Lastly, the application before this court concerns the order related to costs and therefore the merits concerning the urgent application cannot be considered. Therefore, the merits before this court have no prospect of success.

- [23] Regarding the delay, the application in this proceeding was brought 4 years after the consented order was granted. The Applicant's first basis for condonation is that from the 3 December 2018 to February 2020, a period of more than a year he had nothing about this matter, he continued in his bona fide mistaken belief that the matter had been settled. Therefore, there has never been any suggestion that he should be liable for the costs. In my view, it is not necessary to decide whether the application to set aside a judgment on the ground of justus error was brought timeously as this judgment cannot be set aside on this ground.

- [24] Finally, as to costs, there is no reason to depart from the usual principle that costs should follow the result. The Applicant has been unsuccessful and the application stands to be dismissed with costs.

Order

- [25] Accordingly the following order is made

1. The application to rescind and/ vary the order dated 3 December 2018 is dismissed.
2. Costs follow suit.

B LESUFI

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Applicant Adv Sarita Liebenburg

Instructed by:

Shaban Clark Coetzee Attorneys

For the Respondent Adv Lia Kotze

Instructed by:

GMI Attorneys

Date of the hearing: 25 October 2024

Date of judgement: 17 February 2025

[1] 2008 (6) SA 264 (CK).

[2] Id at 283-284.

[3] 1971 (1) SA 227 (C) at 230.

[4] 2019 (4) SA 459 (SCA).

[5] Id at para 465D.

[6]

[2016] ZASCA 157.

[7] Id at para 15.

[8] Erasmus: Superior Court Practice RS 23, 2024, D1 Rule 42-12.

[9] See Erasmus above.

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Prepared on 12 October 2026 · Esheria