

SOUTH AFRICA / JUDGMENT

Nemugumon and Others v Thabatshweu Housing Company (Soc) Ltd t/a Polokwane Housing Association and Another (10206/2023) [2025] ZALMPPHC 39 (18 February 2025)

[2025] ZALMPPHC 39

COURT

Limpopo High Court, Polokwane

BEFORE

Mathabathe

CASE / FILE NUMBER

10206/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

(1) REPORTABLE: NO

(2)

OF INTEREST TO THE JUDGES: YES

(3)

REVISED.

DATE:

18/02/2025

SIGNATURE:

CASE

NO: 10206/2023

CASE

NO: 10158/2023

CASE

NO: 10182/2023

CASE

NO: 10195/2023

CASE

NO: 10444/2023

CASE

NO: 10186/2023

CASE

NO: 10437/2023

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NO: 10169/2023
CASE
NO: 10435/2023
CASE
NO: 10434/2023
CASE
NO: 10447/2023
CASE
NO: 10192/2023
CASE
NO: 10157/2023

	In
the matter between:	SIPHO
	MARTIN NEMUGUMON N
	MALAPEPANE
	MOGALE PETER
	MANYAKKWANE
	MCHEL
	MAKGOWATHA
	KGOLEDI
	FOTANIE
	TIISO GEORGE
	MOTHIBA
	MBOTSE
	KGAPANE
	PAILANE JANE
	EMMANUEL
	KWINDA
	TEIS
	NTEBOHENG PRINCESS
	SHONGWE
	RONDNEY
	MASHABA
	NICOLAS
	MATOA
	ELIZABETH
	SHIKWAMBANA
	MIYELANI
	MPHOHWENI
	SHONTSANI
	MABUNDA
	NKATEKO
	NGOBENI
	CHRISTINAH
	MUGWENA
	HUMBULANI MONICA
	TATHOGWA
	MUFAMADZO EMMA
	MPYANA
	L.M
	LEBALLO
	KHIMOTSO
	MATLOU
	MASEBOTJANE ALBERT
	ENYIOKO
	MPHO POERIA
	MAOKA
	NARE NELSO
	MACHABA
	KHOMOTSO NANCY
	MAPHOLO

LUCIA
MATHOPA
KOLOBE
MOELELWA
MAVIS
PHALA
RONEY
NGOATJE
JOYCE
NAMATHE
THOMAS
KOMA
MOSEDUDI ALFRED
TSHIPURALO
COLLEN
Applicant
and
THABATSHWEU
HOUSING COMPANY (SOC) LTD
Trading
as POLOKWANE HOUSING ASSOCIATION
First
Respondent
POLOKWABE
LOCAL MUNICIPALITY
Second
Respondent

JUDGMENT

MATHABATHE AJ

Introduction

- [1] There are 33 opposed applications for the rescission before me, of orders granted on 12 February 2024 by Makgoba AJ. In these applications, the respective Applicants are represented by one attorney of record and the Respondents are also represented by one attorney in all matters.
- [2] The rescissions application arises from similar facts and orders granted on 12 February 2024 proceedings. This judgment will affect all others 33 rescission applications before me.
- [3] In all rescission applications, the Applicants in paragraphs 5 and 6 of the founding affidavits are approaching this court in terms of the provision of Rule 31(2) of this Court, which is contrary rule 42 and/or common law.

- [4] At the hearing on these matter on 13 November 2024 the court ordered both the Applicants' legal representative to file further written submissions by 26 November 2024 and respondents' legal representative to file further written submissions on 4 December 2024, on legal authorities for the use of Rule 31(2) as opposed to Rule 42 and/or Common law. At the time this judgment was prepared the court order was not complied with either of the parties.

Rescission

- Case Number 10206/2023

- [5] The Applicant sought an order in the following terms:

5.1 Default judgment granted on 12 February 2024 be rescinded,

5.2 Respondents ordered to pay costs of this application on attorney and own client scale (if opposed).

- [6] The Applicant's version is that the First Respondent embarked on the mass eviction process at his place of residence and the Applicant happened to be one of those affected by such massive eviction campaign.
- [7] There was subsequently an application for eviction which was indented to be served on the Applicant which application the Applicant received on the 8 January 2024[1]. The Applicant immediately sought legal assistance from his attorney of record Buthane Rasemana Attorneys, gave instruction to file a notice of intention to oppose eviction application, which was served on 8 February 2024[2] the Respondents' attorneys of record annexed "MRB2" signed on 6 February 2024[3].
- [8] The Applicant in his founding affidavit conceded that he has served a notice to opposed for over months, therefore the Respondents, should have removed and informed the presiding judge on the 12 February 2024, the order ought not to have been granted.
- [9] The Applicant's position is that on 12 February 2024 and at 09:00, his attorney was informed by the presiding acting judge that the said notice of intention to oppose was not in the court file and not filed. The court as such, directed that the matter will proceed as unopposed, and the consequential legal relations will follow. Hence this application for rescission was launched[4].
- [10] The Applicant's further position is that both himself and his attorneys of record arrived during the hearing of other contingent applications about 09:33 which prompted the acting judge to inform his attorney that the roll state at 9:00[5] contrary to the time communicated in the notice of motion[6] without communication and inform by the Respondents' attorneys to that effect[7].

- [11] The Applicant's position is that is not in willful default as he has already served and filed a notice of intention to oppose and that such notice ought to have caused the application to be removed to the opposed roll by practice.
- [12] The Applicant's attitude is that both his notice to oppose and his personal appearance in court on the day of the default judgment is proof enough that he was not in willful default and have necessary intention to oppose such eviction application.
- [13] The Applicants relied on jurisprudence of rule 31(2) of the Uniform Rules as their basis for rescission application, in that by operation and principle, defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice of the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit[8].
- [14] The First Respondent's version as per answering affidavit raise three points of laws:

14.1 First Point in limine: Non-compliance with Rule 6(5)(a) and

- (b) of the Uniform Rules in that the Applicant failed to launch his application in terms of Form 2(a) of first schedule.
- a. According to court papers the Applicant launched and served the First Respondent's attorneys of record, with rescission application on 5 March 2024[9]. Subsequently on 19 March 2024[10], the First Respondent's attorney served as filed notice to oppose rescission application.
- b. It is my view that the First Respondent by serving and filing notice to oppose rescission application and subsequent answering affidavit have taken further steps to the proceedings, therefore the point of law for non-compliance with Rule 6(5)(a) and (b) of the Uniform Rules, has been overtaken by event.
- c. The point in limine is accordingly dismissed.

14.2 Second Point in limine: Non-compliance with Rule 41A of the uniform rules

- b. Uniform Rule 41A(2)(a) states that:

"In every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation."

- b. Similarly, Rule 41A(2)(b) requires the Defendant or Respondent to serve a corresponding notice on the Plaintiff or Applicant indicating either their acceptance or rejection of the referral. This response should be served upon delivery of the notice of intention to defend or oppose or "at any time thereafter, but not later than the delivery of a plea or answering affidavit".

- c. Where a party fails to comply with Rule 41A procedure they may receive notice of an 'irregular step' from their opponent. This notice requires the offending party to remedy the irregularity prior to taking further steps in proceedings, resulting in further delays and costs.
- d. In this case no irregular step was taken by the First Respondent and the Respondents themselves has failed to comply with Rule 41 A (2)(b) which compels respondents to file their own notice confirming whether they agree to or oppose referral to mediation
- e. The parties are equally non-compliant. What is good for the goose is good for the rescission application itself. In my view the merits of this application called for immediate resolution, this is so the principle of finality of litigation expressed in the maxim *interest rei publicae ut sit finis litui*, it is in the public interest that litigation be brought to finality[11].
- f. I therefore declined to uphold the defence of non-compliance with Rule 41A, reiterating that 'the rules are there for the Court and not the Court for the rules.'
- g. In the circumstance, the second point in limine is accordingly dismissed.

14.3 Third Point in limine: Wrong procedure for rescission

- a. This point in limine cracks the merits of all applications for rescission before me, should the court uphold this point is the end of the matter and on the other side should the court find correct procedure in launching this application the Applicants are entitled to relief sought.
- b. The Applicant seeks this relief only on ground under rule 31(2)(b) of the Uniform Rules of Court[12].
- d. The eviction application was brought in motion proceeding not action proceeding and second no default judgment in the court file only the orders granted on 12 February 2024, which the Applicants seek to rescind.
- c. Rule 31 deals with action proceeding not motion proceedings.

[15] The court have noted the Applicants' legal representative in their heads of argument under heading of legal authority have formulated a case under rule 42 contrary to what have been pleaded in their founding affidavits.

[16] Counsel for the Applicants submitted during his oral address referred the court to para 5.1.1.1.1 which read "This application is brought both in terms of the general rules of the above Honourable court but more in particular in terms of Rule 31 of the Uniform Rules of Court."

[17] In this regard, Beyers JA in *Montesse Township and Investment Corporation (Pty) Ltd v Gouws* NO 1965 (4) SA 373 (A) at 380 said the following:

'I am not aware of any general proposition that a plaintiff who has two or more remedies at his disposal must elect at a given point of time which of them he intends to pursue, and that, having elected one, he is taken to have abandoned all others. Such a situation might well arise where the choice lies between two inconsistent remedies and the plaintiff commits himself unequivocally to one or other of them.'

[18] The Applicants enter application under paragraph 6 dealing with jurisdiction of rescission of the founding affidavit is on the prescript of Rule 31(2)(b) of the Uniform Rules, not any other rules. I do this because it is on their papers that the Applicants need to make out a case for the relief sought and their case on the papers differs in a number of respects from the case argued by counsel.

[19] The Constitutional Court, albeit in the context of raising new arguments on appeal, noted the following basic principle in *Prince v President of the Law Society of the Cape of Good Hope* [2000] ZACC 28; 2001 (2) SA 388; 2001 (2) BCLR 133 at para 22:

"It is not sufficient for a party to raise, only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought."

[20] The First Respondent's version on eviction orders against the Applicants are that the Applicants had a lease agreement with the First Respondent. The Applicants failed to honor lease agreement, they have defaulted and/or failed to make payments of the rent for years. A proper notice was given for termination of the lease agreement, to date there is no lease agreement between the Applicant and the First Respondent.

[21] On 17 March 2023, the Applicants were served with letters of demand by the First Respondent but still the Applicants failed to pay rent for the units they are occupying.

[22] The Applicants are now illegal and unlawful occupiers, therefore the First Respondent proceeded with application for eviction.

[23] The First Respondent's version is that the Applicants were notified of the application for eviction which was heard on the 12 February 2024, by Sheriff of the High Court, on 11 December 2023 as per annexure "MM3"[13].

Requirements for rescission

[24] There are three avenues through which rescission of a judgment can be obtained: the setting aside of a default judgment in terms of Rule 31(2)(b), rescission in terms of Rule 42 and rescission under the common law.

24.1 Setting aside a default judgment under Rule 31(2)(b)

- a. Rule 31 concerns default judgments granted in action proceedings where a defendant has failed to file a notice of intention to defend or a plea after being barred. A defendant may, within 20 days of acquiring knowledge of the judgment apply for the Court to set it aside, which the Court may do, on good cause shown.
- b. It is quite evident that Rule 31, concerning action proceedings, is not applicable to the current circumstances and the Applicants cannot rely on this provision.
- c. The sub-rule does not apply to judgments obtained on an unopposed basis in motion proceedings^[14]

24.2 Rescission under Rule 42

- a. Rule 42(1) of the Uniform Rules of Court empowers a court to rescind an order or judgment erroneously sought or granted in certain circumstances.
- b. Rule 42(1) reads as follows:

"Variation and Rescission of Orders

- (1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:
 - (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
 - (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;
 - (c) an order or judgment granted as the result of a mistake common to the parties."

^[25] A litigant must establish the jurisdictional facts in subrule (1) of Rule 42 before a court may exercise its discretion to set aside the order. In these matters the Applicant did not plead the jurisdictional facts in subrule

(1) of Rule 42.

^[26] Thus, the Applicants must show that the 12 February 2024 Order was either erroneously sought or erroneously granted and that it was granted in the absence of any party affected thereby. There are therefore two grounds to be met: the order sought to be rescinded was granted in the party's absence and it was erroneously sought or granted. It is well-established that both grounds must be shown to exist.

^[27] As Streicher JA explained in *Lodhi 2 Properties Investments CC & another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) paras 25 - 27, the phrase 'erroneously granted' relates to the procedure followed to obtain the judgment in the absence of another party and not the existence of a defence to the claim. See also *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) paras 6 and 9. Thus, a judgment to which a party was procedurally entitled, cannot be said to have been erroneously granted in the

absence of another party.

[28] The Applicants have therefore not met the jurisdictional requirements of Rule 42(1)(a) and this court is therefore not endowed with a discretion to rescind its order in terms of this Rule.

28.3 Rescission under the common law

a. Under the common law, a court is empowered to rescind a judgment obtained on default of appearance, provided sufficient cause for the default has been shown.[15] The Appellate Division in Chetty held that the term "sufficient cause" (or "good cause") has two essential elements for rescission of a judgment by default. These are

(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 prospect of success[16]. For there to be good cause, both of these elements must be met. A failure to meet one of them may result in refusal of the request to rescind[17].

[29] As the Applicants were not absent from the proceedings, this ground for rescission under the common law is not applicable in relation to the 12 February 2014 Orders.

[30] It is possible to rescind a final judgment at common law on other, but very limited, grounds, namely fraud and iustus error[18]. Neither of these were pleaded by the Applicants and, on the facts before me, neither is present in the current matter.

[31] In *De Wet and Others v Western Bank Ltd*[19] Trengrove AJA, (as he then was), deliberated on the common law provisions concerning the rescission of the judgment. The learned

judge remarked as follows:

"Under the common law, the Courts of Holland were, generally speaking, empowered to rescind judgments obtained on default of appearance, on sufficient cause shown. This power was entrusted to the discretion of the Courts. This discretion extended beyond, and was not limited to, the grounds provided in Rules of Court 31 and 42 (1) and those specifically mentioned in *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163".(my underlining)."

[32] An Applicant for rescission at common law must show good cause. The requirements for good cause were restated by the Supreme Court of Appeal in *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills* (Cape) 2003 (6) SA 1 (SCA) para 11:

"With that as the underlying approach the Courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence to the plaintiff's claim which prima facie has some prospect of success (*Grant v Plumbers (Pty) Ltd*, 20 HDS Construction (Pty) Ltd v Wait supra, 21 *Chetty v Law Society, Transvaal*)."

[33] In *Zuma v the Secretary of the Judicial Service Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of the State and Others*[20], the Constitutional Court restated the requirements for the rescission of the judgment in terms of the common law as follows:

"[71] The requirements for rescission of a default judgment are two-fold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind. "

[34] Based on the above, I see no basis for the 12 February 2024 Orders to be rescinded or set aside.

[31] I accordingly make the following order: -

1. The applications are dismissed.
2. There is no order as to costs.

S Mathabathe

Acting Judge of the High Court of South Africa

Limpopo Division

Polokwane

Appearances

For the applicants: Mr Buthane

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Dates of Hearing: 13 NOVEMBER 2024

Date of Judgement: 18 FEBRUARY 2025

This judgment was handed down electronically with the consent of and by circulation to the abovementioned legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 18 FEBRUARY 2025.

1. *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (AD) at 306F-G and 309A.

2. Minister of Justice v Ntuli (1997] ZACC 7[1997] ZACC 7; ; 1997 (3) SA 772 (CC) paras 22 and 29.
3. Zondi v MEC, Traditional and Local Government Affairs, and others 2006 (3) SA 1 para 28.
4. Montesse Township and Investment Corporation (Pty) Ltd v Gouws NO 1965 (4) SA 373 (A) at 380.
5. Lodhi 2 Properties Investments CC & another v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA) paras 25-27 State Information Technology Agency Sac Ltd v Gijima Holdings supra at Paragraph 25.
6. Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) paras 6 and 9.
7. Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 764.
8. Government of the Republic of Zimbabwe v Fick (2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) at para 85.
9. KR Sibanyoni Transport Services CC v Sheriff, Transvaal High Court [2005] ZAGPHC 118; 2006 (4) SA 429 (T) at para 6. See, too, Harms in LAWSA, Volume 4, Third Edition Replacement, at 601. Koyabe and Others v Minister of Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae) 2010 (4) SA 327 (CC).
10. De Wet and Others v Western Bank Ltd 1979 (2) SA 1031 at para-F.
11. Zuma v the Secretary of the Judicial Service Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of the State and Others [2021] ZACC 28, at para 53.
- [1] Page 8 paragraph 7.3 line 2 of the founding affidavit.
- [2] Page 8 para 7.4 lines 4-5 of the founding affidavit.
- [3] Annexure MRB2 page 20-21.
- [4] Page 10 paras 7.10.1 to 7.10.2 of the founding affidavit.
- [5] Page 27 annexure MRB4.
- [6] Page 35 annexure MRB5.
- [7] Pages 10-11 par 7.10.2 of the founding affidavit.
- [8] Page 6 par 6 of the founding affidavit.
- [9] Page 1 and 2 of the notice of motion.

- [10] Page 63 and 64 First Respondent notice to oppose.
- [11] See *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977
- (4) SA 298 (AD) at 306F-G and 309A; *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (3) SA 772 (CC) paras 22 and 29; *Zondi v MEC, Traditional and Local Government Affairs and others* 2006 (3) SA 1 para 28.
- [12] Page 6 par 6 of the founding affidavit.
- [13] Page 79 par 14 of the bundle.
- [14] *Eskom Holdings SOC Ltd v Akgwevhu Enterprise (Pty) Ltd* (unreported GJ case no. 4554921 dated 22 November 2022) para 19 to 20; see also Van Loggerenberg, Erasmus: *Superior Court Practice*, Vol 2, Second Edition, D1-364 and D1-365.
- [15] *Chetty v Law Society, Transvaal* 1985
- (2) SA 756 (A) at 764.
- [16] *Chetty* at 765.
- [17] *Government of the Republic of Zimbabwe v Fick* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) at para 85.
- [18] *KR Sibanyoni Transport Services CC v Sheriff, Transvaal High Court*
- [2005] ZAGPHC 118; 2006 (4) SA 429 (T) at para 6. See, too, Harms in *LAWSA*, Volume 4, Third Edition Replacement, at 601.
- [19] 1979 (2) SA 1031 at para-F.
- [20]
- [2021] ZACC 28, at para 53.

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