

SOUTH AFRICA / JUDGMENT

Nesane and Another v Pollock N.O and Others (56445/2020) [2024] ZAGPPHC 1318 (18 December 2024) [2024] ZAGPPHC 1318

COURT

North Gauteng High Court, Pretoria

BEFORE

Meaden

CASE / FILE NUMBER

56445/2020

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REPUBLIC

OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO: 56445/2020

1.

REPORTABLE: YES/ NO

2.

OF INTEREST TO OTHER JUDGES: YES/NO

3.

REVISED: YES / NO

DATE:

SIGNATURE

OF JUDGE:

In the matter between: TSHIANNE ONICA NESANE
First Applicant
AZIMBO
LODGE CLOSE CORPORATION
Second Applicant
and
RICHARD
KEAY POLLOCK N.O
First
Respondent
NURJEHAN
ABDOOL GAFAAR OMAR N.O
Second
Respondent
OSCAR
JABULANI SITHOLE N.O
Third
Respondent
IGNATIUS
CLEMENT MIKATEKO SHIRILELE N.O
Fourth Respondent
MICHELLE
SCHUTTE N.O
Fifth
Respondent
(In
their capacities as the Joint liquidators of the Sixth Respondent)
VELE
INVESTMENTS (PTY) LIMITED (IN LIQUIDATION)
Sixth Respondent

JUDGMENT

MEADEN A J

On 04 NOVEMBER 2024, upon hearing counsel for the First & Second Applicants and First - Sixth Respondents and upon considering the papers, I handed down the following Order:

- [1] “The application for the rescission of the order granted by the above Honourable Court dated 18 January 2021 is dismissed; and
- [2] the applicants are to pay the costs of the application on party and party scale, at Scale B.

I refer to the parties as they were cited in the main application set down on 18 January 2021 and in the subsequent rescission of

judgment

application as set down on 04 November 2024.

The above Order was handed down, taking consideration of the undermentioned:

- [1] The First and Second Applicants resorted in launching a rescission of judgment application on 12 February 2024 and wherein they sought to rescind and/or vary the Court Order previously granted by the Honourable Justice Mokosi on 18 January 2021.[1]
- [2] In essence, Mokosi J had found that the 1st – 6th respondents collusively defrauded the Sixth applicant in the main application of R 5,6 million. Mokosi J in terms of Section 31 of the Insolvency Act 24 of 1936 set aside the unlawful dispositions and ordered that the above amount was jointly and severally payable by the respondents together with a penalty of R5,6 million in terms of Section 31(2) of the Insolvency Act.[2]
- [3] Reference was had by Mr. RK Pollock N.O – 1st applicant in the main application and deponent to the Founding Affidavit therein to various relationships arising and existing as between the various cited respondents. These included:

3.1 The 1st respondent – Mr. TE Nesane being married to the 4th respondent – Mrs. TO Nesane;

3.2 the sole member of the 5th respondent – Azimbo Lodge CC being the 4th respondent – Mrs. TO Nesane;

3.3 the 5th respondent – Azimbo Lodge CC receiving funding from the 3rd respondent – Parallel Property Holdings (Pty) Ltd.

- [4] In contextualizing the above in the main application, the 1st applicant recorded the undermentioned ad paragraphs 141[3], 154 and 155[4] of their Founding Affidavit:

“141. After the investigation reconvened Mr Nesane confessed to the investigation that he had been aware of the fraud perpetrated within VBS and that he had received money in Parallel Properties as payment for him to look the other way. Mr Nesane also conceded that Parallel Properties was in fact his company and Mr Nndwammbi was purely his nominee.

- 154. Mr Nesane has conceded that Parallel Capital is his entity and that the payments received from Vele Investments’ VBS account were bribes in exchange for his silence, which he and his associated respondents (the Second to Fifth Respondents) unlawfully and intentionally retained in consequence whereof Vele Investments suffered damages in the sum of at least R5 600 000. These payments led to the enrichment of Mr Nesane and his associated respondents at the expense of Vele Investments who, in turn, was impoverished thereby.
- 155. Mr Nesane has conceded that he, together with Mr Nndwammbi, Mrs Nesane, Parallel Capital and Azimbo Lodge were party to a fraud and, as such collusive dealing in terms of Section 31 of the Insolvency Act. Their actions and the illicit payments also constitute dispositions without value in terms of Section 26 of the Insolvency Act. These illicit payments and/or dealings fall to be set aside and the applicants are entitled to relief inter alia for repayment of the sum of R5 600 000 and such penalty as the above Honourable Court may in its discretion adjudge in terms of the Insolvency Act, with interest.”

- [5] The applicants in the main application presented a very comprehensive, substantial and damning statement of case in which the circumstances attributed to the demise of VBS Mutual Bank were summarized and with that; circumstances of fiduciary breach coupled with personal enrichment on the part of the 1st respondent that then extended to the involvement and participation of the 3rd, 4th and 5th respondents was laid bare.
- [6] Presented with the aforesaid, the respondents in the main application preferred not to deal head on with such application and in so doing, compile and present comprehensive synopses of their versions thereon and with that summarize their defences that had prospects of success and in opposing this main application and challenging the serious allegations contained therein.
- [7] Instead and following on opposing such main application, the respondents preferred to apply for a postponement which was denied and culminated in the judgment by default then handed down on 18 January 2021.
- [8] In now resorting to this belated rescission of judgment application, what is immediately apparent is that the the applicants again and while vested with the above main application, fail to take this Court into their confidence and in the process substantively contend with the circumstances and as framed in the main application and including in substantively presenting their complete versions incorporating sustainable bona fide defences thereto.
- [9] Instead and in resorting to the above rescission application, the applicants reference the Constitution, Common Law and the Rules of Court in bringing about and resorting to such rescission of judgment application.[5]
- [10] With regard to the Uniform Rules of Court, the applicants do so and with reference Rule 31(2)(b) and Rule 42 of the Uniform High Court Rules.
- [11] Rule 31(2)(b) of the Uniform High Court Rules relates to the conduct of action proceedings. [6] The judgment granted on 18 January 2021 does not arise from an action but rather from an application, thus rendering reference by the applicants to Rule 31 (2) (b) as being misplaced and inapplicable.
- [12] Rule 42 provides that the court may rescind or vary an order or judgment that was erroneously sought or granted in the absence of an affected party or where there was an ambiguity, mistake common to the parties or patent error or omission. Berman AJ stated in *Seattle v Protea Insurance Co Ltd*: [7]

“A ‘patent error or omission’ has been described as an error or omission as a result of which the judgment granted does not reflect the intention of the judicial officer pronouncing it. See First Consolidated Leasing Corporation Ltd v McMullin 1975 (3) SA 606 (T) at 608F.” [8]

[13] Having due regard to the circumstances of this rescission of judgment application, the application of Rule 42 is not applicable here and particularly in the absence of the applicants actually answering on the main application and setting out their version and in the process summarizing sustainable defences.

[14] On requirements for rescission under the common law, these were succinctly summarized in the matter of *Government of the Republic of Zimbabwe v Fick*:^[9]

“The requirements for rescission of a default judgment are twofold. 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.”

[15] In terms of the existing common law test, for the applicants to succeed on rescission, the above requirements require to be met.

The applicants must establish that they have a reasonable and satisfactory explanation for their failure to oppose these proceedings and that they have a bona fide case that carries some prospects of success. As above, this has certainly not been established in the main application and in this rescission of judgment application. The applicants’ failure to take this Honourable Court into their confidence and with due regard to the above requirements is fatal to the applicants’ rescission of judgment application.

[16] Over and above the aforesaid, and ad paragraph 4 of the applicants’ Founding Affidavit^[10] the applicants also reference seeking variation relief in the alternative and in terms of the Constitution.

[17] In so doing, the applicants are required to demonstrate the existence of exceptional circumstances for the granting of rescission of judgment.

[18] Ad paragraph 38 of the 1st applicant’s Founding Affidavit^[11], the 1st applicant summarized the essence of the 1st and 2nd applicants’ rescission application and on the basis recorded below:

“The essence of this case is this, the 2nd applicant and I did not receive any payments from (i) Mr Nesane, or (ii) any of the other related companies, such as Parallel Property

Holdings (Pty) Ltd, from the funds they alleged to have received from Vele Investments.”

[19] This however, is contradicted in the Founding Affidavit deposed to by the 1st applicant in the main application and specifically ad paragraph 144.¹⁰^[12] and wherein it is confirmed that Mrs. Nesane is indebted to the 3rd respondent – Parallel Property Holdings (Pty) Ltd and to the 5th respondent - Azimbo Lodge CC in re monies received from Parallel Property Holdings (Pty) Ltd and in turn the 6th respondent – Vele Investments (Pty) Ltd

[20] The 1st applicant in compilation of his Founding Affidavit to the main application and ad paragraphs 142 – 145 of the Founding Affidavit sets out the various admissions made by the 1st respondent – Mr. Nesane to the main application and in actually quoting the various admissions made by Mr. Nesane under oath in the Insolvency Inquiry conducted in terms of Sections 417 and 418 of the Companies Act 71 of 2008 and to which inquiry Mrs. Nesane was also subpoenaed and confirmed attending.[13]

[21] In essence, Mr. Nesane referenced and confirmed that the 1st, 2nd, 3rd, 4th, and 5th respondents to the main application (namely Messrs Nesane & Ndwammbi, Parallel Property Holding (Pty) Ltd, Mrs. Nesane &

Azimbo Lodge CC) were all beneficiaries under the fraudulent scheme and are as such joint wrongdoers. These serious allegations made by Mr. Nesane on oath were then not challenged and contradicted by any of the respondents in the main application and stood uncontested when the default judgment order was granted on 18 January 2021. The ensuing denial of receipt of payment made by Mrs. Nesane ad paragraph 38 of her Founding Affidavit to the rescission of judgment application and recorded in paragraph 18 above, amounts to a bare denial and which is clearly inadequate in the prevailing circumstances to establish and motivate grounds for rescission of judgment, alternatively; a variation of the order granted on 18 January 2021.

ORDER

Accordingly, this application has been dismissed and on the basis below.

[2] the applicants are to pay the costs of the application on the attorney and client scale and that of legal counsel on Scale B.

MEADEN J R

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 12h00 on this 18th day of December 2024

Appearances

For Applicants: Adv ME Manala Instructed by: Maphoso Mokoena Attorneys Inc. For

Respondents: Adv K Iles Instructed by: Werksmans Attorneys Date of Hearing: 04 November 2024

Date of Judgment: 18 December 2024

[1] 012-272.

[2] 012-29-30.

[3] 001-53.

[4] 001-64.

- [5] Ad paragraph 2 012-2 read with paragraph 4 and 5 012-6.
- [6] Makhomisani N.O and Another v SB Guarantee Company (RF) (PTY) Limited [2022] ZAGPJHC 179 at para 55 and 56.
- [7] 1984 (2) SA 537 (C).
- [8] Seattle v Protea Insurance (n 9) at 541C-D.
- [9]
- [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) (Fick) at para 85; Zuma v Secretary of Judicial Commission of inquiry into the Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and Others
- [2021] ZACC 28 at para 71.
- [10] 012-6.
- [11] 012-16.
- [12] 001-59.
- [13] Ad paragraph 39 012-16.

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Prepared on 10 October 2026 · Esheria