

SOUTH AFRICA / JUDGMENT

Waste Partner Investments (Pty) Ltd and Another v FAW Vehicle Manufacturers SA (Pty) Ltd (36802/2019) [2021] ZAGPJHC 600 (29 October 2021) [2021] ZAGPJHC 600

COURT

South Gauteng High Court, Johannesburg

BEFORE

Fourie

CASE / FILE NUMBER

36802/2019

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 36802/2019

REPORTABLE:

No

OF

INTEREST TO OTHER JUDGES: No

REVISED:

No

In

the matter between:

WASTE

PARTNER INVESTMENTS (PTY) LTD

First Applicant

THABANG

MOENG

Second Applicant

and

FAW

VEHICLE MANUFACTURERS SA (PTY) LTD

Respondent

Coram:	Fourie AJ Heard on: 5 August 2021
Delivered:	29 October 2021
Summary:	Application for rescission. Application of established legal principles to the facts. Application dismissed.

JUDGMENT

Introduction

1. This is one of a number of applications in a convoluted matter, summarised in some detail in a recent judgment by Weiner J, dated 20 October 2021, with no need of repetition here. This particular application is for rescission of a default order granted by Francis J on 17 December 2019, where a settlement agreement concluded between the parties on 17 October 2019 was made an order of court.
2. In terms of the settlement agreement, the second applicant (“Moeng”), acting in his personal capacity and on behalf of the first applicant (“WPI”), assumed liability for the debts of his father (“Phineas Moeng”) and his father’s close corporation, Banakoma Fleet and Shuttle CC (“the CC”), in respect of debts owed by them to the respondent (“FAW”) for the rental of commercial vehicles used to provide waste management services to the Ekurhuleni municipality.
3. It appears from the settlement agreement that this intercession was not altruistic, as the applicants recorded that they had made use of the vehicles during the period of the rental agreement. At the time of concluding the settlement agreement, judgment had been obtained by FAW against Phineas Moeng, and the CC had been wound up.
4. The relevant terms of the settlement agreement are:
 - 4.1. The debt owed to FAW was some R4.3 million;
 - 4.2. The applicants would assume liability for the debt, by paying a reduced agreed settlement amount of R2.2 million, within 90 days (provided they could secure financing), failing which they would pay this reduced amount in 12 equal monthly instalments, commencing on 14 February 2020.

4.3. Any breach of the above undertakings would lead to the full amount of R4.3 million becoming due and payable immediately, and once paid, would entitle the applicants to take delivery of four commercial vehicles.

4.4. The timeous payment of the compromised claim is expressly recorded as an essential part of the settlement agreement. If the applicants meet their obligations, FAW will abandon the judgments against Moeng's father and his CC.

4.5. If the applicants default on their obligations, FAW is entitled to commence with steps in execution against them immediately.

4.6. Clause 6 reads:

"COURT ORDER

"The parties agree that this agreement will be made an order of court and the Respondents [Moeng and WPI] record that they are aware that the Applicant [FAW] will make the necessary application immediately after signature of this agreement to have the agreement made an order of court."

5. The parties were referred to in the settlement agreement as applicant [FAW] and respondents [Moeng and WPI] because the settlement agreement was drawn up in the form of a draft court order, thus further indicating the intention to have it made an order of court.
6. The settlement agreement was signed by all parties on 17 October 2019, with Moeng signing on behalf of WPI.
7. It seems that the settlement agreement was a last gasp effort by Moeng to salvage the business commenced by his father and taken over by him, at least to some degree. Trust between the parties at the time was probably not high, and Moeng made strenuous and unambiguous undertakings to secure finance or to settle the debt. In exchange, FAW would effectively forfeit almost half of the total debts owed by Phineas Moeng and the CC.
8. As expressly recorded in the settlement agreement, FAW immediately proceeded to bring an application to have the settlement agreement made an order of court. The applicant was properly served on Moeng's erstwhile attorneys, and was not opposed. On 17 December 2019, Francis J granted the application, and the settlement agreement was made an order of court.
9. Moeng and WPI failed to obtain finance and failed to pay the first installments of the repayment as agreed. This prompted WPI's attorneys to record in correspondence that the applicants were in contempt of the court order. No response was received, and FAW's attorneys commenced steps in execution.

10. It was only when a writ of execution was served that this rescission application was brought, on 4 August 2020, more than eight months after the order was granted. Apart from seeking to set aside the rescission application on every conceivable basis, the applicants seek to have the underlying settlement agreement set aside as void, on various grounds.

Rescission – general principles

11. In *Freedom Stationery (Pty) Ltd and Others v Hassam and Others* 2019 (4) SA 459 (SCA), the Supreme Court of Appeal had this to say about rescission applications:

“Rescission of court orders generally

- [16] As a general rule, a court has no power to set aside or alter its own final order, as opposed to an interim or interlocutory order. The reasons for this age-old rule are twofold. First, once a court has pronounced a final judgment, it becomes *functus officio* and its authority over the subject-matter has ceased. The second reason is the principle of finality of litigation expressed in the maxim *interest rei publicae ut sit finis litium* (it is in the public interest that litigation be brought to finality). See *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306F – G and 309A; *Minister of Justice v Ntuli* [1997] ZACC 7; 1997 (3) SA 772 (CC) (1997 (2) SACR 19; 1997 (6) BCLR 677) paras 22 and 29; *Zondi v MEC, Traditional and Local Government Affairs, and Others* 2006
- (3) SA 1 (CC) C (2006 (3) BCLR 423; [2005] ZACC 18) para 28.
- [17] There are exceptions to this general rule. 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. See *Childerley Estate Stores v Standard Bank of South Africa Ltd* 1924 OPD 163 at 168 and *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1040E – 1041B. A default judgment, on the other hand, may be set aside in terms of Uniform Rule 31(2)(b), rule 42 or the common law. Only rule 42(1)(a) or the common-law rules in respect of rescission of a default judgment could possibly be applicable to the s 252 order.

- [18] Rule 42(1)(a) provides:

'(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; . . . '

As Streicher JA explained in *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA) ([2007] ZASCA 85) 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) ([2003] 2 All SA 113; [2003] ZASCA 36) 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.

[19] It follows from what I have said that the invalidity of an antecedent I sale of shares agreement could not, by itself, entitle the MZ Hassam Trust to rescission of the s 252 order. It had to bring its case within the requirements of rule 42(1)(a) or the aforesaid common-law rules. The alleged invalidity of an agreement has no bearing on rule 42(1)(a) and could only satisfy the second common-law requirement.”

Assessment of the rescission application

12. As set out above, the applicants were at all times fully aware that

a) the settlement agreement provided for it to be made an order of court immediately upon signature; and b) that the respondent had brought such an application, which was set down for 17 December

2019. The applicants elected not to oppose this application, and must have been aware, at or soon after 17 December 2019, that the order had been granted. They were clearly in wilful default of opposing the application, at the very least in the sense of being indifferent to the outcome of the application and the consequences thereof. See *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T).

13. No credible explanation is provided in the founding papers for the delay of over eight in bringing the rescission application. I reject the assertion by Moeng that he was unaware of the order of Francis J

until 1 August 2020, as patently false. He was fully aware of the terms of the settlement agreement at all times. He was aware that it was to be made an order of court immediately upon signature, and that timeous payment was a critical obligation, failing which steps in execution would follow. Having not met the payment obligations, he must have known, since February 2020, of the looming execution.

14. The manner in which the rescission application was prosecuted, further supports the inference that it is was never bona fide, but was simply part of a legal stratagem devised to frustrate enforcement of the settlement agreement for as long as possible, in the hopes of securing and retaining payments from Ekurhuleni municipality.

15. The applicants took no steps to further the rescission application or have it set down for hearing. Instead, it was used as justification for multiple urgent applications for interim interdicts to stay execution, all of which seem to have been unsuccessful. Eventually FAW took steps to set down the rescission application.

16. Given the lengthy, unexplained delay in bringing the application for rescission, and the applicants' wilful default in failing to oppose the application (compounded by their initial consent to having the settlement agreement made an order of court), the rescission application is fatally defective, entirely lacking in bona fides, and stands to be rejected.
17. In the circumstances, it is not necessary to deal in detail with the bases for rescission, and a brief analysis will suffice. Despite having concluded a settlement agreement, on his own behalf and on behalf of the first respondent, who he represents in these proceedings as CEO, Moeng now asserts that he was not authorised to conclude the settlement agreement on behalf of the WPI. This is obviously far-fetched and nonsensical, but even if it is accepted at face value, it would not invalidate the settlement agreement, considering that Moeng is the CEO of WPI. In the circumstances, FAW was clearly entitled to accept that Moeng was authorised to conclude the settlement agreement on behalf of WPI.
18. A second line of attack advanced is that the debt giving rise to the settlement agreement was owed by others, and the liquidators of the did not consent to the agreement. This is neither here nor there, as the settlement agreement is a self-standing agreement, and the invalidity of an antecedent agreement that may have given rise to it,

in the absence of fraud, would not entitle the applicants to a rescission. See Freedom Stationery at para 19, quoted above.

19. In any event, the factual bases pleaded for rescission are bald and lacking in credibility, and are roundly discredited by the respondent in the answering affidavit. Even if a legally valid basis for rescission was shown, no bona fide grounds for rescission are to be found on the papers that would justify setting aside the order of 17 December 2019.
20. Plainly, this application is just another in a long line of cynical and dishonest attempts to avoid performing in terms of clear undertakings given in a settlement agreement. It is nothing short of an abuse of court processes and resources, and stands to be dismissed, as does the additional and ancillary relief sought in the notice of motion.
21. In the circumstances, I make the following order:

Order:

1. The application is dismissed.
2. The first and second applicants are to pay the costs of this application, on the scale as between attorney and own client, jointly and severally, the one paying the other to be absolved.

Greg Fourie

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

HEARD ON:

5 August 2021

DATE OF JUDGMENT:

29 October 2021

FOR THE APPLICANT:

Adv Mudau

FOR THE RESPONDENT:

Adv C van der Merwe

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2021/600.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/waste-partner-investments-pty-ltd-and-another-v-faw-unknown-topic-agpjhc-2021--6a3ea51a3b1caa9129811598>

Prepared on 13 October 2026 · Esheria