IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – PORT ELIZABETH)

In the matter between:	**Case No: 405/08**
PROUD HERITAGE PROPERTIES (PTY) LTD	**First Applicant**
SHOCKPROOF INVESTMENTS 73 (PTY) LTD	**Second Applicant**
and	
TRANSNET LIMITED	**First Respondent**
NELSON MANDELA BAY MUNICIPALITY	**Second Respondent**
Coram:	**Chetty, J**
Date Heard:	**3 September 2008**
Date Delivered:	**5 September 2008**
Summary:	*Practice – judgment and orders - application for rescission of judgment – Rule 42 (1) (c) – the common law – principles applicable – requirements - striking out application – when ordered – principles restated*

JUDGMENT

Chetty, J

[1] This is an application brought in terms of Rule 42 (1) (c) of the Uniform Rules of Court for rescission of a judgment (the main judgment) in terms of which the applicants were interdicted from

continuing construction of a residential development on Richmond Hill in Port Elizabeth to a height which would obstruct the visibility of the Richmond beacon to ships at sea. The application is premised on the assumption that had I known that the portion of land (erf 854) upon which the Richmond beacon had been erected was not owned by the second respondent I would not have made the order which ultimately issued. It is common cause that all the parties believed the second respondent to have been the owner of erf 854. I should add that although the second respondent is cited in these proceedings no relief is sought against it. It abides the decision of this court.

[2] The applicants contend that the erroneous belief shared by all at the time the application was moved was a mistake common to the parties within the meaning of this expression as used in Rule 42 (1) (c). In the alternative, rescission is sought in terms of the common law on the ground of *justus* error. I shall in due course consider the bases upon which rescission is sought and the competing submissions advanced but am constrained to deal firstly with an application for the striking out of affidavits deposed to by one *Hans Jurgen Frahm (Frahm)*, a former employee of the first respondent and the applicant's attorney, Mr *Gerald Jack Friedman* (*Friedman*).

The application to strike out

[3] It appears from Frahm's affidavit that although he had previous knowledge of the litigation involving the parties he was hesitant to express any adverse opinion on the merits of the first respondent's factual averments because of a perception that to do so would impact negatively on the tenure of his employment with the first respondent. He describes himself as a master mariner but it appears from all accounts that he is an experienced marine pilot. His impending retirement at the time he deposed to the affidavit (he has since retired) with the resultant absence of any punitive sanction for his present actions has engendered a lengthy discourse on affidavit concerning the efficacy of the Richmond beacon.

[4] Enamoured by these allegedly empirical revelations the applicant's attorney, under the guise of the application for rescission of the main judgment, seeks to introduce *Frahm's* affidavit which in essence disputes the factual substratum upon which the first respondent's application was based. There was no formal application to introduce this further affidavit but it was nonetheless filed several weeks after the first applicant's replying affidavit had been filed. On the morning of the hearing a second affidavit deposed to by *Frahm* was handed up from the bar. The filing notice described it as the first applicant's further replying affidavit.

[5] Consequently, in his affidavit filed simultaneously with that of the first *Frahm* affidavit, the applicant's attorney, Mr *Friedman (Friedman)*, in seeking the admission of that affidavit in these proceedings contends that he "*believe(s) it would be appropriate for this Honourable Court to have proper insight into the true facts"*. In the view that I take of the matter, it would not only be wholly inappropriate but impermissible to do so. The plaintive appeal by the applicant's attorney for the affidavit to be admitted in these proceedings envisages not only a re-evaluation of the factual allegations in the interdict application but a reconsideration of issues disposed of in the main judgment.

[6] It is immediately apparent from a reading of *Frahm's* affidavit that there is no mention or suggestion of the common mistake the parties laboured under during the hearing of the interdict application. Consequently it cannot have any relevance to the application in terms of Rule 42 (1) (c). During the course of argument I sought clarity from Mr *Beyleveld* as to the relevance of both the *Frahm* affidavits. Counsel was understandably constrained to submit that they were only peripherally relevant. In my view this is not the type of matter where in the exercise of my discretion to permit the filing of additional affidavits I should accede to the applicants' request. They are not relevant to the issues which fall for decision and properly fall to be struck out. The further *Frahm* affidavit filed by the applicant purporting

to be a further replying affidavit likewise has no relevance. It must be regarded as *pro non scripto*.

The application in terms of Rule 42 (1) (c)

[7] Before I proceed to consider the competing submissions advanced on behalf of the parties it is apposite to refer to the approach of our courts as to the meaning and effect of Rule 42 (1) (c). In **Tshivhase Royal Council v Tshivhase: Tshivhase v Tshivhase** 1992 (4) SA 852 (AD) Nestadt JA, considered Rule 42 and in particular subrule (1) (c) and remarked as follows at pp. 862I-863E:

> *". . . the Rule sets out exceptions to the general principle that a final order, correctly expressing the true decision of the Court, cannot be altered by that Court. The Judge is functus officio (Firestone South Africa (Pty) Ltd v Geneticuro AG 1977 (4) SA 298 (A) at 306F-G). I agree with the statement of Vivier J in Theron NO v United Democratic Front (Western Cape Region) and Others 1984 (2) SA 532 (C) at 536G that the Court has a discretion whether or not to grant an application for rescission under Rule 42 (1). In relation to subrule (c) thereof, two broad requirements must be satisfied. One is that there must have been a 'mistake common to the parties'. I conceive the meaning of this expression to be what is termed, in the field of contract, a common mistake. This*

occurs where both parties are of one mind and share the same mistake; they are, in this regard, ad idem (see Christie Law of Contract in South Africa 2nd ed at 382 and 397-8). A mistake of fact would be the usual type relied on. Whether a mistake of law and of motive will suffice and whether possibly the mistake must be reasonable are not questions which, on the facts of our matter, arise. Secondly, there must be a causative link between the mistake and the grant of the order or judgment; the latter must have been 'as the result of' the mistake. This requires, in the words of Eloff J in Seedat v Arai and Another 1984 (2) SA 198 (T) at 201D, that the mistake relate to and be based on something relevant to the question to be decided by the Court at the time. Other cases which illustrate this are Ex parte Barclays Bank 1936 AD 481 and Van Zyl v Van der Merwe 1986 (2) SA 152 (NC). The principle is that you cannot subsequently create a retrospective mistake by means of fresh evidence which was not relevant to any issue which had to be determined when the original order was made. The reason is obvious: the Court would at that time have had before it no evidence and thus no wrong evidence on the point; hence there would have been no mistake. Contrast this with the case where the subsequent evidence is aimed at showing that the factual material which led the Court to make its original order was, contrary to the parties' assumption as to its correctness, incorrect. Here one

would have the type of situation envisaged by Rule 42 (1) (c).” (emphasis supplied)

[8] It is not in issue that at the time the interdict application was moved erf 854 belonged to an entity styled the Hospital Trustees and not the second respondent. It is now alleged by the first respondent that it has, since judgment in the interdict application had been delivered, concluded an agreement with the previous owner of erf 854 and acquired ownership thereof. Although there does not appear to be any clarity on the question of ownership of erf 854, it was conceded by Mr Beyleveld that it would appear that the state, through one or other of its various organs, owns erf 854. As interesting as the submissions concerning the acquisition of servitudal rights through prescription, the acquisition of land in terms of s 3 of **The Legal Succession to the South African Transport Services Act 9 of 1989**, etc were, it is unnecessary, in view of the conclusion to which I have come, to consider the arguments advanced.

[9] In the main judgment I remarked that the Richmond beacon had been erected on erf 854 and occupied its site for over thirty years. It is not in dispute that throughout that period it has been in lawful occupation and its right of occupation has not been assailed in any way. Given the legislative obligation cast upon the first respondent in terms of the **National Ports Act 12 of 2005** it is inconceivable that any organ of

state could or would take a decision to now adversely affect the first respondent's right of occupation of erf 854.

[10] It is moreover clear from the judgment that ownership of erf 854 had no material bearing on the real issues which fell for decision in the main application viz, *inter alia*, whether the first respondent had established a clear right. The reasons for finding that it had are clearly expressed in par [13] of the judgment where I held:-

> *"Its (the applicant's) consistent stance, elucidated upon in the founding and supporting affidavits, is that it has an obligation in terms of the applicable legislation to ensure the safe passage of ships into the harbour. As alluded to hereinbefore, the Richmond beacon has occupied its present site for the last 30 years. Its proportions and specifications would have alerted even laypeople, let alone architects, land surveyors, property developers etc, that it had not been erected for aesthetic purposes. Henderson, who, on his own admission is a registered architect, a shareholder of the first respondent and director and shareholder of the second respondent must at the very least have realised what its purpose was. In addition, the proximity of the Richmond beacon to the site of the proposed development would as a matter of common sense have alerted the respondents to the*

> *fact that the proposed development, when fully constructed, would deleteriously affect the proper functioning of the Richmond beacon. Undeterred thereby, the respondents proceeded with the initial construction. When the applicant became aware of the development and its impact on the Richmond beacon it sought an audience with Henderson to resolve the issue. Those efforts and subsequent attempts ended in stalemate. The attitude adopted and persisted with throughout is that by virtue of their ownership of the property the respondents are entitled to do therewith as they please. The respondents' reliance on the constitutional guarantees enshrined in Chapter 2 of the Constitution is entirely misplaced. I am satisfied that the applicant has established the first requisite."*

[11] It appears clearly from the aforegoing that the clear right which I found the first respondent to have established was in no way dependant upon ownership of erf 854 by the second respondent. Notwithstanding the fact that the parties are now *ad idem* that their erroneously held view is properly to be regarded as a common mistake, the further question to be decided is whether the applicant has established a causal link between the common mistake and the eventual order which issued. The quoted passage of the main judgment reproduced in paragraph [10] above clearly establishes that there is none. As I remarked earlier ownership of erf 854 had no

material bearing on the issues which fell for decision. The second requirement of Rule 42 (1) (c) that there must be a causative link between the mistake and the grant of the order has therefore not been met.

Justus error

[12] A court's inherent power to rectify its own judgment has authoritatively been dealt with in the case of **Firestone South Africa (Pty) Ltd v Gentiruco A.G.** 1977 (4) SA 298 (AD) where Trollip JA stated at 306F-307G:-

> "*The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes functus officio: its jurisdiction in the case having been fully and finally exercised, its authority over the subject- matter has ceased. See West Rand Estates Ltd. V. New Zealand Insurance Co. Ltd., 1926 A.D. 173 at 00 176, 178, 186-7 and 192; Estate Garlick v. Commissioner of Inland Revenue, 1934 A.D. 499 at p. 502.*
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> *There are, however, a few exceptions to that rule which are mentioned in old authorities, and have been authoritatively accepted by this Court. Thus, provided the court is*

approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following cases:

(i) *The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interests on the judgment debt, which the Court overlooked or inadvertently omitted to grant (see the West Rand case, supra). . .*

(ii) *The Court may clarify its judgment or order, if, on the proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order (see the West Rand case, supra at pp 176, 186-7; marks v Kotze, 1946 A.D. 29). . .*

(iii) *The Court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention (see, for example, Wessels & Co. v. De Beer, 1919 A.D. 172; Randfontein Estates Ltd. V. Robinson, 1921 A.D. 515 at p 520l the West Rand case, supra at pp 186-7). This exception is confined*

to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance. Kotzé, J.A., made this distinction manifestly clear in the West Rand case, supra at pp 186-7, when, with reference to the old authorities, he said:

"The Court can, however, declare and interpret its own order or sentence, and likewise correct the wording of it, by substituting more accurate or intelligent language so long as the sense and substance of the sentence are in no way affected by such correction; for to interpret or correct is held not to be equivalent to altering or amending a definitive sentence once pronounced.".

(iv) Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the Court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order (see Estate Garlick's case, supra, 1934 A.D. 499)." (emphasis supplied)

[13] Applying the aforegoing remarks underlined in bold in the above quoted passage to the facts of the present matter it is clear that rescission on the ground of justus error is entirely misplaced. The applicant's case is not predicated on any of the exceptions to the general rule enunciated therein.

[14] In the result therefore the following orders will issue:

(1) The application for rescission of the main judgment is dismissed with costs.

(2) The affidavits of Mr *Hans Jurgen Frahm* and Mr *Gerald Jack Friedman* are struck out and the applicant is ordered to pay the costs of the application to strike out.

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D. CHETTY
JUDGE OF THE HIGH COURT