IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Number: 1580/2020

In the matter of:

NEO KHUMO DISEKO	**APPLICANT**
and	
ANTHONY BERLOWITZ ATTORNEYS	**1st RESPONDENT**
VOLTEX(PTY) LTD t/a LIGHTING STRUCTURES AND ATLAS GROUP	**2nd RESPONDENT**
ABSA BANK	**3rd RESPONDENT**
THERESA VAN DER MERWE	**4th RESPONDENT**

JUDGMENT BY: **MOLITSOANE, J**

HEARD ON: **26 MAY 2022**

DELIVERED ON: **07 SEPTEMBER 2022**

This judgment was handed down electronically by circulation to the parties'represantatives by email and released to SAFLII.
The date and time for the hand down is deemed to be 09:00 on the 07 September 2022

[1] The applicant seeks rescission of two cost orders granted by Musi JP against her in her personal capacity. Only the First Respondent opposes the application. The orders she seeks to rescind are:

a) The court order granted on 24 December 2020 in the business rescue application under case number 1580/2020(the business rescue cost order);

b) The court order granted on 22 April 2021 in the application for leave to appeal under the same case number as above (the leave to appeal cost order).

[2] The applicant contends that the two cost orders were erroneously sought or were granted in the absence of the applicant. Rule 42(1) provides that the court may on application rescind a judgment erroneously sought or granted in the absence of a party affected thereby or a judgment where there is an ambiguity, error or a mistake common to both parties.

[3] In *Bakoven Ltd v G.J. Howes (Pty) Ltd* the court said:

> [1]... An order or judgment is 'erroneously granted' when the Court commits an 'error 'in the sense of a 'mistake in a matter of law appearing on the proceedings of a Court of record." It follows that a Court in deciding whether a judgment was 'erroneously granted' is, like a court of appeal, confined to the record of the proceedings. In contradistinction to relief in terms of Rule 31(2)(b) or under the common law, the applicant need not show 'good cause' in the sense of an explanation for his default and a bona fide defence. Once the applicant can point to an error in the proceedings, he is without further ado entitled to rescission.

[1] 1992(SA 466 at 471E-I.

[4] A judgment is erroneously granted if there existed at the time of its issue a fact of which the court was unaware of, which would have prevented the granting of the judgment and which would have precluded the court, if aware of it, not to grant the judgment.[2]

[5] It is necessary to refer to the background of this dispute. The applicant was the Human Resources Manager for Ikageng Electrical Contractors(Pty)Ltd(Ikageng), and had been in the employment of the said company from 4 September 2014 to 23 September 2020. It is her case that she was approached to act as applicant in a bid to place Ikageng in a business rescue. As a result, she duly deposed to a confirmatory affidavit. the reason that she signed the affidavit was that according to what she was told, such an act would 'assist the company'.

[6] The applicant is adamant that her interaction with the matter of the business rescue application was only with the Fourth Respondent and the signing of the confirmatory affidavit. She further contends that she was informed by one Mr Orlowitz of the First Respondent that there were orders made against her in the applications for the business rescue and the leave to appeal. Mr Orlowitz also provided her with a copy of the special leave to appeal to the Supreme Court of Appeal following the dismissal of the business rescue application and the leave to appeal.

[7] Upon receipt of the copies of the court orders the applicant sought the assistance of her current attorneys of record. Her attorneys addressed a correspondence to the First Respondent annexed to the papers marked Annexure FA 5 in which clarity was sought

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[2] See Nyinguwa v Moolman 1993(2) SA 508(Tk); Naidoo v Matlala N.O. and Others 201294) SA 143(GNP) at 153.

regarding the mandate of the First Respondent to represent the applicant in the business rescue and leave to appeal applications.

[8] The First Respondent opposes this application on the basis that the applicant has failed to make a case for the rescission of judgment.

[9] It is not in dispute that the applicant was cited as a party in the business rescue application and the leave to appeal. The applicant also signed a confirmatory affidavit. Her locus standi as well as her citation as a party was never in dispute in both the business rescue and the leave to appeal application. Section 131(1) of the Companies Act provides that unless a company has adopted a resolution contemplated in section 129 of the Companies Act, an affected person may apply to a court at any time for an order placing a company under supervision and commencing business rescue proceedings. It is not the case of the applicant that there was a resolution as contemplated in section 129. The applicant had the necessary locus standi, being an '*affected person'* as defined in section128(1)(a) of the Companies Act 71 of 2008. '*Affected person'* in relation to a company, means:

i. A shareholder or creditor of the company;
ii. Any registered trade union representing employees of the company; and
iii. If any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives.

[10] While the basis of the view that the judgment was granted erroneously is that the applicant did not mandate the Firs Respondent to institute the business rescue and leave to appeal

applications, at no stage of those proceedings did the applicant challenge the mandate of the First Respondent. For all intents and purposes the court was made aware by citing the Applicant and also by filing the confirmatory affidavit that the Applicant was a party to the proceedings. In its judgment the court said the following:

"At the centre of both applications is Ikageng Electrical Contractors(Pty) Ltd a company incorporated in terms of the laws of South Africa(Ikageng). In the one application, Mesdames Theresa Van der Merwe and Neo Diseko(applicants), both employees of Ikageng, sought an order that Ikageng be placed under supervision and that business rescue proceedings be commenced with in terms of section 131 of the Companies Act No 71 of 2008."

[11] From the reading of confirmatory affidavit in the business rescue application it is clear that the Applicant confirmed with reference to the affidavit of Theresa Van der Merwe that she and the said Van der Merwe were legally represented and that where submissions are made in law, same were done on the advice of their said legal advisers. It is thus clear that the Applicant was legally represented in the business rescue application.

[12] It is difficult to discern the basis upon which the applicant can contend that the order of costs the court granted was erroneous. In the absence of the challenge of the mandate of the First respondent it is difficult to see how it can be argued that the court granted the order erroneously. The fact that the First Respondent was not mandated to represent the applicant is not a fact that the court was made aware of. What is more clear to the court is that the First Respondent appeared to have believed that the applicant was a party to the proceedings as indicated to an email sent to the Fourth Respondent on 7July 2020 attached to the papers marked

Annexure "AA4". The email from the First Respondent addressed to the Fourth Respondent says:
"*I refer to the above matter and enclose herewith an affidavit for signature by you and Neo in the usual fashion.*"

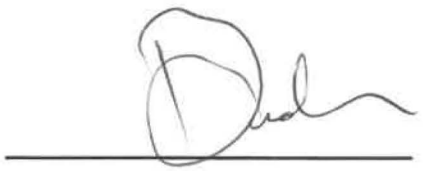
[13] It might be so that the First Respondent did not directly consult with the Applicant. The Applicant was, however, not an ordinary employee that one may say was illiterate. She was a Human Resources Manager of Ikageng. It is difficult to infer that she could have deposed to an affidavit and confirmed the contents thereof without understanding the purport thereof. Even if it could be argued that the applicant had no mandate to represent the applicant in those proceedings, in my view the undisputed evidence is that the applicant was a party to the proceedings as an affected person. She also signed a confirmatory affidavit as a party and by so doing, she put herself at risk of an order of costs in the usual course of litigation. I cannot find that the order granted was erroneous.

[14] The contention that the order was granted in the absence of the applicant is disingenuous. The proceedings in both the business rescue and leave to appeal applications were so called motion proceedings. It is common knowledge that such proceedings are essentially adjudicated on affidavits and supporting documents. Parties do not generally attend court. It cannot be said that once the court grants an order, such an order was granted in the absence of the parties. The parties were in my view 'present' because their documents were properly before court. During the applications their Counsel moved their applications on their behalf. Even in circumstances where the legal representatives of the

parties are not before court, once their papers are properly before court, such papers cannot be ignored. For the reason the notion that the applications were granted in the absence of the parties ought to be rejected. In my view the applicant has failed to make a case for rescission. It is unnecessary to traverse other points raised in opposition. I make the following order:

ORDER

1. The application is dismissed.
2. The applicant is ordered to pay the costs of the First Respondent.



P.E. MOLITSOANE, J

On Behalf of the Applicant:	**Adv. Van der Merwe**
Instructed by:	**VAN WYK ATTORNEYS**
	BLOEMFONTEIN

On Behalf of the First Respondent: **Adv. L Acker**

Instructed by: **BLAIR ATTORNEYS**

BLOEMFONTEIN