

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 13787/2015

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

10 FEBRUARY 2025

Judge Dippenaar

In the matter between:

**PEAK STAR 133 (PTY) LTD T/A DOLPHIN
CONSTRUCTION**

APPLICANT

And

**RAUBEX CONSTRUCTION (PTY) LTD
BRYTE INSURANCE COMPANY LIMITED**

**FIRST RESPONDENT
SECOND RESPONDENT**

IN RE:

RAUBEX CONSTRUCTION (PTY) LTD

APPLICANT

AND

BRYTE INSURANCE COMPANY LIMITED

RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading it onto the electronic platform. The date and time for hand-down is deemed to be 10h00 on the 10th of FEBRUARY 2025.

DIPPENAAR J:

[1] This is an opposed application concerning the rescission and setting aside of an order granted by Hulley AJ in the high court, sitting as court of first instance, on 8 August 2016 in motion proceedings between the first respondent and the second respondent. The proceedings related to a demand made by the first respondent under an on demand retention money guarantee issued by the second respondent, which the second respondent declined to pay. In terms of the Hulley order the second respondent was directed to make payment to the first respondent of an amount of R1 409 726.11 as claimed under the guarantee.

[2] The applicant is Peakstar 133 (Pty) Ltd t/a Dolphin Construction ('Dolphin'), represented herein by its sole director, Mr Van Niekerk. The first respondent is Raubex Construction (Pty) Ltd ('Raubex'), the party who made demand under the retention guarantee. The second respondent is Bryte Insurance Company Ltd ('Bryte'), the party who issued the retention money guarantee at the behest of Dolphin. Where convenient the parties will be referred to by name.

[3] The second respondent did not actively participate in the proceedings. At the hearing, the second respondent's counsel placed on record that it would abide the decision of the court.

[4] The background facts are not contentious. During 2013, Raubex secured a contract with Eskom SOC Ltd for the construction of an Eskom Operations and Management Office and Visitors Centre (the main agreement). Upon award of the contract, Raubex subcontracted a portion of the works to Dolphin. The general conditions of contract ('GCC') found application in the sub contract agreement concluded between Raubex and Dolphin. The subcontract provided for 10% of the contract price to be withheld as and for retention money during the contract period. In lieu of the retention money, Dolphin provided a retention money guarantee obtained from Bryte.

[5] A dispute arose between Raubex and Dolphin, resulting in Raubex demanding payment from Bryte under the retention guarantee. Bryte declined to pay, leading to Raubex instituting the proceedings which were heard by Hulley AJ. It was undisputed that Dolphin assisted Bryte in opposing the application and actively participated in the proceedings by providing a substantial affidavit by Mr Van Niekerk¹, setting out various grounds on which payment under the guarantee was resisted. Dolphin was not cited as a party in those proceedings and elected not to intervene in those proceedings at any stage.

[6] The history of the litigation is relevant to the issues which arise in this application. Aggrieved by the order granted by Hulley AJ ('the court of first instance'), Bryte sought and was granted leave to appeal to the Full Court under case no A5067/2016. On 8 December 2017, the Full Court upheld the appeal, set aside the order of the court of first instance and substituted it with an order dismissing Raubex's application with costs.

¹ Dolphin's sole director and deponent to the applicant's affidavits in the present proceedings.

[7] Pursuant to Raubex being granted special leave to appeal by the Supreme Court of Appeal (“the SCA”), the order of the Full Court was set aside by the SCA under case no 337/2018 on 20 March 2019.² In a unanimous judgment, the SCA upheld the appeal and set aside the order of the Full Court. It was replaced with an order dismissing the appeal with costs. The SCA held that Bryte failed to discharge the onus of establishing fraud on the part of Raubex. The judgment of the SCA further made clear that demand was made in accordance with the terms of the guarantee and that Bryte was obliged to make payment, unless it was able to establish fraud on the part of Raubex.³ It also held that the say so of Mr Van Niekerk ‘falls far short of what would be required to establish fraud on the part of Raubex in respect of the existence of a breach’. A subsequent application for leave to appeal to the Constitutional Court by Bryte was dismissed.

[8] Pursuant thereto, Bryte made payment to Raubex of the amount claimed in terms of the demand. Thereafter, Bryte launched motion proceedings against Dolphin on 11 March 2022 for payment of the amount, based on an indemnity agreement concluded between those parties underpinning the guarantee. Arbitration proceedings further ensued between Dolphin and Raubex pertaining to the contractual disputes between them. The amount paid to Raubex under the retention guarantee did not form part of the disputes raised in the arbitration.

[9] During June 2022, some six years after the granting of the order of the court of first instance, Dolphin as applicant launched the current application in terms of which the applicant sought rescission of the judgment granted by Hulley AJ under r 42(1)(a), alternatively, the common law. Dolphin’s case was that the Hulley AJ order was erroneously sought and erroneously granted in its absence. The alleged procedural irregularity was that there was a material non-joinder in those proceedings as it should have been joined by Raubex as an interested and affected party to the proceedings before Hulley AJ.

² Reported Sub nom (337/2018) [2019] ZASCA 14 (20 March 2019)

³ Para 8-9.

[10] In support of its submission that there was good cause for rescission under the common law, it was submitted that Raubex's claim contained insufficient averments to sustain a cause of action. Dolphin sought to introduce reliance on certain 'jurisdictional requirements' contained in clauses 2.3 and 2.5 of the GCC in support of an argument that the demand made by Raubex on the guarantee was unlawful as it did not aver compliance with clauses 2.3 and 2.5 of the GCC. This, it was submitted was a *bona fide* defence to Raubex's claim. However, it accepted that the allegations of fraud were correctly dismissed by Hulley AJ in the proceedings before him. The applicant submitted that had the court of first instance and the SCA been provided with the relevant provisions of the GCC, it would have found that Raubex was not entitled to the relief sought.

[11] Raubex opposed the application on the basis that none of the relevant requirements of either r 42(1)(a) or the common law were met and the application fundamentally lacked prospects of success. It contended that the applicant's averments disregarded that what the applicant sought to raise, was essentially a subsequently disclosed defence, which did not serve before Hulley AJ and thus did not avail it and that, in any event, it did not constitute any valid defence to Raubex's claim. Raubex disputed that Dolphin was a necessary party to the proceedings, as it had a financial, rather than a direct and substantial legal interest. It further pointed out that the Supreme Court of Appeal has pronounced on the matter and the validity of the demand, rendering the issues raised *res judicata*. Raubex further challenged the jurisdiction of this court to entertain the rescission application.⁴

[12] Prior to dealing with the merits of the application, it is thus necessary to consider the antecedent question, namely whether the high court has jurisdiction to entertain the rescission application and to set aside the order granted. It is trite that where jurisdiction

⁴ Answering affidavit, para 6. At the hearing, the first respondent's counsel sought leave to submit supplementary heads of argument, which was not opposed by the applicant. An order granting such leave was made at the hearing. The jurisdiction issue was expressly addressed in the supplementary heads of argument.

is contested a ruling must be made on that issue before a court makes a ruling on other issues.⁵

[13] Dolphin submitted that after the SCA set aside the order of the Full Court and dismissed Raubex's appeal, it was the order of Hulley AJ which stands and which must be rescinded. I agree with Raubex that this approach does not pass muster.

[14] Although the proceedings started in the high court as court of first instance, appeal proceedings followed in the appellate courts, being the Full Court, the Supreme Court of Appeal and the Constitutional Court. The Constitutional Court refused leave to appeal the order of the SCA. By setting aside the order of the Full Court and substituting it with an order dismissing the appeal, the Supreme Court of Appeal finally determined the appeal against the orders of the court of first instance and placed its imprimatur on the order granted by Hulley AJ. The approach adopted by the applicant simply ignores this.

[15] Mnguni J in *Zuma v Minister of Police* summarised the hierarchy of courts as provided for in Chapter 8 of the Constitution. He held: '*Section 173 of the Constitution grants the Constitutional Court, the Supreme Court of Appeal and the high courts, the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice*'.⁶

[16] A high court does not have the jurisdiction to countermand and interfere with, nor suspend or rescind an order of an appellate court, whether directly or indirectly. To do so would be unconstitutional and unlawful.⁷ A high court does not have any concurrent

⁵ Competition Commission of South Africa v Standard Bank of South Africa Limited and related matters 2020 (4) BCLR 429 (CC).

⁶ Zuma v Minister of Police 2021 JDR 1496 (KZP) paras 24-26.

⁷ Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others 2021 (1) BCLR 1263 (CC). The relevant principles pertaining to rescission applications are set out in paras 49-65, 68-77, 79-84.

jurisdiction over or any 'over-ride power' over orders of higher courts such as the Supreme Court of Appeal or the Constitutional Court.⁸

[17] The constitutional and jurisdictional reality is entrenched by the trite proposition that 'a court must be competent to make whatever orders it issues'. If a court lacks authority to make an order it grants, such order constitutes a nullity.⁹ The applicant cannot pursue the rescission application before the high court, given that the appellate courts have pronounced on the matter and the court of first instance is *functus officio*.

[18] A deviation from the important doctrine of precedent, invites 'legal chaos'¹⁰ and embarks, in the words of Mnguni J, on impermissible 'judicial adventurism'.¹¹ If this court were to entertain the rescission application under the present circumstances, the doctrine of hierarchy and precedent will be disturbed and there will be no finality to legal decisions.

[19] I conclude that the high court does not have the jurisdiction to entertain the rescission application, given that the matter was finally determined by the appellate courts. That is dispositive of the application, which must fail. Given the conclusion reached, it is not appropriate to consider the merits of the application.

[20] There is no reason to deviate from the normal principle that costs follow the result. Considering the complexities involved, costs on Scale C is justified. The parties were both agreed on this issue. The first respondent sought costs on a punitive scale, submitting that the application constituted an abuse. Whilst the application was ill-conceived, I am not persuaded that such an order is warranted or that the application was *mala fide*.

⁸ Zuma v Minister of Police *supra*, para 32.

⁹ Competition Commission of South Africa v Standard Bank of South Africa Limited and related matters 2020 (4) BCLR 429 (CC) para 201, quoted in Zuma *supra* para 35; Zuma *supra* paras 36 and 38.

¹⁰ Turnbull-Jackson v Hibiscus Coast Municipality and others 2014 (6) SA 592 (CC) para 54-56.

¹¹ Zuma v Minister of Police *Supra* para 38.

[21] In the result, I grant the following order:

The application for rescission is dismissed with costs on Scale C, including the costs of senior counsel.



**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

HEARING

DATE OF HEARING : 03 FEBRUARY 2025

DATE OF JUDGMENT : 10 FEBRUARY 2025

APPEARANCES

APPLICANT'S COUNSEL : APJ Els SC with Mr AA Basson

APPLICANT'S ATTORNEYS : Thomas and Swanepoel Attorneys c/o
Pagel and Schulenburg Attorneys

RESPONDENT'S COUNSEL : GW Amm SC

FIRST RESPONDENT'S ATTORNEYS : Peyper Attorneys

SECOND RESPONDENT'S COUNSEL : Adv A Cooke on watching brief

SECOND RESPONDENT'S ATTORNEYS : Norton Rose Fulbright South Africa Inc.