



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 4910/2021P

In the matter between:-

**COLIN JOSEPH DAVID
KEVIN PAUL DAVID**

**FIRST APPELLANT
SECOND APPLICANT**

and

PRECHAND SEVASANKAR MAHARAJ

RESPONDENT

ORDER

1. The order granted by default on 11 August 2023 under case number 4910/2021P is rescinded.
 2. The applicants are directed to pay the respondent's costs of this application, jointly and severally, the one paying the other to be absolved on a scale as between attorney and client.
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JUDGMENT

R. Singh, AJ

Introduction

[1] This is an opposed application for rescission of an order granted by default against the applicants on 11 August 2023.

[2] The said order struck out the applicants' claim and defence to the respondent's claim in reconvention. Judgment was also granted against the applicants (as plaintiffs in the action) in respect of the respondent's claim in reconvention in the sum of R1 350 875, 97 together with interest and costs.

[3] The order was granted in the absence of the applicants. This application was premised in the founding affidavit on the provisions of Uniform Rule 42(1)(a), alternatively Rule 31(2)(b), further alternatively the common law.

The Facts

[4] The following facts are common cause:

- a. The applicants sued the respondent for outstanding rental which they alleged was due arising from a verbal agreement of lease concluded with the respondent.
- b. The respondent denied the existence of the lease agreement or that any monies were due to the applicants. He delivered a claim in reconvention wherein he alleged that in terms of a loan agreement with the applicants, he lent and advanced monies to them. He further alleged that he entered into two purchase and sale agreements with them in terms of which he sold certain motor vehicles to them. He alleged that the applicants defaulted with payment of their loan obligations and instalments in terms of the purchase and sale agreements.
- c. The applicants delivered a plea to the claim in reconvention and denied Indebtedness to the respondent. The applicants alleged that they had fulfilled payment of their obligations to the respondent.
- d. Following the close of pleadings, the applicants' erstwhile legal representative withdrew. The respondent applied for a trial date. By then, both parties had delivered their discovery affidavits.
- e. The respondent served a notice in terms of Uniform Rule 35(6) on the applicants to which they failed to respond. Pursuant thereto, the respondent brought an application to compel production of the documents referred to in the notice. This application was served personally on both applicants. They did not oppose the application nor did they appear at court. The order was granted by default on 22 May 2023. (the May 2023 order)
- f. When the 22 May 2023 order was served on the applicants, they alleged that they noted that they were reflected as the applicants in the headings of

the order. The order called upon the respondents to produce the documents listed in the order. The applicants alleged that they thought that the entire order was an error as they have not launched any application. On 5 July 2023, they wrote to the respondent's attorney enquiring about the May 2023 order. There was no response to this email. The said email appears to have been sent several times to the respondent's attorney.

g. The applicants were then served with an application to strike out their claim and defence to the claim in reconvention for failing to comply with the 22 May 2023 order (the strike out application). The strike out application was set down for 26 July 2023. The applicants delivered a notice of intention to oppose and on 26 July 2023 and the matter was adjourned to 11 August 2023 for the applicants to deliver their answering affidavit. The applicants' did not deliver an answering affidavit by 11 August 2023 nor were they present at court. The order was granted by default.

The Issues

[5] The issues to be decided are:-

- a. whether the applicants are entitled to an order rescinding the order granted on 11 August 2023;
- b. who ought to pay the costs of the present application.

The parties' submissions

[6] Mr Temlett who appeared for the applicants submitted that the 22 May 2023 order was defective due to the error in the citation of the parties in the headings. He submitted that it is trite that once an irregularity has occurred, the court need look no further and rescind the order. He relied on the provisions of Uniform Rule 42(1)(a) and submitted that it was not necessary for the applicants to show "good cause" once it was established that the 22 May 2023 order was irregular. He did not place reliance on Uniform Rule 31(2)(b) or the common law. Mr Temlett argued that had the court been aware that the 22 May 2023 order which was served on the applicants was defective, it would not have granted the order on 11 August 2023. The applicants sought the costs of the application on a scale as between attorney and client.

[7] Mr Naidoo SC who appeared on behalf of the respondent submitted that the applicants were opportunistic in raising the defect in citation and that the order had to

be looked at in context. He relied on *Natal Joint Municipal Pension Fund vs Endumeni Municipality*¹ where it was stated that a sensible meaning is preferred to one that leads to unbusiness like results or undermined the purpose of a document. Mr Naidoo SC further submitted that the application was an abuse of the process of court and that the outcome of the trial eventually is a foregone conclusion given that the applicants despite numerous opportunities were unable to produce the proof that they had made payment to the respondent. He sought the costs of the application on a scale as between attorney and client.

The Law

[8] In the matter of *Rossitter & others vs Nedbank Ltd*², the Supreme Court of Appeal held that ‘a judgment is erroneously granted if there existed at the time of its issue a fact which the court was unaware of, which would have precluded the granting of the judgment if the court was aware of it.’ It follows that Rule 42 empowers a court to rescind an order or judgment if the applicant establishes jurisdictional facts in order for the court to exercise its discretion to set aside the order. If the jurisdictional facts are not established, the enquiry as to whether an order must be rescinded ceases at this point. In view of this, it is not necessary for a party to show “good cause” under Rule 42(1)(a)³.

Application of the facts to the law

[9] *Ex facie* the 22 May 2023 order, it is evident that the names of the parties have been transposed, namely the applicants in the present application are cited as the applicants in the said order and the respondent in this application is cited as the respondent in the order. It is noteworthy that the applicants at the time the order was served on them were unrepresented. They did make attempts to ascertain what the 22 May 2023 order was all about by forwarding e-mails to the respondent’s attorney. No response was furnished by the respondent’s attorney in this regard. Instead, the respondent’s attorney proceeded to bring the strike out application which served before the court on 11 August 2023. Inasmuch as it is clear that the draft order that was sought on 22 May 2023 was correct, it would appear that the incorrect citations of the order occurred when the order was typed at court. I am of the view that the respondent ought to have taken steps to respond to the applicants’ email and ensure that the 22 May 2023 order was typed to correctly reflect the

¹ 2012 (4) SA 593 (SCA), para 18

² (96/2014) [2015] ZASCA 196 (1 December 2015), para 16

³ National Pride Trading 452 (Pty) Ltd vs Media 24 Limited 2010 (6) SA 587 (ECP) at 597I-598B

details of the parties. This would have been a simple exercise. I am therefore satisfied that the applicants have met the requirements of Rule 42(1)(a) and that they are entitled to the order of 11 August 2023 being set aside.

Costs of the application

[10] Generally costs follow the result and the applicants ought to be entitled to the costs of this application because they have succeeded on the merits. *In casu* however, I am not satisfied that the applicants are entitled to the costs of this application on the basis that once this application was issued, the respondent indicated that he was willing to consent to the relief being granted provided the applicants furnished proof of payment which they rely on in the action. The applicants did not accept this offer nor did they set this application down for hearing. The respondent had to take it upon himself to set the matter down. It was unnecessary for this matter to come before this court as an opposed motion when the applicants could have acceded to the offer by the respondent. In the circumstances, the applicants must bear the costs of this application on a scale as between attorney and client.

Conclusion

[11] In the result, I make the following order:

- a. The order granted by default by on 11 August 2023 under case number 4910/2021P is rescinded.
- b. The applicants are directed to pay the respondent's costs of this application, jointly and severally, the one paying the other to be absolved on a scale as between attorney and client.

R SINGH, AJ

Date of hearing : 29 August 2024
Date of judgment : 05 September 2024

APPEARANCES

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