

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Case Title: Windhoek Wanderers and Municipal Council of Windhoek Gerrit Van Pletzen N.O. Isack Kaulikufwa Hendjala N.O.	Case No: HC-MD-CIV-MOT-REV-2020/00306 Division of Court: Main Division Heard on: 7 March 2023
Case No: HC-MD-CIV-MOT-REV-2020/00306	Division of Court: Main Division
Applicant: Windhoek Wanderers	Respondents: Municipal Council of Windhoek (1 st Respondent) Gerrit Van Pletzen N.O. (2 nd Respondent) Isack Kaulikufwa Hendjala N.O. (3 rd Respondent)
Heard before: Honourable Justice Usiku	Delivered on: 28 March 2023
Neutral citation: <i>Windhoek Wanderers v Municipal Council of Windhoek</i> (HC-MD-CIV-MOT-REV-2020/00306) [2023] NAHCMD 152 (28 March 2023)	
Order: <ol style="list-style-type: none">1. The first respondent's application for rescission, is dismissed.2. The first respondent is ordered to pay the costs of the applicant, such costs include costs of one instructing and one instructed counsel. It is further ordered that such costs shall not be subject to the limitation imposed in terms of rule 32(11).3. The matter is postponed to 26 April 2023 at 15h15 for a status hearing.4. The parties shall file a joint status report on or before 19 April 2023.	
Reasons for order:	
USIKU J:	

Introduction

[1] For convenience sake, the parties are referred to as in the main application. This is an interlocutory application brought by the first and third respondents for an order rescinding an order made by this court dated 25 August 2022. The respondents' application is premised on an argument that the court order dated 25 August 2022 was granted as a result of a mistake common to the parties. In the same breath, the respondents also argue that the 25 August 2022 order is one in which there is a 'patent error' as contemplated in rule 103(1)(c) and should, on that account, be rescinded.

Background

[2] On 25 August 2022, this court made an order in the following terms:

- '1. The applicant's point in *limine* is upheld and it is declared that the application is not opposed by the first respondent.
2. To the extent that the third respondent purports to act on behalf of the first respondent, the third respondent's answering affidavit is hereby struck.
3. The third respondent is ordered to pay the applicant's costs occasioned by the point in *limine*, such costs include costs of one instructing and one instructed counsel.
4. The matter is postponed to 28 September 2022 at 15h15 for status hearing.
5. The applicant and the third respondent shall file a joint status report on or before 21 September 2022, setting out their proposals on the further conduct of the matter.'

[3] The foregoing order was a sequel to a point *in limine* raised by the applicant to the effect that the third respondent simply alleged in his answering affidavit that he was 'duly authorised by the first respondent to depose to this affidavit'. The applicant argued that the third respondent did not aver that he was authorized to oppose, on behalf of the first respondent, the review application brought by the applicant.

[4] After the court handed down the order dated 25 August 2022, the first and third respondents brought the present application, seeking the rescission of the aforesaid order.

[5] The rescission application is opposed by the applicant.

The rescission application

[6] The founding affidavit supporting the application is deposed to by O'Brien Hekandjo, the Chief Executive Officer of the first respondent. In the affidavit, Mr Hekandjo avers that he is duly authorized to bring the application on behalf of the first respondent. Although the notice of motion states that the application is brought on behalf of the first and third respondents, Mr Hekandjo does not allege that he is also authorized to bring the application on behalf of the third respondent.

[7] The rescission application is brought in terms of rule 103(1) (c) and (d).

[8] The respondents assert that the applicant's main review application was withdrawn by applicant's legal practitioner in open court, on 8 December 2021 and that the only issue outstanding between the parties is, who should pay the costs of suit.

[9] The respondents contend that the legal practitioners for both parties, who attended to the matter on 8 December 2021 are not the same legal practitioners presently attending to the matter. The current legal practitioners on both sides were not aware of the submissions made by the applicant's legal practitioners on 8 December 2021.

[10] It is further contended in the rescission application that, the legal practitioners on both sides mistakenly agreed between themselves that the only issue that needed to be argued and be determined by the court was the issue of the authority of the third respondent to represent the first respondent. The cause of the mistake is alleged to be that the legal practitioners were unaware that the matter was withdrawn or settled on 8 December 2021.

[11] The respondents argue that the 'patent error' is that the legal practitioners had agreed to argue the issue of the authority of the third respondent to represent the first respondent, in respect of the review application, which was withdrawn.

[12] The respondents, therefore, contend that the judgment delivered on 25 August 2022 was based on a mistake common to both parties and is one in which there is a patent error as contemplated in rule 103(1)(c) and (d).

[13] In its answering affidavit opposing the rescission application, the applicant contends that

the deponent to the respondents' founding affidavit does not allege that he is authorised by the third respondent to launch the rescission application, on his behalf. Therefore, the applicant denies that the deponent has authority to launch the rescission application on behalf of the third respondent.

[14] The applicant also submits that, the court order dated 25 August 2022 has declared that the main review application was not opposed by the first respondent. The effect of such an order is to bar the first respondent from participating from the present proceedings, until such time that first respondent is granted leave, in terms of the rules, to do so. The applicant, therefore, contends that the first respondent is not entitled to launch the rescission application without having first sought and obtained leave from the court to do so.

[15] As regards the merits of the rescission application, the applicant asserts that the parties had filed a joint case management report on 15 March 2022 in terms of which the parties agreed that the issue of the authority of the third respondent to oppose the review application on behalf of the first respondent should be determined *in limine*. Thereafter, the court made an order to that effect and directed the parties to file heads of argument on the point *in limine* only. The parties participated in the hearing on the point *in limine* without the respondents raising any of the issues now raised in the rescission application.

[16] The applicant further asserts that, following the hearing on 8 December 2021, the parties filed a joint status report dated 25 January 2022, in which they agreed that settlement discussions were not yet concluded and the parties sought a final postponement for settlement purposes. Thereafter, the parties filed a joint status report on 8 February 2022, in which the parties jointly informed the court that they have been unable to settle the matter and proposed that the matter be postponed for a case management conference. The matter was thereafter postponed for a case management conference. In their joint case management report, the parties agreed that the issue of the authority of the third respondent be determined first. The issue of authority was then determined by the court on 25 August 2022, after the court had heard the parties' arguments on the issue on 4 August 2022. The respondents now seek to have the court order made on 25 August 2022, rescinded.

[17] The applicant submits that the first respondent has not made out a case for the relief that it seeks and that the rescission application be dismissed with costs.

Analysis

[18] I shall first deal with the two points *in limine* raised by the applicant. The first point in *limine* concerns the authority of the deponent to respondents' founding affidavit, to bring the rescission application on behalf of the third respondent. It was stated in the matter of *Namibia Protection Services (Pty) Ltd v Hainghumbi*¹ that where the issue of authorization of the proceedings is raised in the answering affidavit, an applicant may bring documents proving authority or the ratification of the institution of the proceedings, in reply.

[19] In the present matter, the respondents have not filed a replying affidavit and therefore have not shown that the deponent to the respondents' founding affidavit has the necessary authority to bring the rescission application on behalf of the third respondent. Where there is a challenge to authority, those relying on it must prove it. In the present matter the *onus* is on the deponent to the respondents' founding affidavit to prove that he is duly authorized to act on behalf of the third respondent. On the facts placed before court, I am of the opinion that the deponent to the founding affidavit is not authorized to bring the rescission application on behalf of the third respondent and the applicant's point *in limine* on this aspect, stands to be upheld.

[20] In regard to the second point *in limine*, namely that the first respondent is barred from participating from the present proceedings, until such time that it has sought and been granted leave to do so, I am not persuaded that the first respondent requires leave to challenge, if it so wishes, the court order that pronounced that it has not opposed the review application. The first respondent has filed a notice of intention to oppose the review application, and is, ipso facto, a party to the proceedings. However, it failed to file an answering affidavit and therefore, has not opposed the review application. I am of the opinion that, as a party to the proceedings, the first respondent does not require leave to challenge the validity or legality of a decision that affects its interests. This point *in limine* has no merit, in the circumstances, and stands to be dismissed.

[21] As regards the merits of the rescission application, the relevant parts of rule 103 provides as follows:

'Variation or rescission of order or judgment generally

103. (1) In addition to the powers it may have, the court may of its own initiative or on the

¹ *Namibia Protection Services (Pty) Ltd v Hainghumbi* (HC-MD-LAB-APP-AAA-2021/00046) [2022] NALCMD 15 (23 March 2022), para 29.

application of any party affected brought within a reasonable time rescind or vary any order or judgment -

- (a) erroneously sought or erroneously granted in the absence of any party affected thereby;
 - (b) in respect of interest or costs granted without being argued;
 - (c) in which there is an ambiguity or a patent error or omission, but only to the extent of that ambiguity or omission; or
 - (d) an order granted as a result of a mistake common to the parties.
- (2) ...'

[22] It is common cause that the first respondent brings its rescission application in terms of rule 103(1)(c) and (d). Rule 103(1)(c) is confined to rescission of an ambiguous order or an order containing a patent error or omission. Rule 103(1)(d) is confined to rescission of an order resulting from a mistake common to the parties.

[23] An ambiguity or patent error or omission, has been described as an ambiguity or an error or omission as a result of which the judgment or order granted does not reflect the intention of the judicial officer pronouncing it.² In other words, the ambiguous language or the patent error or omission must be attributable to the court itself and relief will only be granted where the terms of the judgment do not reflect the true intention of the presiding judge.³

[24] When rescission is sought on the ground that an order was granted as a result of a mistake common to the parties, two requirements must be satisfied, namely:

- (a) there must have been a common mistake, in that both parties are of one mind and share the same mistake, and,
- (b) there must be a 'causative link' between the mistake and the granting of the order.⁴

[25] The above two requirements are satisfied by leading evidence, which came to the knowledge of the parties after judgment, to the effect that the facts upon which the court's decision was based were incorrect, contrary to the parties' assumption.⁵

[26] Considering the facts and circumstances of the present case, I am of the view that the first respondent has not met the requirements of rule 103(1)(c) and (d). Firstly, there is no evidence that the 'patent error' alleged by the first respondent is attributable to the court itself.

² Herbstein and Van Winsen" :The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa 5th Edn. Volume 1 p.934.

³ Ibid.

⁴ Op. Cit. p.935.

⁵ Ibid.

Secondly, there is no evidence that 'the common mistake' alleged by the first respondent, was shared by the applicant (or by its legal practitioners). Nor has the first respondent led evidence showing that the alleged 'mistake' relate to and is based on something relevant to the question of 'authority' which was determined by the court in its judgment dated 25 August 2022.

[27] I am therefore of the view that, having regard to the facts and the circumstances of this matter, the first respondent has failed to make out a case for the rescission of the court order dated 25 August 2022 and the application must be dismissed.

[28] On the issue of costs, the applicant submitted that the conduct of the first respondent in bringing this rescission application amounts to frivolous and vexatious conduct and that it should result in an appropriate costs order made against it.

[29] I agree with the foregoing submission. I am of the view that the allegations made on behalf of the first respondent, to the effect that the review application was withdrawn or settled on 8 December 2021 are entirely unreasonable and without foundation. This is borne out by the transcribed record of what transpired in court on 8 December 2021, and by the fact that the parties' legal practitioners continued in January 2022 to exchange correspondence in an effort to reach amicable settlement, which effort ultimately failed. If the first respondent genuinely believed that the matter was withdrawn or settled on 8 December 2021, then the aborted settlement efforts would not have been undertaken. I am also of the view that, the conduct of the first respondent in bringing the rescission application, in the circumstances, is unacceptable, vexatious and amounts to an abuse of the court process. Having reached such conclusion, I am of the view that an appropriate costs order in the circumstances, is a costs order not limited in terms of rule 32(11). I shall therefore grant an order in those terms.

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

1. The first respondent's application for rescission, is dismissed.
2. The first respondent is ordered to pay the costs of the applicant, such costs include costs of one instructing and one instructed counsel. It is further ordered that such costs shall not be subject to the limitation imposed in terms of rule 32(11).
3. The matter is postponed to 26 April 2023 at 15h15 for a status hearing.
4. The parties shall file a joint status report on or before 19 April 2023.

Judge's signature

Note to the parties:

B Usiku Judge	Not applicable
Counsel:	
Plaintiff:	Defendant:
CJ Van Zyl (with him C Turck) Of Dr Weder, Kauta & Hoveka Inc. Windhoek	K Angula Of AngulaCo Inc., Windhoek