REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case No: 7583/2019

1. REPORTABLE: NO
2. Of interest to other judges: NO
3. Revised

19/08/2021 .....
DATE SIGNATURE

In the matter between:

THE CITY OF EKURHULENI METROPOLITAN MUNICIPALITY Applicant/ Seventh Respondent

In re:

UNLAWFUL OCCUPIERS: 1 ARGYL STREET First Applicants

UNLAWFUL OCCUPIERS: 193 PRESIDENT STREET Second Applicants

UNLAWFUL OCCUPIERS: 214 MEYER DRIVE Third Applicants

UNLAWFUL OCCUPIERS: 146 MEYER DRIVE Fourth Applicants

UNLAWFUL OCCUPIERS: 117 JOURBET STREET	Fifth Applicants
UNLAWFUL OCCUPIERS: 180 MEYER STREET	Sixth Applicants
UNLAWFUL OCCUPIERS: 12 KNOX STREET	Seventh Applicants
UNLAWFUL OCCUPIERS: 70 PRESIDENT STREET	Eighth Applicants
UNLAWFUL OCCUPIERS: 103 KNOX STREET	Ninth Applicants
UNLAWFUL OCCUPIERS: 1 GRAVETT STREET	Tenth Applicants
UNLAWFUL OCCUPIERS: 43 SPILBURY STREET	Eleventh Applicants
UNLAWFUL OCCUPIERS: 53 END STREET	Twelfth Applicants
UNLAWFUL OCCUPIERS: STIRLING COURT	Thirteenth Applicants
UNLAWFUL OCCUPIERS: 27 POWER STREET	Fourteenth Applicants
UNLAWFUL OCCUPIERS: UNITED BUILDING	Fifteenth Applicants
UNLAWFUL OCCUPIERS: FRIMIDA COURT	Sixteenth Applicants

and

ROHLANDT HOLDINGS CC	First Respondents
42 POWER STREET PROPERTIES CC	Second Respondents
LANRON PROPERTIES	Third Respondents
RICHMOND INVESTMENTS CC	Fourth Respondents

GERMISTON CENTRAL REAL ESTATE CC	Fifth Respondents
LIMA JOSE MANUEL MONTEIRO	Sixth Respondents
EKURHULENI METRO MUNICIPALITY	Seventh Respondents
MEC FOR DEP OF HUMAN SETTLEMENTS	Eighth Respondents
SHERIFF OF COURT GERMISTON SOUTH	Ninth Respondents
WAVERLY COURT CC	Tenth Respondents

JUDGMENT

VAN DER MERWE AJ:

[1] The applicant, the City of Ekurhuleni Metropolitan Municipality (the Municipality) seeks a rescission of an order which was granted by agreement between the parties on 12 February 2020 and seeks condonation for the late filing thereof.

[2] The application for the rescission is brought in terms of the common law and in terms of Rule 42. The grounds for the application are based on the allegations that i) the Municipality's erstwhile attorney did not have the necessary authority to enter into the agreement, that ii) the court order is incompetent and that iii) it, by common error between the parties, does not resolve the issue of whether the eviction orders are stayed or whether the

Municipality and the MEC for Department of Human Settlements (MEC) are to provide alternative accommodation or not.

[3] Whether at common law, or under Rule 42, the court's power to rescind a final order is limited and the circumstances within which the power may be exercised fall within a relatively narrow ambit.[1] This is because rescission may only be granted in circumstances where the common law or the Rules of court specifically permit it.[2]

[4] As far as the common law is concerned, rescission is permissible only on the basis of fraud, *justus error* (on rare occasions), where in certain exceptional circumstances new documents are discovered, where judgment was granted by default, and on the basis of *justa causa,* where there is an absence of a valid agreement between the parties to support the judgment.[3]

[5] A judgment given by consent cannot arbitrarily be repudiated or withdrawn, but it may be set aside on the ground of *justus error* in certain circumstances, provided that such error vitiated the true consent and did not relate to motive or to the merits of a dispute which it was the very purpose of the parties to compromise.[4]

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[1] Childerley Estate Stores v Standard Bank of SA Ltd 1924 OPD 163 at 166

[2] South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA at 550H

[3] Erasmus Superior Court Practice, Vol. 2 at D1-561 and cases cited therein

[4] Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd 1978 (1) SA 914 (A) at 922G-923A

[6] A judgment given by consent may be set aside on good and sufficient cause shown and a court may have regard to i) the reasonableness of the explanation proffered by the applicant of the circumstances in which the consent judgment was entered, ii) the bona fides of the application for rescission and the iii) the bona fides of the defence on the merits of the case which carries some prospect of success; a balance of probability need not be established. All these factors must be viewed in conjunction with each other and with the application as a whole.[5]

Background

[7] The parties who were involved in the application set down for 12 February 2020 and who were represented, were the Unlawful Occupiers of sixteen properties belonging to the First to Sixth Respondents (collectively referred to as the Rohlandt Respondents), the Rohlandt Respondents, the Municipality and the MEC.

[8] In the application was initially set down on an urgent basis for 19 March 2019 where the unlawful occupiers sought the following relief:

1. That the eviction of the unlawful occupants of the respondents' aforesaid properties be stayed, pending the provision of alternative accommodation by the applicant and the MEC: Human Settlements; and

2. That the respondents be interdicted from executing the aforesaid eviction orders, pending the provision of alternative accommodation to the

[5] Erasmus, Superior Court Practice Vol. 2 at D1-565 to D1-566 and cases cited therein

unlawful occupants of the respondent's aforesaid properties." (the main application)

[9] The Rohlandt Respondents delivered a counter application for *inter alia* the following relief:

1. That the failure of the Municipality and the MEC to provide alternative accommodation to the unlawful occupiers of the Rohlandt Respondents' properties, infringed the latter's rights as contemplated in Sections 7(2), 9(1) and (2) and 25(1) of the Constitution of the Republic of South Africa Act No. 108 of 1996 (as amended) ("the Constitution") and the rights of the unlawful occupiers as contemplated in Section 26(1) of the Constitution;

2. That the Rohlandt Respondents were entitled to payment of damages by the Municipality and the MEC, jointly and severally, for the continued occupation of the Rohlandt Respondents' properties;

3. That the unlawful occupiers continue to be in occupation of the Rohlandt Respondents' properties until alternative accommodation be made available to them by the Municipality and/or the MEC;

4. That the quantum of the Rohlandt Respondent's aforesaid damages as contemplated be referred to trial;

5. If, in relation to the investigation and determination of damages suffered, the parties cannot reach agreement regarding procedural matters, leave be granted to make application in terms of Rule 33(5) for directions; and

6. That a mandamus be granted against the MEC, to the effect that the MEC provide the Applicant with a reply to the Applicant's application for funding for emergency housing in the instance.

[10] The parties reached settlement pertaining to the matter which was set down before Lamont J on 12 February 2020 and a draft order was made an order of court providing as follows:

"1. The Ekurhuleni Metropolitan Municipality ("the Municipality") is ordered to purchase the following immovable properties situated at the below-mentioned addresses/descriptions which have been the subject matter of the two eviction orders granted under case numbers 40089/2017 and 43010/2017 in the above Honourable Court, which properties are owned by the First to Sixth Respondents as well as Waverley Court CC: ... [Sixteen properties listed]

2. Waverley Court CC is hereby joined as the Tenth Respondent.

3. The value of the abovementioned 16 immovable properties shall be determined in terms of the provisions of Section 12(1) of the Expropriation of Land Act 63 of 1975 subject thereto:

3.1 that the parties record that the quantum of arrears in respect of rates and taxes, water and electricity in respect of all the immovable properties up to October 2017 is in dispute and must be determined either by

agreement or by court, which arrears must be taken into account in determination of the purchase price.

3.2 the Municipality is ordered to reverse/write off all rates and taxes, water and electricity and other ancillary charges including interest from October 2017 to date of transfer of the immovable properties in respect of all the immovable properties.

4. The First to Sixth and Tenth Respondents claim for loss of income up to date of transfer of the immovable properties shall also be determined either by agreement or by court.

5. If, in relation to the to the investigation and determination of the purchase price for the properties, the parties are unable to reach settlement, the quantum of the purchase price shall be referred to court (either by way of motion procedure or action procedure) and in respect of inspection and other matters of procedure relating thereto, leave is granted to any of the parties to make application to the High Court for directions.

6. Once a purchase price in respect of the immovable properties have been determined either by agreement or by order of court, the MEC for the Department of Human Settlements/ the Eighth Respondent ("the MEC") is ordered to make such amount/s available to the municipality within three (3) months of such determination or agreement.

7. If the MEC does not release the funds to the municipality within 3 months from the date of the determination, the First to Sixth and Tenth Respondents are authorized to issue a warrant of execution against the MEC for such amount/s determined.

8. The municipality is ordered to bear any costs associated with the transfer of the immovable properties and shall sign any and all documentation necessary to effect transfer of the immovable property, failing which, the sheriff of the High Court is authorised to sign such documentation that may be necessary to give effect to the transfer of the immovable property.

9. The costs of the application are reserved."

Conduct of the Municipality

[11] Since the initiation of the two applications for eviction in 2017 by the Rohlandt Respondents, there were many postponements and directives by the court, *inter alia,* where in one such instance the Municipality was directed to produce an alternative housing report during May 2018. In such report the Municipality proposed the purchase of a farm in the Germiston area to which the occupiers could be moved, but could not do so without the financial support of the MEC. During this time and on or about 21 June 2018, it came to the knowledge of the Rohlandt Respondents that the building invasions had taken place with the assistance of the Municipality's Housing Task Team. It was contended on behalf of the Rohlandt Respondents that this conduct of the Municipality should be taken into account in reaching a conclusion in the

rescission application as the Municipality is the author and orchestrator of the events which resulted in the bringing of the eviction application and the subsequent applications.

[12] As a result, they contended that relief should not be granted to the Municipality as they did not come to court with clean hands and relied on the matter of *Klokow v Sullivan*[6] where it was held that relief should be barred for anyone guilty of improper conduct. It does not only disapprove and sanction illegal actions, but will also deny relief for bad conduct that, as a matter of policy, should be discouraged.

[13] The allegation by the Rohlandt Respondents that the Municipality aided the Unlawful Occupiers in invading their properties was not meaningfully rebutted by the Municipality and accordingly it would not be unfair if an adverse inference is drawn against the Municipality insofar as its *bona fides* are considered in the bringing of the rescission application.

Authority Municipality's erstwhile attorney

[14] The Municipality contends that its erstwhile attorney, Mr. Maluleke, had no authority to settle the matter on the terms and conditions contained in the court order and that he was only given instructions to deal with the issue of alternative accommodation. There is no allegation that the Municipality expressly withheld authority from Mr. Maluleke to settle the matter. It proffered i) no further explanation regarding instructions relating to the counter

[6] Klokow v Sullivan 2006 (1) SA 259 (SCA) at para 17

application, ii) no further reasonable and acceptable explanation why Mr. Maluleke's mandate was only cancelled during the last week of September 2020, iii) no explanation why it did not report the conduct of Mr. Maluleke to the Legal Practice Council (the LPC) and iv) fails to directly attack his competence to enter into a settlement agreement it now seeks to rescind.

[15] Furthermore, the Municipality submits in its founding affidavit that the instructions to an attorney to sue or defend a claim may include the implied authority to enter into a settlement, provided that the attorney acts in good faith. Yet, it i) does not say why the settlement agreement is unjust, ii) why it is not in its best interest and iii) why or how the attorney had not acted in good faith, where the settlement deals with the Municipality's statutory obligation to provide alternative accommodation, at no cost to itself.

[16] It is also silent on the issue of whether any representative was available to give instructions or present at court on 12 February 2020. On a reading of the papers as whole it appears that the Municipality left the matter in the hands of Mr. Maluleke, its erstwhile attorney.

[17] Since the delivery of the rescission application the Rohlandt Respondents' attorney (based on the relevant allegations of the founding affidavit) lodged a complaint with the LPC against Mr. Maluleke. What is, for the purposes of this matter, relevant about this complaint is Mr. Maluleke's response thereto. He stated under oath that at no stage did he mislead the parties at the hearing of the matter on 12 February 2020 and he denied that he

acted improperly and/or mala fide. He explains that it has always been the case of the Municipality that it did not have the funds to assist the Unlawful Occupiers with alternative housing and that an application for funding made to the MEC was rejected. However, on 12 February 2020 the MEC agreed to fund the Municipality for the purchase of the relevant immovable properties which are occupied by the Unlawful Occupiers. He also states that already on 10 July 2018 the court directed the parties to engage meaningfully with regards to the purchase of the properties and/or alternative housing.

[18] The Rohlandt Respondent's initial counter application to join Mr. Maluleke in the rescission proceedings was withdrawn, in my view correctly so, and they tendered the wasted costs.

[19] Regarding the settlement of rates, taxes, water and electricity and ancillary charges for the period stipulated in the court order, it would not have been just and equitable in the particular circumstances of this case, for the Rohlandt Respondents to be held liable for these costs.

[20] The relevant general principles governing an attorney's authority are set out in the matter of *MEC for Economic Affairs, Environment and Tourism v Kruisenga and Another*[7] (footnotes omitted) where it is stated that:

"[8] . . . our courts, under the influence of English law, have distinguished between settlements made outside of and those made during the course of litigation

[7] 2010 (4) SA 122 (SCA) at 127B – 129F

– and appear to have accepted that the power to settle a claim is one of the usual and customary powers afforded a legal representative in the latter instance. So, in *Mfaswe v Miller*,[8] an attorney's clerk compromised a claim on the day of the trial before the client had arrived at court. He did so fearing that if the client did not arrive in good time default judgment may be given against him. Thereafter the client sued his attorney for the full amount of the original claim. The court said that the clerk had accepted the compromise 'in the exercise of the discretion vested in an attorney'. And because he had acted in good faith, and was not negligent, the court held that the attorney was not liable to the client in damages. *Alexander v Klitzke*[9] provides an interesting example of an attorney's general authority. The defendant had alleged that his attorney's general authority did not empower him to accept the plaintiff's tender of settlement, but the court disagreed, saying:

> 'The authority of a power of attorney which is filed by the client, to carry his case to final end and determination, does include authority to make a *bona fide* compromise in the interests of his client, and at any rate, if a client wishes to repudiate such a compromise made on his behalf, then I certainly think that the repudiation should be a timeous one.'

In *Klopper v Van Rensburg*,[10] in an *ex parte* application for a temporary interdict to restrain the sale of usufructuary property, and in answer to a question from the court, counsel stated that if security were given by the respondent for the value of the property sold, that would meet the case. When the respondent thereafter tendered security, and the applicant rejected it contending that counsel had no authority to agree to a tender of security, the court held that he was bound by his counsel's offer as the latter 'was only doing his plain duty (to) his client. He was making an offer in his client's best interests, and an offer which . . . he had every right to make'. . .

[11] To summarise it would appear that our courts have dealt with questions relating to the *actual* authority of an attorney to transact on a client's behalf in the following manner: Attorneys generally do not have implied authority to settle or

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[8] (1901) 18 SC 172.
[9] 1918 EDL 87 at para 88.
[10] 1920 EDL 239.

compromise a claim without the consent of the client. However, the instruction to an attorney to sue or defend a claim may include the implied authority to do so provided the attorney acts in good faith. And the courts have said that they will set aside a settlement or compromise that does not have the client's authority where, objectively viewed, it appears that the agreement is unjust and not in the client's best interests."

[21] In the more recent matter of *Denby v Ekurhuleni Metropolitan Municipality*[11], *Alexander v Klitzke* was cited with approval. The court held that, similar to the facts in this application, on the papers there was nothing to indicate that the defendant had expressly withheld from its attorneys the authority to settle the matter and that by all accounts the defendant left it in the hands of its attorneys. The court accordingly made a settlement an agreement of court.

[22] There is nothing to suggest that, in settling the matter in the manner that Mr. Maluleke did, is anything other than acting *bona fide* and in the best interests of the Municipality.

[23] Based in the above principles, the Municipality's contention that Mr. Maluleke did not have authority in law or otherwise to settle the matter is without merit.

[24] Furthermore, in the *Kruizenga*-matter the court accepted that by agreeing to the settlement, the state attorney not only exceeded its actual authority, but did so against the express instructions of his principal. The court cautioned against permitting litigants to resile from the terms of a settlement

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[11] 2021 (1) SA 190 GJ at para 25.

agreement entered into by their erstwhile attorney on the basis that "it would mean practically that attorneys can no longer assume that their colleagues are authorized to make important decisions in the course of litigation without the principal's independent confirmation. This cannot be countenanced"[12]. It held that, even in those circumstances, the appellant is estopped from denying the authority of the state attorney. Based on the facts particular to the matter before me, the Municipality is also estopped from denying the authority of its erstwhile attorney to have settled the matter in the manner that he had.

Competency of the settlement agreement

[25] In considering whether the court order incorporating the settlement agreement is a competent one I follow the principles as set out in *Eke v Parsons*[13] and *PL v YL*[14].

[26] *Firstly*, the court order is competent and proper as it relates to directly and indirectly to the underlying *lis* between the parties. It is apparent from the court order that the Municipality with the assistance of the MEC shall provide alternative accommodation to the Unlawful Occupiers by purchasing the properties they currently occupy, from the Rohlandt Respondents. With the issue of alternative accommodation being resolved, it has a direct impact on the application to stay eviction proceedings which became academic once the settlement was reached and made an order of court.

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[12] Kruizenga at para 21
[13] 2016 (3) SA 37 (CC) at 48G – 49D
[14] 2013 (6) SA 28 (ECG) at 51G – 52C

[27] It has been held by our courts that "Negotiations with a view to settlement may be so wide and ranging as to deal with issues that, although not strictly at issue in the suit, are related to it – whether directly or indirectly – and are of importance to the litigants and require resolution . . . it does not seem to serve any practical purpose to suggest that these issues should be excised from an agreement that a court sanctions as an order of court".[15] In other words practicalities relating to the sale of the properties, transfer duty, relevant rates and taxes and the like relating to the same underlying issues, disputes and parties, although not strictly at issue in the suit, could form part of the settlement agreement, especially if it brings an expedited end to litigation between the parties.

[28] *Secondly*, the agreement is not objectionable and its terms are capable, both from a legal and practical point of view, of being included in a court order. The terms accord with the Constitution and the law and it is not at odds with public policy. I say so because in considering the remedy afforded by the court order there is balance between the interests of the landowners, Rohlandt Respondents and the Unlawful Occupiers in terms of the protection they enjoy under section 25 and 26 of the Constitution respectively.

[29] The Municipality's objection to the enforceability of the court order on the basis that the court cannot force parties to contract or order it to purchase the properties is without merit as Mr. Maluleke had authority in law to settle the matter. Furthermore, the objection relating to the manner in which the purchase

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[15] *Eke v Parsons* at para 19

price is to be determined, is equally without merit as the Supreme Court of Appeal had previously endorsed a settlement agreement where the City of Cape Town agreed to purchase properties (which were the subject matter in the High Court) which value, similarly, had to be determined in terms of the provisions of section 12 of the Expropriation of Land Act 63 of 1975.[16]

[30] *Thirdly*, the court order holds some practical and legitimate advantage as there is i) no need for the execution of the eviction orders, ii) the Municipality is absolved from the burden of having to secure new or different alternative accommodation for the Unlawful Occupiers and it brings an end to some of the litigation between the parties.

Conclusion

[31] This court retains a discretion to grant a rescission but this discretion should be exercised judicially and having regard to all the facts and circumstances of the matter.

[32] The Municipality has not shown that the application for rescission was made *bona fide*. With regards to the settlement and in particular the fact that the MEC has agreed to fund the purchase of the sixteen properties currently being occupied by the Unlawful Occupiers (thereby solving the alternative accommodation problem it was faced with) it is unconscionable that the Municipality now seeks a rescission of the order.

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[16] Coppermoon Trading 203 (Pty) Ltd v The Persons Whose Identities are Unknown and who unlawfully occupy the Remainder of Erf 149. Philipi, Cape Town and Others 2020 JDR 0553 SCA

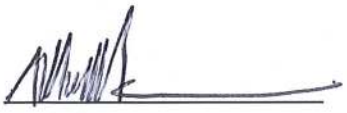
[33] Based on the facts particular to this matter, no case has been made out to grant a rescission based on the grounds of *justus error* or a mistake common to the parties. The Municipality failed to show good and sufficient cause to justify the grant of a rescission application in that it did not give a reasonable explanation as to the circumstances in which the consent judgment was entered.

[34] In light of the above it is unnecessary to deal with the issue of condonation. This is not a case where the prospects of success tip the scales in favour of the Municipality and there would be no point in granting condonation.

ORDER

[35] The following order is granted:

1. The application for rescission is dismissed with costs.



A.M. VAN DER MERWE
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	**: 28 July 2021**
DATE OF JUDGMENT	**: 19 August 2021**

APPLICANT'S COUNSEL	**: E. Sithole**
APPLICANT'S ATTORNEY	**: Ncube Incorporated Attorneys**
FIRST to SIXTH and TENTH RESPONDENTS' COUNSEL ("ROHLANDT RESPONDENTS)	**: K. Premhid**
FIRST to SIXTH and TENTH RESPONDENT'S ATTORNEY	**: JHS Attorneys**