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

CASE NO: 41472/2018
REPORTABLE: NO
OF INTEREST TO OTHER JUDGE: NO
REVISED:
3 May 2022

In the matter between:

METAL INDUSTRIES PROVIDENT FUND	Applicant
and	
CONSOLIDATED STEEL INDUSTRIES (PTY) LIMITED T/A STALCOR	First Respondent
RIBA, CLIFFAR	Second Respondent
METAL INDUSTRIES BENEFIT FUNDS ADMINISTRATORS	Third Respondent
IN RE:	
CONSOLIDATED STEEL INDUSTRIES (PTY) LIMITED T/A STALCOR	Plaintiff
RIBA, CLIFFARD	First Defendant
METAL INDUSTRIES BENEFIT FUNDS ADMINISTRATORS	Second Defendant

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgement and order are accordingly published and distributed electronically. The date and time of hand-down is deemed to be 14h00 on 03 May 2022

JUDGMENT

LENYAI AJ:

[1] This is an application wherein the applicant seeks to rescind or vary orders made against it in terms of Rule 42(1)(a) of the Uniform Rules of Court alternatively the common law.

[2] The applicant avers that on 23rd June 2020 orders were granted by the court in summary judgement proceedings in which the applicant had not been cited or served with the papers, to the effect that its assets must be attached by the third respondent and paid over to the first respondent. The applicant further avers that the order was only signed and stamped by the registrar on 11th February 2021 and eventually it was served on the third respondent on the 15th February 2021. The applicant only became aware of the order on the 15th February when it was brought to its attention by the third respondent.

[3] It is noteworthy to mention that the first respondent had raised a point *in limine* with regard to the late filling of the application by the applicant, this was however withdrawn at the beginning of the hearing of the matter.

[4] It is common cause between the parties that:

4.1 The second respondent was employed by the first respondent until 8 August 2018 when his employment contract was terminated. On 7 November 2018 the first respondent issued summons and instituted proceedings against the second and third respondents, in which the first respondent alleged that the second respondent had breached his obligations owed to the first respondent and had, among other things, misappropriated the first respondent's property and had made certain misrepresentations to the first respondent when he claimed overtime. The third respondent was being interdicted from making any pension payments to the second respondent pending finalisation of the matter. When the second respondent did not defend the action against him, the first respondent obtained default judgement .

4.2 There was no action brought against the applicant (fund) and no summons were served on the applicant. This fact is not disputed by the first respondent. In its answering affidavit at paragraph 8, the first respondent concedes that "*from all the pleadings, and indeed the Notice of Motion filed in the present application (the default judgement), that the second defendant is in fact "Metal Industries Benefit Funds Administrators", and not the applicant".* The applicant states that the first respondent, in its answering affidavit at paragraph 44, seems to suggest that it was not necessary for the Fund to be cited and for the order to be sought against it since the third respondent acts as the fund's agent.

[5] In terms of the joint practice note, the parties agree that the question that the court must answer is whether the respondent can rely on service on the third respondent as sufficient to obtain an order against the applicant in a matter wherein the applicant was not a party until the draft order was presented to the court.

[6] Rule 42(1)(a) of the Uniform Rules of Court provides that:

> *(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary –*
>
> *(a) An order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby.*

[7] The party relying on Rule 42(1)(a) must demonstrate to the court that it has standing or *locus standi*. To establish standing under Rule 42(1)(a), an applicant must show a direct substantial interest in the judgement or order that it seeks to rescind or vary. The Supreme Court of Appeal in the matter of **De Villiers v GJN Trust 2019 (1) SA 120 (SCA) at 128A-129C**, stated that the applicant must show a legal interest in the subject matter of the action or application which would be prejudicially affected by the order in that action or application.

[8] It is trite that a party that has a direct and substantial interest in the subject-matter and outcome of any legal dispute ought to be joined in the proceedings. The

Supreme Court of Appeal in the matter of **Bowring NO v Vrededorp Properties CC and Another 2007 (5) SA 391 (SCA) at page 398 para 21,** held that the substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgement of the Court in the proceedings.

[9] The applicant submits that it has a direct and substantial interest in the court order *in casu* and it also has a legal interest in the subject matter of the action and subsequent summary judgement proceedings that was launched by the first respondent in 2018 which could be prejudicially affected by the order in that action. The applicant's interest, is the ownership of its assets and the payment of benefits in accordance with its rules. The Court order at Paragraph 8 thereof, instructs the third respondent to take the applicant's assets and give them to the first respondent in circumstances where the applicant is not a creditor of the first respondent. To be exact the order states that "*the second respondent (*the third respondent in this application) *is ordered to deduct from the Fund and pay to the Plaintiff* (First Respondent in this application) *such sum equivalent to the total damages suffered by the Plaintiff inclusive of interest and costs."*

[10] The applicant further submits that the Court Order does not say what must be deducted is the amount that the Fund is holding for the second respondent. It expressly says "*the total damages suffered by the Plaintiff*" including interest and legal costs regardless of whether that amount exceeds what the Fund was holding on behalf of its former member (the second respondent). These total damages in terms of the court order amount to R757 030.17 whereas at any given point the second respondent had only R103 871.73 in the Fund. What is even more alarming to the applicant is the letter of demand from the first respondent's attorneys, which stated that the judgement debt had grown with interest to R907 134,60 as of June 2020. The applicant is concerned that the amount has grown since then and it will continue to grow. In the same letter there were threats of attachment of the applicant's assets should the court order not be complied with.

[11] The applicant contends that the effect of the court order is therefore that the assets of the Fund, which it holds as future benefits on behalf of its other members,

must be taken from it and given to the first respondent. The respondent on the other hand does not dispute this allegation and insists that it was not necessary to cite and serve the fund as it was represented by its administrator.

[12] The applicant submits that the same arguments apply to paragraph 7 of the court order. The order that the payment of benefits payable in terms of the rules of the Fund must be stopped, clearly affects the Fund in that it prevents the Fund from complying with its contractual obligations to its members.

[13] The first respondent's argument that it was not necessary to cite and serve the applicant has no merit in our law and is rejected by the court. I am satisfied that the applicant has demonstrated direct and substantial interest in the order and a legal interest in the subject matter of the application which could be prejudicially affected by the order. The order of the court is already causing challenges in the administration of the Fund in that it has ordered that the payments of benefits must be stopped.

[14] In the matter of **Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz 1996 (4) SA 411 (C),** the court held that Rule 42(1)(a) *"is a procedural step designed to correct expeditiously an obviously wrong judgement or order".* The court went on to deal with instances under which this Rule can be successfully invoked. It held as follows: "…*Relief can be granted under this Rule* if *there was an irregularity in the proceedings…".*

[15] In the matter of **Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA) at para [24]**, the court held that: "*Where notice of proceedings to a party is required and judgement is granted against such party in his absence without notice of the proceedings having been given to him such judgement is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgement is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given."*

[16] Turning to the matter before me, the applicant's name *was included on the draft court order right at the tail end of the matter*. In my view it is irregular to include the name of a party who was not cited and served on the final order or judgement, placing onerous obligations on that party. Furthermore, the applicant was not given notice of the proceedings and a judgement was granted against it in its absence, such judgement in my view was erroneously and irregularly granted.

[17] The first respondent in its answering affidavit contends that the Fund's (applicant) remedy lies in an appeal and not rescission proceedings. Rule 42(1)(a) as stated in **Promedia Drukkers supra,** the Supreme Court of Appeal has made it crystal clear that it *"is a procedural step designed to correct expeditiously an obviously wrong judgement or order".* Having decided that the judgement was erroneously and irregularly granted, the applicant is proper before court.

[18] In the premises, the following order is made:

(a) Paragraph 7 and 8 of the Order handed down on 23 June 2020 under case number 41472/2018 is hereby rescinded and set aside in terms of the Uniform Rule 42(1)(a).

(b) The first respondent is ordered to pay the costs of the application including cost of two counsel.

M.M.D LENYAI
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the Applicant:	Adv S Khumalo SC and Adv N Ferris
Instructed by:	Bowman Gilfillan INC
Counsel for the Respondents:	CD ROUX
Instructed by:	RC Christie INC

Date of hearing:	03 February 2022
Date of judgment:	03 May 2022